This chapter will discuss the various methods by which easements can be extinguished. It is recommended that the chapter on Easements be referred to for an understanding of how prescriptive easements and easements by estoppel thru parol license are created. The chapter on Adverse Possession discusses the elements required for transfer of title of real property by that method. The principles of law discussed in those chapters will aid in understanding the way easements can be extinguished.

Several methods exist whereby easements can be extinguished. They are; (1) Extinguishment by written release of license, (2) Misuse of the easement (overburdening or changing the scope), (3) Reverse prescription, (4) Merger of ownership, (5) Elimination of the original purpose for the easement, (6) Forclosure and tax sale, (7) Abandonment. This section on abandonment will discuss non-use simply as evidence of abandonment, since non-use in itself will not constitute an abandonment of an easement.

Also, a brief discussion of the revival of easements once extinguished, will be presented.

EXTINGUISHMENT BY WRITTEN RELEASE OR LICENSE

Easements may be extinguished by written methods, such as by deeds, plats and agreements. Since extinguishment of an easement is a transfer of a right in real property, that is, the rights of the dominant tenement are transferred to the servient tenement, the statute of frauds is applicable. (Remember, as with transfer of title by unwritten methods within the operation of law, there are exceptions to the statute of frauds and it will be shown in the other sections of this chapter that extinguishment of easements also occur by unwritten methods).

"An easement may be extinguished by an express written release of the servient estate... In order to be effectual, a release must be executed with the same formalities as are generally required in making transfers of interest in land." Sedillo Title Guaranty, Inc. v. Wagner, 80 N.M. 429, 457 P.2d. 361.

Granting of a license can extinguish an easement. For example, if the owner of the easement grants a license to the servient estate to construct something which interfers with the use and enjoyment of the easement, then the license becomes a grant and as such when the license is executed it is not revocable.

"...the rule is well settled that a parol agreement between the owners of the dominant and servient tenements may operate to extinguish as easement whether created by grant or prescription, where such agreement has been executed by the owner of the servient tenement." Tusi v. Jacobsen, 293 P. 587.

The case of Sedillo Title Guaranty, Inc. v. Wagner, supra, clearly implies the same, as follows:

"An easement cannot be extinguished by an unexecuted oral agreement." (underline added for emphasis).

EXTINGUISHMENT BY MISUSE

As stated in the chapter on Easements, an easement is for a "special" or "specific purpose". If the "specific purpose" of the easement is clearly established, and then the use becomes greater than originally intended to the extent of overburdening the servient estate; or if the easement is subsequently used for a purpose different than originally intended and the result is interferrence with the proper enjoyment of the remaining servient estate or original easement; then the easement may be extinguished.

As a general rule, use of an easement for a purpose not specifically authorized or a use of the easement in a manner which is excessive with respect to the original anticipated use, does not necessiarily extinguish the easement. The unauthorized use or additional burden must be wilful and substantial. Also, if the increased burden can be eliminated and the original purpose fully reinstated then the easemnent might not be extinguished. The conditions that would extinguish an easement would require an additional burden of such scope that the original purpose of the easement cannot be fulfilled.

The following cases discuss the concept of misuse:

"...the defendants, their heirs and assigns, have the use of this range for so long as there is a range to use, and they have the exclusive right to use the land for range purposes. When the range is put to a higher use by the grantees, such as constructing a home or breaking the soil for farming, then the range is destroyed and the right to use for range purposes that portion of the property put to higher use is withdrawn until such time as the property may revert to range again." Phoenix Title and Trust Company v. Smith, 1 Ariz. App. 424, 403 P.2d. 828.

"Changes in the extent or nature of user which do not increase the burden on the servient tenement do not destroy the easement." Marangi v. Domenici, 326 P.2d. 527. (underlines added for emphasis).

"Also, the servitude (easement) is extinguished by the performance of an act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise." Park County Rod and Gun Club v. Department of Highways, 517 P.2d.352 (Mont.).

REVERSE PRESCRIPTION

Easements may be extinguished by a method known as "inverse" or "reverse" prescription. This method requires the elements required to establish title to real property by adverse possession to be present for the statutory time period, in detriment to the continued and proper use of an easement. It is generally held that an easement for ingress-egress is extinguished when the servient tenement fences in the easement and puts the land to a use which is adverse to the dominant tenement (holder of the easement) and such use continues for the statutory time period for adverse possession and possess all of the same elements as required to gain title by adverse possession. As with adverse possession or prescriptive easements, permissive enclosure of the easement will negate the adverse claim.

"It is well settled that an easement, regardless of whether it was created by grant or use, may be extinguished by the owner of the servient tenement upon which the easement is a burden, by adverse possession thereof by the servient tenement owner for the statutory period...The non permissive erection and maintenance for the statutory period of permanent structures, such as buildings, which obstruct and prevent the use of the easement will operate to extinguish the easement...The extinguishment by adverse possession need not be of the entire easement. It may be extinguished in part- to the extent that is embraced in the scope of the adverse possession." Glatts v. Henson, 188 P.2d. 745.

