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REAL PROPERTY-PRESCRIPTION-RECIPROCAL EASEMENTS IN MUTUAL DRIVEWAY

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REAL PROPERTY—PRESCRIPTION—RECIPROCAL EASEMENTS IN MUTUAL DRIVEWAY—Plaintiffs brought this suit in equity to establish their right to an alleged easement acquired by prescription in a joint driveway on the lot line separating their lot from defendants' lot and for injunctive relief restraining defendants from interfering with their use of the driveway. The husband of the common grantor of these lots had erected a house on each lot in 1924 and had constructed a driveway over the eight feet of land between the houses, half of the driveway being on each lot. Each lot was thirty-one feet wide and each had a garage in the rear, defendants' garage being accessible from an alley while plaintiffs' garage was accessible only by means of the driveway. The husband of the common grantor testified that he had built the joint driveway to enhance the value of the lots, and when the lots were sold to defendants' predecessor in 1924 and to plaintiffs' predecessor in 1925, he told each purchaser "that they would have the right to use the driveway and that the occupants of the other lot would also use it." The original grantees and their successors continued the mutual use of the driveway until 1948, when defendants erected a fence down the middle of the driveway. On appeal from a decree of the circuit court that an easement by prescription had been acquired, *held,* reversed. The user began as a mutual convenience to both lots, hence, it was permissive, not adverse.[1] *Banach v. Lawera,* 330 Mich. 436, 47 N.W. (2d) 679 (1951).

[1]Some of these facts are taken from the record of the case on appeal and do not appear in the court's opinion.

In most jurisdictions the rights of the parties under the facts of the principal case would depend on the law of easements by implied grant and reservation; in Michigan, however, it is established that a right of way is not a continous easement,[2] and continuousness is a necessary element for the creation of an easement in this manner. Since no mention of an easement appeared in the records of title, plaintiffs' only ground for relief was that an easement by prescription had been acquired. The doctrine of prescription originally stemmed from a theory or legal fiction of a lost grant, but this theory is more or less in disrepute today and the modern view is that prescription is dependent upon the same principles as adverse possession of land.[3] The burden of proving a continuing adverse user acquiesced in by the owner of the servient tenement for the prescriptive period rests on the claimant.[4] A user under a parol license is permissive and can never ripen into an easement by prescription;[5] but consent to the user may be more than a license—it may be an oral agreement amounting in terms to a grant of an easement which is void under the Statute of Frauds. If such is the case, the consent through which the user began affirmatively supports the presumption that the user was adverse and under a claim of right.[6] The user under an oral grant is adverse because it does not continue *under* the grantor, but continues in the supposed right of the grantee acquiesced[7] in by the grantor, while the user under a license is permissive because it is in recognition of the paramount right of the licensor.[8] The view of the Michigan court is that where the driveway is of mutual convenience to both lots, the user is permissive, and, therefore, can never ripen into an easement by prescription.[9] While this is one factor tending to show a permissive user, it should not be conclusive. A

[2] Morgan v. Meuth, 60 Mich. 238, 27 N.W. 509 (1886); Burling v. Leiter, 272 Mich. 448, 262 N.W. 388 (1935), criticized in 34 MICH. L. REV. 882 (1936); Milewski v. Wolski, 314 Mich. 445, 22 N.W. (2d) 831 (1946).

[3] Plaza v. Flak, 7 N.J. 215, 81 A. (2d) 137; 5 PROPERTY RESTATEMENT §460 (1944).

[4] 1 JONES, EVIDENCE, 4th ed., §378 (1938). The great majority of courts aid the claimant by creating a rebuttable presumption of an adverse user where it appears that the user has been enjoyed openly and continuously for the prescriptive period. 11 MICH. L. REV. 384 (1913); 17 UNIV. CHI. L. REV. 211 (1949); 170 A.L.R. 776 (1947).

[5] Naporra v. Weckwerth, 178 Minn. 203, 226 N.W. 569 (1929); Beechler v. Byerly, 302 Mich. 79, 4 N.W. (2d) 475 (1942); 4 TIFFANY, REAL PROPERTY, 3d ed., §1196 (1939) and cases cited therein.

