

Michigan Law Review

Volume 41 | Issue 6

1943

EASEMENTS-USE OF BOUNDARY-LINE DRIVEWAYS AS PERMISSIVE OR ADVERSE

R. W. A.

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

R. W. A., *EASEMENTS-USE OF BOUNDARY-LINE DRIVEWAYS AS PERMISSIVE OR ADVERSE*, 41 MICH. L. REV. 1130 (1943).

Available at: <https://repository.law.umich.edu/mlr/vol41/iss6/7>

This Response or Comment is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

COMMENTS

EASEMENTS—USE OF BOUNDARY-LINE DRIVEWAYS AS PERMISSIVE OR ADVERSE—The essence of prescription as a means of acquiring ownership or an interest is long-continued use. If the claimant's task were simply the proof of the use and that it had been open, it would not be a difficult one. The chief difficulties are encountered in establishing that the use had the necessary quality of adverseness. The like requirement as to a possession that ripens into ownership under the statute of limitations has its problems, but they are, generally speaking, not so troublesome.¹

It is easy to say that an "adverse" use in one that is not permissive, that it is one made under "claim of right." As a definition such statement is accurate, but it leaves the real difficulty to be faced: the determination whether a use on proved facts was "not permissive" but under "claim of right." It must be remembered that the latter phrase

¹ In adverse possession one has the more unequivocal fact of possession which is normally continually visible. When it is said that an adverse possessor is one who "acts like an owner" reference is made to outward manifestations much more expressive than the usual acts of mere user.

necessitates no "claim" in anything like the popular sense of the word and, even more baffling, that a use may be "not permissive" though the servient owner all the time knew of the use and suffered it to continue; indeed, he may have literally assented to it.

Only rarely in judicially approved cases of prescription does one find anything like a positive or affirmative claim of right. Such claim is almost always a deduction from the circumstances of the use, the most potent factor being the fact that it was not permissive. A possession of land under an ineffective attempt to convey it to the possessor, for example, an oral gift, is adverse. Though the possession is taken with the full assent of the attempted donor and is therefore in that sense permissive, the important fact is that the possession does not continue *under* such donor but in the supposed right of the occupant. So in the case of prescription, a use that is pursuant to an ineffective attempt to create an easement is adverse.² On the other hand, use under a mere license is permissive and no matter how long continued it will not support a prescriptive claim. The one making the use in such case is not acting as owner of the right but in recognition of the paramount right of the licensor.

The point of real difficulty, the turning point in these situations, is in determining whether the arrangement which initiated the use is more properly to be regarded as intended to be permanent, despite the informality, or as a temporary accommodation. If the former, the use should be classed as adverse; if the latter, as permissive.³

A common type of case presenting the question is the frequent arrangement between neighbors for a common driveway, part on the land of each. It may be an economy and in many instances a saving of limited space to have such common driveway leading perhaps to garages in the rear. Only occasionally will the parties' understanding be put into such form as to meet the legal requirements for the creation of cross-easements. Not infrequently considerable expense is incurred in building the driveway and one or both of the neighbors may arrange his or their premises in reliance upon the continued use of the way. So long as friendly relations continue, no difficulty arises, but when, as sometimes happens, such relations become strained, one party may con-

² See, for example, *Wortman v. Stafford*, 217 Mich. 554, 187 N.W. 326 (1922); *Lechman v. Mills*, 46 Wash. 624, 91 P. 11 (1907).

³ In addition to the cases in the preceding note, see *Gyra v. Windler*, 40 Colo. 366, 91 P. 36 (1907); *Alderman v. New Haven*, 81 Conn. 137, 70 A. 626 (1908); *Sell v. Finke*, 295 Ill. 470, 129 N.E. 90 (1920); *Robert v. Perron*, 269 Mass. 537, 169 N.E. 489 (1930); *Outhwaite v. Foote*, 240 Mich. 327, 215 N.W. 331 (1927), noted 26 MICH. L. REV. 453 (1928); *Holm v. Davis*, 41 Utah 200, 125 P. 403 (1912); *Texas & P. Ry. v. Scott*, (C.C.A. 5th, 1896) 77 F. 726. The difficulties have led to the formulation of presumptions, which, however, sharply vary. See 11 MICH. L. REV. 384 (1913).

clude to block off the drive. Then the discommoded neighbor will endeavor to establish an easement by prescription.