"An easement, whether acquired through grant, adverse use, or as an abutter's right, may be extinguished by the owner of the servient tenement by acts adverse to the exercise of the easement for the period required to give title to land by adverse possession." Busby v. State, 2 Ariz. App. 451, 409 P.2d. 735.

As with adverse possession and prescriptive easements, the burden of proof will fall upon the party attempting to prove the elements of adverse possession. The benefit of the doubt is given to the owner of the easement, shown as follows:

"All presumptions being in favor of the easement owner, we hold that the quantum of proof was insufficient to establish loss of the Busbys' access rights by adverse possession." Busby v. State, supra.

From the following it is clear that:

1) Reverse prescription can extinguish easements that were created by grant, user, and implication.

2) Only the portion of the easement which is affected by adversity, is extinguished. This is similar to the extent of an easement which can be created by prescription (see chapter on Easements).

3) When attempting to prove reverse prescription, the benefit of the doubt is given to the owner of the easement.

MERGER OF OWNERSHIP

Merger of ownership is a rather common method by which an easement can be extinguished. The concept is that when the dominant estate becomes united with the servient estate, there is a confusion of rights, and the easement may become extinguished. The rights of the servient tenement and the rights to the fee of the property are vested with the same person. Merger of ownership generally extinguishes an easement regardless of the method by which it was created. An exception to this rule is a way of necessity that came into existence as a result of the former unity of title and subsequent separation of the two estates involved. The way of necessity is simply put into a state of suspension.

The following cases discuss merger of ownership:

"It is true that a person cannot own an easement in his own property- the interests become merged, but when he is so using his land that the elements of adverse possession prevail as to the easement owned by another, he is in a sense acquiring that easement- having it merge with his fee interest- eliminating that interest of another in his land." Glatts v. Henson, supra.

"However, as in this case, if at any time the owner in fee of the dominant parcel acquires the fee in the servient parcel not subject to any other outstanding estate, the easement is then extinguished by merger. Merger would occur at the time the property was acquired or at the termination of the outstanding estates, if any, whenever the owner acquired the unrestricted fee." Witt v. Reavis, 284 Or. 503, 587 P.2d. 1005.

"It is fundamental that where the title in fee to both the dominant and servient tenements becomes vested in one person, an easement is extinguished...". Castle Associates v. Schwartz, 407 N.Y.S. 2d. 717.

There are exceptions to the merger theory. Other exceptions are shown by the following cases:

" ' * * * Mergers are not favored in equity. When a lesser and higher estate meet and coinide in the same person they will be kept separate when equity and justice require it, unless there is an expressed intention to the contrary. * * * ' ". Quoted in Witt v. Reavis, supra, from the case of South Beach Lumber Corp. v. Swank, 210 Or. 383, 392-93, 311 P.2d. 1018, 1023 (1957). (underlines added for emphasis).

This case went on to clarify the apparent major limitation, as follows:

"This quotation, however, is taken out of context. That rule applies to the case where a mortgagee of land later acquires the fee; the mortgage interest normally merges in the higher fee interest but not where such a merger would harm the mortgagee. We are not aware of any case, and none has been cited to us, that holds that a merger like the one in the case at bar is "not favored in equity". "

ELIMINATION OF THE ORIGINAL PURPOSE

Since easements are created for a specific purpose, it stands to reason that if that purpose for which the easement was created is eliminated, then the easement will be extinguished.

The following cases illustrate this concept:

"An easement acquired by a utility for a public purpose is terminated by abandonment of that purpose." People v. Ocean Shore R.R., 196 P.2d. 570.

"It is well settled that where a utility acquires an easement (as distinguished from a fee simple title) in the nature of a right of way for a public purpose, the abandonment of the public purpose terminates the easement and the easement reverts." Slater v. Shell Oil Co., 103 P.2d. 1043.

A common example for elimination of a purpose would be completion of a construction project that included "temporary construction easements".

As a general rule, implied easements are not extinguished when the original purpose is eliminated. An implied easement is considered true and permanent and differs from a way of necessity in that a way of necessity exists only as long as the necessity exists.

FORECLOSURE AND TAX SALE

When a mortgage or deed of trust is executed prior to the creation of an easement and the property is subsequently foreclosed on, then the easement may be extinguished. If the easement was in existence at the time the mortgage or deed of trust originated, then the easement generally is not extinguished. Each case would have particular circumstances, such as whether the holder of the deed of trust knew of the easement or signed an instrument for the grant. By the same token if a foreclosure occurs involving an easement which was executed after the deed of trust, and the mortgage holder subsequently fails to reserve the same easement upon execution of a new mortgage, then the easement may be extinguished.

With regards to extinguishment of easements on the servient estate as a result of a tax sale, the courts have issued split decisions. The circumstances for each are varied and complex.

ABANDONMENT

Abandonment is often a very misunderstood concept. Many people think simple non-use constitutes an abandonment. This is not true. To have an abandonment there must be an intent to abandon and subsequent acts which carry the abandonment into effect.

"An easement acquired by deed is not lost by mere non-user. "It must be accompanied with the express or implied intention of abandonment; and the owner of the servient estate, acting upon the intention of abandonment and the actual non-user, must have incurred expenses upon his own estate. The three elements--user, intention to abandon, and the damage to the owner of the servient estate--must concur in order to extinguish the easement." " Smith v. Worn, 93 Cal. 206, 28 P. 944.

