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EASEMENTS — EXTINGUISHMENT BY ADVERSE POSSESSION OF SERVIENT OWNER — CHARACTER OF ACTS NECESSARY — In 1902, Y, the owner of riparian land, granted to W, by deed then recorded, the flowage rights over such land. Some years later by general warranty deed containing no reference to the easement, the servient land was conveyed to L, from whom by similar successive conveyances it came to the plaintiff. In the interval the flowage rights had passed to the defendant, and in 1931 the latter erected a dam across the river and flooded the plaintiff's land. Thereupon the plaintiff brought this action for damages. The trial court held that, though all the owners of the servient land subsequent to Y had exercised acts of ownership over it, there was no showing that the easement had been extinguished by adverse possession. *Held*, judgment affirmed. *Graham v. Safe Harbor Water Power Corp.*, 315 Pa. 572, 173 Atl. 311 (1934).

It is well settled that an easement may be lost by adverse or inconsistent acts of the servient owner continued for the prescriptive period.¹ On the other hand, it is equally well established that the fee owner is entitled to make any use of the servient land not inconsistent with the continuance of the easement.² Thus, whether acts are adverse is often a difficult problem, with the answer depending upon the character of the easement. It is usually stated that the acts of the adverse claimant, sufficient to bar the easement, must be such as would give rise to an action by the dominant owner.³ As regards the ordinary easements of passage over land, it is generally held that enclosure of the way is not an adverse act,⁴ though it may interfere to some extent with the reasonable use of the easement. Thus the maintenance of gates, fences or bars, even though such may be locked, does not bar the easement.⁵ The fact that these obstructions are often for the benefit of all concerned leads to the presumption that they are permissive and not adverse.⁶ Where a permanent structure, such as a building or wall, is maintained and interferes with passage, it is universally held that the right is terminated, at least over that portion of the land encroached upon.⁷ In the cases

¹ *Mitchell v. Bovard*, 279 Pa. 50, 123 Atl. 588 (1924); *Wattles v. Village of McHenry*, 305 Ill. 189, 137 N. E. 114 (1922); *Greif v. Teas*, 156 Md. 284, 144 Atl. 231 (1929); 2 TIFFANY, REAL PROPERTY, 2nd ed., sec. 379 (1920).

² *Duross v. Singer*, 224 Pa. 573, 73 Atl. 951 (1909); *Harvey v. Crane*, 85 Mich. 316, 48 N. W. 582, 12 L. R. A. 601 (1891); *Crocker v. Cotting*, 181 Mass. 146, 63 N. E. 402 (1902); *Arnold v. Stevens*, 24 Pick. (41 Mass.) 106, 35 Am. Dec. 305 (1839).

³ *Rudolph v. Glendale Improvement Co.*, 103 W. Va. 81, 137 S. E. 349 (1927); *American Brass Co. v. Serra*, 104 Conn. 139, 132 Atl. 565 (1926).

⁴ *Smith v. Langewald*, 140 Mass. 205, 4 N. E. 571 (1885); see also cases in note 5, *infra*.

⁵ *Greve v. Caron*, 233 Mich. 261, 206 N. W. 334 (1925); *Brookshire v. Harp*, 186 Ky. 217, 216 S. W. 379 (1919); *Davis v. Wilkinson*, 140 Va. 672, 125 S. E. 700 (1924); *Boyd v. Hunt*, 102 Tenn. 495, 52 S. W. 131 (1899).

⁶ See *Blauser v. Carson*, 74 Pa. Super. Ct. 223 (1920).

⁷ *Goodwin v. Bragaw*, 87 Conn. 31, 86 Atl. 668 (1913); *Brooks v. West Boston Gas Co.*, 260 Mass. 407, 157 N. E. 362 (1927); *Jessop v. Kittaning Borough*, 225 Pa. 589, 74 Atl. 554 (1909); *Rupprecht v. St. Mary's Roman Catholic Church Soc.*, 198 N. Y. 576, 92 N. E. 1101 (1910).

involving plowing or cultivation, it is agreed that the use of the land for agricultural purposes will not bar an easement over it.⁸ But if, as an additional factor, the land is fenced in and exclusive dominion is exercised over it by the adverse claimant, the easement will be lost.⁹ In the field of water floodage rights, the courts consistently hold that plowing or cultivating the servient land is not actionable, and hence not an adverse user.¹⁰

J. E. O'B.

⁸ *Fulcher v. Dierks Lumber & Coal Co.*, 164 Ark. 261, 261 S. W. 645 (1924); *Les v. Alibozek*, 269 Mass. 153, 168 N. E. 919, 66 A. L. R. 1094 (1929).

⁹ *Tuttle v. Sowadski*, 41 Utah 501, 126 Pac. 959 (1912); *Peck v. Loyd*, 38 Conn. 566 (1871); *Yeakle v. Nace*, 2 Whart. (52 Pa.) 123 (1837).

¹⁰ *Seymour Water Co. v. Leblin*, 195 Ind. 481, 144 N. E. 30, 145 N. E. 764 (1924); *Butterfield v. Reed*, 160 Mass. 361, 35 N. E. 1128 (1894); *Haigh v. Lenfesty*, 239 Ill. 227, 87 N. E. 883 (1909).