A good example of this sort of neighborhood difficulty is found in a recent Illinois case.⁴ Adjoining owners, *A* and *B*, in 1920, joined in building a cinder drive between their houses leading from the street to garages in the rear, the garages apparently being built following the construction of the driveway, their location being determined, in part at least, by the existence of the way. A year later, at *A*'s suggestion, each laid a cement walk, three and one-half feet wide, thus giving a hard surface driveway in place of the cinders. In 1925, *A*'s lot was conveyed to *D*, and the ownership of *B*'s lot was acquired by *P*. Common use of the driveway continued amicably until 1942, when *D* erected a fence down the middle of the way, there having been some objection by Mrs. *D* to the way in which Mrs. *P* was driving her car at the back end of the drive. This led to an action by *P* to restrain *D* from obstructing the driveway, *P* claiming an easement by prescription. It appeared that after the trouble began *D* had provided access to his garage from an alley in the rear. To get to and from *P*'s garage would require considerable readjustment of his premises, the landscaping, etc., having been done in reliance upon the availability of the cement driveway. The court denied *P*'s claim to an easement by prescription, the basis being that the long-continued use had been permissive, hence not "adverse."

Such concepts as "adverse use" and "permissive use" are so ambiguous that surely in determining their meaning as applied to a particular fact situation one is warranted in giving weight to the desirability of the conclusion that is indicated by the one or the other. As pointed out in an earlier note in this *Review*,⁵ continuous travel over uncultivated, waste land may well be classified as permissive even though precisely the same sort of travel over cultivated areas would be deemed adverse. An agreement between neighbors for what was obviously deemed a temporary use by one of the land of another should not ripen into an easement by use, and the result would be reached by classifying such use as permissive. On the other hand, when neighbors effect an arrangement, however informal, for uses of each other's land that bears the earmarks of permanence and the use continues for the prescriptive period, it seems a clearly sensible conclusion that an easement or mutual easements result, and the user would be said to have been adverse. Fairness and decency in conduct are furthered by such conclusion.⁶

⁴ *Lang v. Dupuis*, (Ill. 1943) 46 N.E. (2d) 21.

⁵ 11 MICH. L. REV. 384 (1913).

⁶ If two neighbors were to enter into an informal agreement for the erection of a common wall on the dividing line, half on each lot, each one to have the right to use the entire wall, and the wall were built and used accordingly for the prescriptive period,

In reaching its conclusion the Illinois court felt that its course was determined by a series of earlier decisions in that state.⁷ Those cases proceeded on the familiar general proposition that "a verbal permission to pass over the lands of another cannot ripen into a prescriptive right, however long the permissive use is enjoyed." As pointed out above, the problem is not so simple as such broad language indicates.⁸

The recent case of *Johnson v. Whelan*⁹ presents a much more sensible and realistic view. The facts there were essentially the same. The court said:

"While it may be true, as contended by defendant, that mere permissive use of a way over the lands of another, however long indulged in, will not ripen into an easement, for the reason that such use bears no element of adverse claim, yet we cannot agree that in this case there was no adverse claim. Each owner, after the driveway was paved, was by his use thereof asserting an adverse right in the portion of the way lying on the other's land."¹⁰

R.W.A.

surely good sense would dictate a conclusion, if possible under the law, that easements had been created. Though the use in a very real sense had been permissive, it would seem it ought to be classified as adverse.

⁷ Illinois Cent. R.R. v. Stewart, 265 Ill. 35, 106 N.E. 512 (1914); Bontz v. Stear, 285 Ill. 599, 121 N.E. 176 (1918); Baird v. Westberg, 341 Ill. 616, 173 N.E. 820 (1931).

⁸ On behalf of *P* it had also been argued that while the original arrangement may have amounted only to a license, it should be concluded that the actions induced by such permit, the change in position in reliance thereon, resulted in an irrevocable right, in effect, an easement. This contention, too, was rejected.

⁹ 171 Okla. 243 at 244, 42 P. (2d) 882 (1935).

¹⁰ In the annotation to this case in 98 A. L. R. 1098 (1935), many cases are collected. In *Thompson v. Schappert*, 229 Iowa 360, 294 N.W. 580 (1940) the court concluded that an easement arose out of a common use of a driveway located on the boundary line on the ground that there had been acquiescence, the same sort of acquiescence that, under the Iowa law, is effective to establish a boundary line in accordance with occupancy.