"Proof of abandonment of such an easement requires action releasing the ownership and the right to use with clear and convincing proof of an intentional abandonment." Harmon v. Rasmussen, 375 P.2d. 762.

"... an intention with which an act is done is a question of fact to be determined by the trial court from a consideration of the conduct of the parties and the surrounding circumstances." Flanagan v. San Marcos Silk, 235 P.2d. 107.

Arizona cases are quite consistent with the principles set forth in the preceeding cases. The following cases emphasize some of these principles, as follows:

"Abandonment means the act of intentionally and voluntarily relinquishing a known right absolutely and without reference to any particular person or purpose." Mason v. Hasso, 90 Ariz. 126, 367 P.2d. 1.

This case further states:

"Contra to appellants' contention as evidence by item (3) in their assignment of error abandonment requires no act of the other party before it is complete. It is entirely unilateral and the moment the intention to abandon unites with acts of relinquishment, the abandonment is complete."

"Abandonment involves an intention to abandon, together with an act or omission to act by which such intention is apparently carried into effect." City of Tucson v. Koerber, 82 Ariz. 347, 313 P.2d. 411.

An important question is what circumstances constitute a clear intent to abandon? As discussed in Flanagan v. San Marcos Silk whether an abandonment has occured revolves around the conduct of the parties and surrounding circumstances". It seems that any number of acts could constitute evidence of an abandonment. Conduct of the parties alone could be sufficient. The case of Kolberg v. McKean's Model Laundry & Dry Clean. Co., 9 Ariz. App. 549, 454 P.2d. 867, states as follows:

"Abandonment need not be expressed since it may be inferred from the conduct of the parties and the attendant circumstances."

The case of Gerhard v. Stephens, 442 P.2d. 692 (California), emphasizes the need for clear and convincing proof of intent to abandon, as follows:

"We then explain that the trier of fact, before decreeing an abandonment, must find that the owner's conduct clearly and convincingly demostrates the necessary intent."

As stated in Flanagan, supra, intent will be based on facts, and the surveyor (or other party to a transaction) should always be on the lookout for facts that indicate intent, preferably in writing.

Often times, abandonment is confused with nonuse, or vice-versa. As a general rule, nonuse of an easement for any period of time will not affect an easement acquired by a grant or by a reservation in a previously executed instrument. However, the non-use is always considered as evidence of an intent to abandon.

The case of Sedillo Title Guaranty, Inc. v. Wagner, 80 N.M. 429, 457 P.2d. 361, supports this principle, as follows:

"...nonuse of an easement does not create a presumption of abandonment. In addition to nonuse, other circumstances must exist which clearly evidence an intention to abandon the easement...Mere nonuse, for however long, of an easement created by grant is almost universally held not to constitute an abandonment." (underlines added for emphasis).

The forgoing illustrates that nonuse alone will not extinguish an easement that was created by grant. However, an easement of prescriptive nature my be extinguished by non-use, provided the non use continues for the same period of time required to create the easement by prescription. Intent is also a major consideration.

The Arizona case of Furrh v. Rothschild, 118 Ariz. 251, 575 P.2d. 1277, states as follows:

"...And an easement created by prescription may be lost by mere nonuse only if nonuse is for the prescriptive period... Even though a right of way acquired by prescription is no longer necessary because of the habitual use by the owner of another equally convenient way, it is not extinguished unless there is an intentional abandonment of the former way." Furrh v. Rothschild.

REVIVAL OF EXTINGUISHED EASEMENTS

Generally speaking, an easement once extinguished cannot be automatically revived. The easement needs to recreated by some method to create an easement. An easement extinguished by misuse, however, may be revived upon removal of the misuse. This is evident from the case of Phoenix Title and Trust Company v. Smith, supra, where the court certainly implied that the use for range purposes may be reinstated when the land ceased to be used for residence or farming.

Easements extinguished by merger of ownership are not necessarily revived upon subsequent separation of title. Only when there is an equitable reason to do so will the courts revive an easement extinguished by merger.

The case of Brown v. Oregon Short Line R. Co., 102 P. 740 (Utah), states as follows:

"In Taylor v. Hampton, supra, there is a convincing discussion of the question, in which the court, at page 106 of 4 McCord (17 Am. Dec. 710), states the doctrine in the following language:
"(1) That a servitude [easement] is extinguished by any obstruction of a permanent nature by the party himself to whom the servitude is due (or by his consent), or by the voluntary

acquisition or acceptance of any other right or privilege incompatible with the exercise or enjoyment of it; and (2) that being once lost it is gone forever, and can never be revived but by a new grant." "

"... and since ownership of both parcels was in fee, we find that whatever claim to a right of way which might have existed ended with merger of the subject lots in one owner...Once extinguished, as here by merger, the easement does not come again into existence upon a separation of the former servient and dominant estates unless a proper new grant or reservation is made." Fitanides v. Holman, 310 A.2d. 65 (Me.).