[6] C. B. Alling Realty Co. v. Olderman, 90 Conn. 241, 96 A. 944 (1916); McKenzie v. Elliott, 134 Ill. 156, 24 N.E. 965 (1890); Schroer v. Brooks, 204 Mo. App. 567, 224 S.W. 53 (1920); Jenkins v. McQuaid, 153 Miss. 185, 120 S. 814 (1928); Wortman v. Stafford, 217 Mich. 554, 187 N.W. 326 (1922); Lechman v. Mills, 46 Wash. 624, 91 P. 11 (1907).

[7] For a discussion of the distinction between acquiescence and permission, see Dozier v. Krmpotich, 227 Minn. 503, 35 N.W. (2d) 696 (1949).

[8] Phillips v. Bonadies, 105 Conn. 722, 136 A. 684 (1927); Jacobs v. Brewster, 354 Mo. 729, 190 S.W. (2d) 894 (1945); 41 MICH L. REV. 1130 (1943).

[9] Wilkinson v. Hutzel, 142 Mich. 674, 106 N.W. 207 (1906); Hopkins v. Parker, 296 Mich. 375, 296 N.W. 294 (1941); Milewski v. Wolski, supra note 2; Worden v. Assiff, 317 Mich. 436, 27 N.W. (2d) 46 (1947); Wasilewski v. Kowal, 320 Mich. 473, 31 N.W. (2d) 697 (1948).

more logical approach to the question whether an oral grant of an easement or a parol license was given, is a consideration by the court of *all* the circumstances. Some of the factors to be considered are the permanency of the arrangement,[10] the physical layout of the driveway and lots,[11] and the nature of improvements made in relation to the driveway.[12] In the principal case the distance between the houses was only eight feet, so that the only access to the rear of the lots was by means of a joint driveway; and the garages erected at the end of the driveway, while not indestructible or unchangeable, were of such a nature that reasonable persons would not have built them if the use of the driveway was only a temporary accommodation and subject to termination at the whim of either lot owner. A consideration of these factors seems to lead to a determination that the husband of the common grantor gave an oral grant of an easement rather than a parol license, and even though he had no authority to do this, these same considerations show that each owner was asserting an adverse right to the use of that part of the driveway lying on the other's lot. It is submitted that the mechanical approach of the Michigan "mutual convenience" rule which disregards, or at least de-emphasizes, the other circumstances, does not lead to a result within the spirit of the doctrine of prescription,[13] nor one which promotes the protection of property interests or the security of titles.

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[10] Alstad v. Boyer, 228 Minn. 307, 37 N.W. (2d) 372 (1949); Jacobs v. Brewster, supra note 8; Jensen v. Showalter, 79 Neb. 544, 113 N.W. 202 (1907); Holm v. Davis, 41 Utah 200, 125 P. 403 (1912); Lechman v. Mills, supra note 6.

[11] Justice Shaw in Barnes v. Haynes, 13 Gray (79 Mass.) 188 at 192 (1859) said, "We think that the antiquity, the distance between and the relative position of their respective dwelling houses, and the open lands in the rear of each . . . strengthens the presumption of a non-appearing grant." A way across unimproved land would tend to show a permissive user. Monroe v. Shrake, 376 Ill. 253, 33 N. E. (2d) 459 (1941); Walthus v. Tanner, (Okla. 1951) 233 P. (2d) 303.

[12] Some cases have held that even though the user originated as a license, it becomes an irrevocable license where the licensee had expended money in making permanent improvements in reliance on the license and cannot be restored to his original position if the license is revoked. Pierce v. Cleland, 133 Pa. 189, 19 A. 352 (1890) (common stairway); Checketts v. Thompson, 65 Idaho 715, 152 P. (2d) 585 (1944) (fenced lane to cattle watering hole); Stoner v. Zucker, 148 Cal. 516, 83 P. 808 (1906) (irrigation ditch); Forde v. Libby, 22 Wyo. 464, 143 P. 1190 (1914) (private way).

[13] Justice Holmes has said, "Prescription and limitation are based on one of the deepest principles of human nature, the working of association with what one actually enjoys for a long time, whatever one's defects of title may be, and of dissociation from that of which one is deprived, whatever may be one's rights. The mind like any other organism gradually shapes itself to what surrounds it, and resents disturbance in the form which its life has assumed." Dunbar v. Boston and Providence Railroad Corp., 181 Mass. 383 at 385, 63 N.E. 916 (1902).