And finally from the case of Schwoyer v. Smith, 131 A.2d. 385:

"Early in the common law an easement was held to be extinguished when title to the dominant and servient lands came into the hands of the same person. "No man", it was said, "can have an easement in his own land ", and the easement was deemed to have been swallowed up in a "merger" of the two estates... However, "merger is a technical rule at best and so, even though two rights become united in one person, a court in equity will keep them separated if that is required by an outstanding claim of a third party, or is necessary in view of the proprietor's own situation." "

The surveyor should certainly bring to the attention of the client the facts and circumstances which would lend consideration as to whether an easement has been extinguished by one of the methods discussed in this chapter.

2 Ariz.App. 451

Dorrity E. BUSBY and Shirley K. Busby, his wife, Appellants,

v.

The STATE of Arizona ex rel. Justin HERMAN, Director Arizona Highway Department, Appellee.*

2 CA-CIV 47.

Court of Appeals of Arizona.

Jan. 18, 1966.

Condemnation proceedings in which the landowners appealed from order of the Superior Court of Pima County, Case No. 67905, Herbert F. Krucker, J., denying motion for new trial after entry of judgment in their favor. The appeal was filed in the Supreme Court and referred to the Court of Appeals. The Court of Appeals, Hathaway, J., held that where state failed to prove that they had acquired easement of ingress and egress from unimproved property to highway by adverse possession, landowners were entitled to have jury consider loss of such access as part of the compensation to be paid for taking of portion of land.

Judgment set aside, a new judgment entered in part and a new trial granted with respect to certain property.

1. **Eminent Domain ⇐85**
Highways ⇐85

Owner of land abutting on a highway has easement of ingress and egress to and from his property which constitutes a property right compensable by state when taken for public use.

2. **Easements ⇐32**

An easement, whether acquired through grant, adverse use, or as an abutter's right, may be extinguished by owner of servient tenement by acts adverse to exercise of easement for period required to give title to land by adverse possession. A.R.S. §§ 12-521, 12-526, subsec. A.

3. **Highways ⇐85**

State which claimed in eminent domain proceeding that abutting owners' easement of ingress and egress to highway had been extinguished by adverse possession had burden of proving the acquisition of easement by adverse possession.

4. **Highways ⇐85**

State which brought condemnation proceedings and claim that owners' easement of ingress and egress to highway had been extinguished by adverse possession because of erection of fence on highway right-of-way failed to prove all the essential elements of adverse possession. A.R.S. §§ 12-521, 12-526, subsec. A.

5. **Adverse Possession ⇐114(1)**

Adverse possession cannot be made out by inference but only by clear and positive proof.

6. **Highways ⇐85**

To constitute a bar to landowners' right of ingress and egress to and from highway it devolved on state to show by clear, positive and unequivocal evidence that their use of easement by erecting a fence along right-of-way and thereby blocking access from unimproved land was inconsistent with and antagonistic to owners' right. A.R.S. §§ 12-521, 12-526, subsec. A.

7. **Eminent Domain ⇐79**

Where deed from owners' predecessor in interest expressly included compensation for any damages accruing to land by reason of construction of public highway and owners purchased with notice of restriction in favor of state, owners were estopped in eminent domain proceeding from claiming additional compensation for damages resulting from highway construction, including any alleged loss of access to highway from other street on which property abutted.

* This appeal was filed with the Arizona Supreme Court and assigned that Court's No. 7806. The matter was referred to this Court pursuant to § 12-120.23 A.R.S.

8. Eminent Domain ⇐85

Where state failed to prove that they had acquired easement of ingress and egress from unimproved property to highway by adverse possession, landowners were entitled to have jury consider loss of such access as part of compensation to be paid for taking of portion of land.

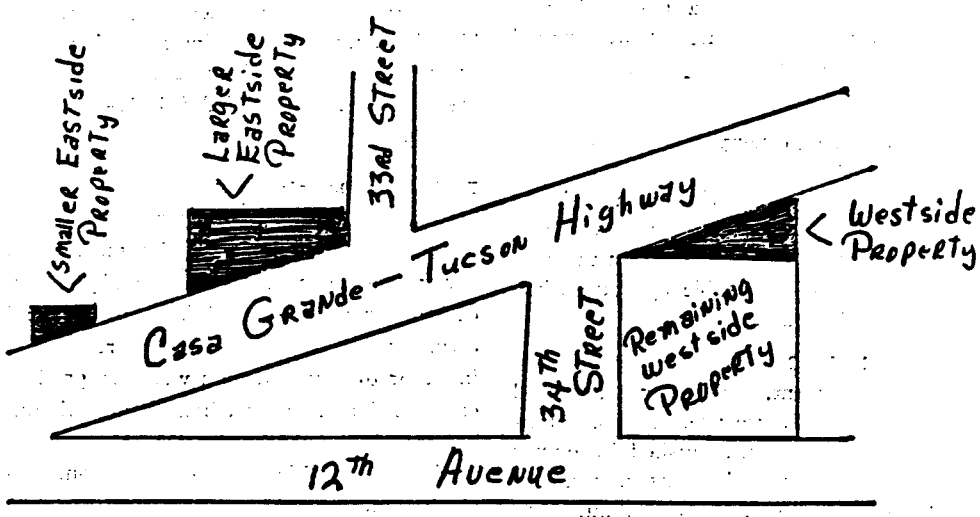
Dowdall, Harris & Brown, by Ray C. Brown, Tucson, for appellants.

Darrell F. Smith, Atty. Gen., Phoenix, Robert S. Tullar, Tucson, Sp. Asst. Atty. Gen., for appellee.

HATHAWAY, Judge.

Dorrity E. Busby and Shirley K. Busby, husband and wife, appeal from an order of the superior court, Pima county, denying their motion for a new trial after entry of judgment in their favor on a jury verdict of $2,260 for realty parcels taken by the State. The sole issue submitted to the jury was the amount of compensation to be paid to the defendant property owners. The trial court instructed the jury, in substance, that the parcels involved had no access to the highway and the jury was not to consider access rights in determining the fair market value of the property.

The Busbys owned three parcels of property, two of which abutted on the east side of the Casa Grande-Tucson Highway and one abutted on the west side of the highway. The larger east side parcel also abutted on 33d Street and the west side parcel abutted both on 34th Street and 12th Avenue. For purposes of the Tucson Freeway project the State sought to acquire by condemnation proceedings both east side parcels and a triangular-shaped segment of the west side parcel which abutted on the highway. The remaining segment of the west side property on which the Busbys had constructed a residence abutted on 34th Street and 12th Avenue. The east side parcels consisted of unimproved vacant land. By earlier condemnation proceedings in 1949, the State had acquired all of the unimproved lots on the east side of the highway except the two parcels involved here.



The principal question involved in this appeal is whether the Busbys had access rights to the highway from all or any of the three parcels involved which should have been considered in assessing damages. We shall consider the properties in their relation to the highway and hereinafter refer to the two east side parcels as the "east

property" and the west side parcel as the "west property."

EAST PROPERTY

[1] An abutting property owner to a highway has an easement of ingress and egress to and from his property which constitutes a property right compensable by the State when taken for public use. State ex rel. Morrison v. Thelberg, 87 Ariz. 318, 324, 350 P.2d 988 (1960). The State's position in the court below was that the east property's easement of egress and ingress had been extinguished by adverse possession. Adverse possession, as defined in A.R.S. § 12-521, means an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

[2, 3] An easement, whether acquired through grant, adverse use, or as an abutter's right, may be extinguished by the owner of the servient tenement by acts adverse to the exercise of the easement for the period required to give title to land by adverse possession. Popovich v. O'Neal, 219 Cal.App.2d 553, 33 Cal.Rptr. 317, 319 (1963). In this jurisdiction the limitations period is ten years. A.R.S. § 12-526, subsec. A. The act relied upon by the State as adverse to the Busbys' exercise of their access easement is the erection of a fence along the right-of-way, thereby obstructing the access of the east property to the highway. The burden, however, of proving the acquisition of the easement by adverse possession lay with the State. Fritts v. Ericson, 87 Ariz. 227, 230, 349 P.2d 1107 (1960); Lewis v. Farrah, 65 Ariz. 320, 323, 180 P.2d 578 (1947).

The sole evidence adduced at trial concerning this question of adverse possession is the following testimony:

State's witness:

"Q. Since 1949, do you know whether or not there has been a fence running along the existing right-of-way line in front of those two pieces of property * * *?

A. I believe there has been a fence.

Q. To your knowledge, has that fence been there continuously since '49?

A. To the best of my knowledge.

Q. Have you or to your knowledge the Arizona Highway Department had any complaint from anyone about the existence of that fence along there?

A. Not that I know of."

Mrs. Busby, on direct examination:

"Q. Was there a fence along here between the property and the Freeway?

A. After they finished the Freeway.

Q. They put up a fence there?

A. Put a fence."

And on cross-examination:

"Q. And at that time they put up the fence along the right-of-way, running from 34th past both pieces, and that fence has been there ever since?

A. Yes."

[4, 5] The trial court obviously resolved the issue of adverse possession in the State's favor as indicated by its instruction to the jury that, as a matter of law, the east property had no access to the highway. We believe this was error as the State failed to prove all of the essential elements of adverse possession. Such possession cannot be made out by inference, but only by clear and positive proof. Lewis v. Farrah, supra; Kraus v. Griswold, 232 Cal.App.2d 698, 43 Cal.Rptr. 139, 147 (1965). All presumptions being in favor of the easement owner, we hold that the quantum of proof was insufficient to establish loss of the Busbys' access rights by adverse possession. Since the east property was unimproved the Busbys would have no reason to utilize the easement, a fortiori since they had egress and ingress to inspect the property via 33d Street. In fact the existence of a fence along the right of way would afford protection from trespassers, a decided advantage to an absentee property owner.

[6] The proof offered by the State merely indicates a period of nonuser of the easement. Even if it were conceded that a continuous period of nonuser has been shown, the evidence fails to establish that the obstruction of the easement by the State during that period was hostile and adverse to the Busbys. To constitute a bar, it devolved upon the State to show by clear, positive and unequivocal evidence that their use of the easement was inconsistent with and antagonistic to the Busbys' right. Lewis v. Farrah, supra; La Rue v. Kosich, 66 Ariz. 299, 303, 187 P.2d 642 (1947); See also Kurz v. Blume, 407 Ill. 383, 95 N.E.2d 338, 25 A.L.R.2d 1258 (1950).

WEST PROPERTY

In 1949, the Busbys' predecessor in interest conveyed to the State of Arizona a portion of the west parcel for highway use, retaining the portion which is the west property involved in the instant case. The deed, recorded in 1949, contained the following recital:

> "The consideration herein expressed shall be in full compensation for the land conveyed and also for any loss, damage, injury or inconvenience accruing or resulting, or which may hereafter accrue or result to the Grantor, his successors or assigns, or damages to any remaining abutting properties, by reason of the construction of a public highway.
>
> "It is further understood and agreed the consideration received by the Grantor is also in full payment and this instrument transfers, assigns and conveys all permanent impairment or obstruction of any easements, public utilities service, right of access or right of ingress and egress to the highway from the abutting properties remaining in possession of the Grantor."

[7] In 1956, the west property was conveyed to the Busbys, subject to, inter alia, the above restriction of record. The Busbys concede that the right of access to the highway had been transferred to the State by the 1949 conveyance. They contend, however, that the property had a right of access to 34th Street which included the right of passage to the highway. Since the construction of the Freeway would create a cul de sac at the east end of 34th Street, the Busbys argue that they were entitled to have the jury consider as an element of damages the impairment of the access right to 34th Street. We cannot agree.

The 1949 deed from the Busbys' predecessor in interest is clear and unambiguous. The consideration therein expressed included compensation for any damages subsequently accruing to the west property by reason of the construction of a public highway. The deed by reason of the above quoted provisions estopped the grantor from claiming damages resulting from changes in the establishment and construction of the highway. State v. Lindley, Tex. Civ.App., 133 S.W.2d 802, 804 (1939). Mr. and Mrs. Busby, purchasers with notice of the restriction in favor of the State, are likewise estopped and the State was relieved of further liability for payment of additional compensation for damages resulting from highway construction. See Muse v. Mississippi State Highway Commission, 233 Miss. 694, 103 So.2d 839, 848 (1958); Hamilton v. City of Bismarck, 71 N.D. 321, 300 N.W. 631, 634 (1941); 29A C.J.S. Eminent Domain § 207.

[8] The judgment entered for the Busbys was for a total sum of $2,260 without indicating the compensation allocable to the individual properties. The jury's verdict, however, which is part of the record on appeal, sets forth the damages as follows:

> "1. For the taking of Parcel No. 1 (Smaller Eastside property), $89.00.
>
> "2. For the taking of Parcel No. 2 (Larger Eastside property), $800.00.
>
> "3. For the taking of a portion of Parcel No. 3 (a portion of Westside property) $1,371.00.

"4. Severance damages, if any, to the remainder of Parcel No. 3 (Remainder of Westside property) $0.

Accordingly, the trial court is ordered to set aside the judgment and to enter a new judgment against the State of Arizona in favor of the defendant property owners for the sum of $1,371, the amount of damages for the taking of the west property. It is further ordered that a new trial be granted with respect to the east property in conformity with this opinion.

ANTHONY T. DEDDENS and WILLIAM C. FREY, Superior Court Judges, concur.

NOTE: Judges Herbert F. Krucker and John F. Molloy having requested that they be relieved from consideration of this matter, Judges Anthony T. Deddens and William C. Frey, Judges of Superior Court, Cochise County and Pima County, respectively, were called to sit in their stead and participate in the determination of this decision.

PHOENIX TITLE AND TRUST COMPANY, a corporation, Marvin Lustiger and Thelma Lustiger, his wife, Henry Steinberg, Lake Mead Land and Water Co., a corporation, Appellants,

v.

J. M. SMITH and Winnie E. Smith, his wife. Dale D. Smith and Barbara M. Smith, his wife, Appellees.*

1 CA-CIV 40.

Court of Appeals of Arizona.

July 1, 1965.

Rehearing Denied Sept. 2, 1965.

Suit to quiet title or for declaratory judgment to determine possession in and to certain land. The Superior Court, Mohave County, Cause Number 5516, Charles P. Elmer, J., gave judgment for the original sellers, and the purchasers appealed. The Court of Appeals, Cameron, J., held that the effect in the agreement for sale and in the deed of a reservation of range use rights by the defendant sellers was to give the sellers, their heirs and assigns, the use of the range for so long as there was a range to use and the exclusive right to use the land for range use purposes, but that when the range was put to a higher use by the purchasers the range was destroyed and

* to this Court pursuant to Section 12-120.23 A.R.S.

the right to use for range purposes that portion of the property put to the higher use was withdrawn until such time as the property might revert to range use again.

Reversed and remanded.

1. Contracts ⇐163

Generally, if written provisions of a contract are inconsistent with printed provisions, written matter deliberately added by parties must prevail.

2. Deeds ⇐138

For purpose of determining what is granted in a deed, distinction between exception and reservation is of little importance since, by whatever name, property excepted or estate reserved is never considered a part of grant.

3. Deeds ⇐138

"Exception" in deed operates on description of property and withdraws from the description the excepted property whereas "reservation" is technically a newly created right which grantee impliedly conveys back to grantor.

See publication Words and Phrases for other judicial constructions and definitions.

4. Covenants ⇐49

Doubts arising from deed as to intention of parties must be resolved in favor of free and untrammeled use of land.

5. Deeds ⇐139, 142

Benefit of defect of description of exception or reservation of land accrues to grantee.

6. Contracts ⇐155

In case of doubt of effect of language put in to form contract, language is interpreted against party who chose it.

7. Deeds ⇐90

Interpretation under which deed will be valid and operative must be preferred to one which will nullify deed.

8. Deeds ⇐90

Any doubt as to construction of language of deed should be resolved against grantor.

9. Deeds ⇐93

Intention of parties is arrived at by considering language contained within instrument.

10. Easements ⇐26(1), 52

Effect in agreement for sale and in deed of a reservation of range use rights by original sellers was to give the sellers, their heirs and assigns, use of range for so long as there was a range to use and exclusive right to use land for range use purposes, but when range was put to a higher use by purchasers, range was destroyed and right to use for range purposes that portion of property put to higher use was withdrawn until such time as property might revert to range again.

Lewis, Roca, Scoville, Beauchamp & Linton, by John P. Frank and Walter Cheifetz, Phoenix, for appellants.

Hughes & Hughes, by John C. Hughes, Hess Seaman and Renz L. Jennings, Phoenix, for appellees.

CAMERON, Judge.

Plaintiffs below, appellants herein, brought suit to quiet title or for declaratory judgment to determine possession in and to some 40,000 acres of land in Mohave County, Arizona. Appellant, Phoenix Title and Trust Company, appears in its capacity as a trustee.

In the summer of 1956, the defendants below, appellees herein, entered into negotiations to purchase some 45,000 acres of land, including some patented mining claims situated in Mohave County, Arizona. The purchase price was $150,000. Other than the patented mining claims, mineral rights to the property had been reserved by prior grantors. The agreement for sale of the 45,000 acres, comprising what is called the Diamond Bar Ranch, was dated 1 August, 1956, but was not signed until October, 1956. Defendants, by agreement dated 3 October, 1956, contracted to sell 40,000 acres of the 45,000 acres purchased, less the patented mining claims, to Southwestern Realty

Company for the amount of $200,000. In the agreement for sale, the following provision is contained:

> "The sellers herein reserve unto themselves, their heirs, executors, and assigns, all range use rights."

The warranty deed to the said 40,000 acres also contained the provision:

> "The grantors herein reserve unto themselves, their heirs, executors, and assigns, all range use rights."

The agreement for sale is a form agreement prepared by Phoenix Title and Trust Company and contains the following provisions as part of the *printed* form:

> "Buyer may enter into possession of said property and continue in such possession for and during the life of this agreement. Buyer agrees to maintain said premises and all improvements thereon in good repair to prevent no waste thereof and take the same care thereof as a prudent owner would take."

The agreement carries Phoenix Title and Trust Company escrow number 541882.

Also on 3 October, 1956, Southwestern Realty Company, an Arizona corporation, entered into an agreement to sell the same 40,000 acres to George L. Dobson, a resident of California, for the amount of $270,000. This agreement was also on plaintiff Phoenix Title and Trust Company's form (escrow number 541883), and referred specifically to the rights of the defendant "in and to all range use rights in the within property". The sales price, $270,000, was later reduced to $250,000.

The testimony indicates that Mr. Dobson thought he was dealing with the defendants in the purchase of this land through Mr. O. C. Williams as broker, and not until late in the transaction did he realize that Southwestern Realty Company was to be a party to the transaction. The testimony also indicates that the defendants were aware of this so-called "double escrow" and had no objections to Southwestern selling this property for whatever it could obtain.

The testimony is abundantly clear in the trial below, that the defendants and Mr. Dobson and Mr. O. C. Williams, acting for Southwestern Realty Company, intended in this transaction to transfer "exchange rights" only in and to the 40,000 acres. Mr. Dobson understood this, Mr. Williams understood this, and it was clearly Mr. Smith's intention. The instruments as recorded in the office of Mohave County Recorder, however, are completely silent as to this intention.

By "exchange rights" as defined by the parties, is meant the right of the holder of the "rights" to apply to the United States Government to "trade" or "exchange" this property for other government property located elsewhere in the state or county on whatever basis the authorities will agree to trade.

When Mr. Dobson was unable to exchange his interest in and to the 40,000 acres for other land held by the federal government, he then sold his interest to other parties, some of whom comprise the plaintiffs herein.

[1] It should be noted that though the defendants strongly dispute the right of the buyers to enter into possession of said property, that the printed portion of the agreement for sale specifically provides that "buyer may enter into possession of said property and continue into such possession for and during the life of the agreement", and we assume thereafter when the agreement is performed. The provision is in direct conflict with the interpretation placed upon the reservation of range use rights by the defendant. Generally, if the written provisions of a contract, here the reservation of range use rights, are inconsistent with the printed provisions, the written matter deliberately added by the parties must prevail. Wilhorn Builders v. Cortaro Management Company, 82 Ariz. 48, 308 P. 2d 251 (1957); Deuel v. McCollum, 1 Ariz. App. 188, 400 P.2d 859 (1965).

The question then before this Court concerns the legal effect in the agreement for sale and in the deed of the reservation of

range use rights by the defendants-sellers to Southwestern Realty Company.

[2, 3] It has been said that the terms "reservation and exception" are often used interchangeably and that their distinction is "technical, slight and shadowy", Victory Oil Co. v. Hancock Oil Co., 125 Cal.App.2d 222, 270 P.2d 604 (1954). Ordinarily, for the purpose of determining what is granted in a deed, the distinction between an exception and a reservation is of little importance since by whatever name the property excepted or the estate reserved is never considered a part of the grant. Reynolds v. McMan Oil & Gas Co., 11 S.W.2d 778 (Tex. Com.App.1928). While an exception operates on the description on the property and withdraws from the description the excepted property, Moore v. Davis, 273 Ky. 838, 117 S.W.2d 1033 (1938), a reservation is technically a newly created right which grantee impliedly conveys back to the grantor. Goss v. Congdon, 114 Vt. 155, 40 A.2d 429 (1945), Nelson v. Bacon, 113 Vt. 161, 32 A.2d 140 (1943). In the instant case, the "range use rights" would properly be considered a reservation since it is a new right or use created out of the property granted to Southwestern Realty Company.

[4-9] Counsel cite no cases and we have been unable to find any in which a reservation for grazing or range use purposes has been reserved to the grantor, their heirs and assigns, in perpetuity. We must, therefore, consider some rules of construction in determining the effect that this clause has at law on future purchasers of this property. Generally, doubts arising as to the intention of the parties must be resolved in favor of a free and untrammeled use of the land. Marshall v. Callahan, 229 S.W.2d 730 (Mo.App.1950). Also, benefit of the defect of description of exception or reservation accrues to the grantee. Pima Farms Co. v. McDonald, 30 Ariz. 82, 244 P. 1022 (1926).

> "* * * when a party chooses the language which he puts into a form contract, in case of doubt of its effect the general rule is that it is interpreted against him." Liberty Mutual Insurance Co. v. Hercules Powder Co., 224 F.2d 293, at 294 (3 Cir. 1955).

And, also:

> "A well-settled rule of construction requires an interpretation under which the deed will be valid and operative in preference to one which will nullify it; and another equally as well-settled rule is that the language of the deed is the language of the grantor, and if there is any doubt as to its construction, it should be resolved against the grantor." Kuklies v. Reinert, Tex.Civ.App., 256 S.W.2d 435, at 442 (Tex.Civ.App., 1953).

Added to these rules is one equally important rule that the instrument must be viewed in its entirety:

> "* * * the fundamental rule is that the intention of the parties is arrived at by the language contained within the instrument." Corn v. Branche, 74 Ariz. 356, at 358, 249 P.2d 537, at 538 (1952).

It should be pointed out that nothing in the agreement for sale or deed indicates a sale of "exchange rights". The sale is of "all certain real property" described with the reservation of the range use. There is no mention of a sale of "exchange rights".

Defendants contend that by reserving the "range use rights", that the defendants retained all of the surface rights in and to the 40,000 acres as against every one and in perpetuity. That the purchasers would not be allowed to use the property for any reason other than for exchange purposes and "that defendants had the right to the exclusive possession of the land". The purchasers had been paying the taxes on the land.

To put the construction upon this reservation desired by the appellee, would be repugnant to and completely destroy the grant made by the defendants:

> "It is perfectly legal for parties to contract and place in their deeds certain reservations or exceptions for the use and possession of the conveyed prem-

> ises as a part of the consideration thereof to be enjoyed by the grantor, his heirs and assigns, for a stated period of time. * * * Of course, reservations or exceptions that contradict the grant, and are so repugnant as not to be able to determine whether any title passed at all, would be void and nonenforceable." Word v. Kuykendall, 246 S.W. 757, at 759 (Tex.Civ.App. 1923).

[10] In construing the term "range use rights" in the agreement for sale and in the deed herein, it is our opinion that the only logical conclusion we can reach and still uphold the validity of the grant is this: the defendants, their heirs and assigns, have the use of this range for so long as there is a range to use, and they have the exclusive right to use the land for range use purposes. When the range is put to a higher use by the grantees, such as constructing a home or breaking the soil for farming, then the range is destroyed and the right to use for range purposes that portion of the property put to the higher use is withdrawn until such time as the property may revert to range again.

We express no opinion as to the effect of a deed conveying "exchange rights" only or even if "exchange rights" can be sold. We merely state that the interpretation that the defendants attempt to place on the reservation in the instant case, is so inclusive as to totally consume the grant and be repugnant to the grant itself.

The matter is reversed and remanded for proceedings not inconsistent with the opinion.

STEVENS, C. J., and DONOFRIO, J., concur.