Prescriptive Easements Like You’ve Never Seen Them: Ohio – 2020
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Adverse Possession (General)

› Remember “OCEANS”
› Occupation,
› Continuous,
› Exclusive,
› Adverse (to the true owner)
› Notorious (open and),
› for the Statutory Period.

Ohio: What is a Prescriptive Easement (1)
› “[a]n easement is a right, without profit, created by grant or prescription, which the owner of one estate, called the dominant estate, may exercise in or over the estate of another, called the servient estate, for the benefit of the former.
› ‘Prescription is the acquisition of an easement, over the property of another, through adverse use of that property.’

Ohio: Confusing the Rules (1)
Ramunno v. Murphy: 86 N.E.3d 802; 2017
› The facts are undisputed that the parties (or their predecessors in interest) entered into the Driveway Easement.
› Thus, the trial court’s findings that the Ramunnos have an implied easement and a prescriptive easement are contrary to its finding that the parties entered into the Driveway Easement.

Ohio: Confusing the Rules (2)
Ramunno v. Murphy: 86 N.E.3d 802; 2017
› As stated by this court previously, express easements and implied easements are mutually exclusive.
› And a party cannot have a prescriptive easement, which requires an adverse use of the property, when the property owner has expressly granted permission to use her property.

Early History
Lapse of time, coupled with non-possession or inaction, may alter a man’s legal position vis-à-vis his property, both corporeal and incorporeal, in several different ways.

The law may (1) bar the owner from asserting his rights by a droitural action and thus leave these rights suspended in a state of unenforceability;
(2) extinguish his legal right as well as his remedy;
(3) transfer his rights to another who has exercised them by long-continued possession or use; and
(4) impose a presumption that long-continued possession or use by another had its beginning in a lawful deviation of right.

The approach described in the fourth example, that of imposing a presumption, differs somewhat from an acquisitive prescription, though its effect is also investitive.

A presumption does not afford a mode of acquiring new rights but rather provides a means of protecting a presumably lawful acquisition of presently existing rights, whose origin is lost in antiquity.

It is a legal substitute for title supplied through an evidentiary device. Its employment is found both in the common and Roman law systems.

The English law since the time of Bracton (1200–1268), if not since a century earlier, has allowed easements to be acquired through immemorial user termed “prescription”.

This was the only form of acquisitive prescription known to the common law. Its application has been firmly restricted to easements and profits.

II. And be it further enacted, That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way (d) or other easement, or to any watercourse, (e) or the use of any water, to be enjoyed or derived upon…

…shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years.

Doctrine of Presumed Grant
(Lost Grant Theory)
The party claiming a prescriptive easement has the burden of proving each of those elements. Society generally prefers that traditional recordable conveyances control the status of titles for real property interests. Some courts base prescriptive easements on a fiction that long usage evidences a written conveyance that was later lost.

The public's ability to acquire the right to use a road is predicated upon the principle that "public easements, as well as others, ... may be shown by long and uninterrupted use and enjoyment, upon the conclusive legal presumption from such enjoyment, that they were, at some anterior time, laid out and established by competent authority." "A landowner who forebears from effectively disrupting use of his property by his neighbor or the general public eventually accedes to the continuation of that same use."

For the law will never construe a possession tortious unless from necessity. On the other hand, it will consider every possession lawful, the commencement and continuance of which, is not proved to be wrongful. And this upon the plain principle, that every man shall be presumed to act in obedience to his duty, until the contrary appears. When, therefore, a naked possession is in proof, unaccompanied by evidence, as to its origin, it will be deemed lawful.

In order for the doctrine of a lost grant to be applicable, the possession must be under a claim of right, actual, open and exclusive. A chain of conveyances is important. So is the payment of taxes. A claim for government lands stands upon no different principle in theory so long as authority exists in government officials to execute the patent, grant or conveyance. As a practical matter it requires a higher degree of proof because of the difficulty for a state to protect its lands from use by those without right.

The doctrine, as to presumptions of grants, has been gone into largely, on the argument, and the general correctness of the reasoning is not denied. There is no difference in the doctrine, whether the grant relate to corporeal or incorporeal hereditaments. A grant of land may as well be presumed, as a grant of a fishery, or of common, or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions.

On the facts in evidence the jury as a question of law must presume a grant from Fitzpatrick to McArthur or his grantees, or as a question of fact may presume it. I concede that to raise this presumption there must be a possession—adverse in law as well as in fact. There are cases where a possession adverse in fact is not so in law, I will mention three classes.
(1). The possession of a lessee after the expiration of his lease is not in law adverse to the lessor, and cannot be until possession is surrendered to him.

(2). The possession of a party under contract of purchase is in law not adverse to the vendor.

(3). So the possession of a trustee is not in law adverse to the cestui que trust; but subject to these and similar exceptions the doctrine of presumed grant applies.

The books enumerate many reasons in support of the doctrine.

(1). Public interests require an end of litigation, interest, republique, etc., is the maxim which Angell declares (Sec. 9) antedates the Christian Era, is venerable for its age as it is hallowed in its purposes of peace.

(2). Public interests require that titles be settled so as to promote improvements and agriculture, Angell, Sec. 9.

Truth requires courts to presume as probable that parties who long delay to make claims have abandoned or transferred them.

(4). Justice requires that parties in possession (who cannot preserve evidences of title, often in imperfect writings or by parol) shall not suffer by loss of evidence.

(5). Honesty requires that fraudulent claims shall find no favor when the evidence to defeat them is lost.

The rule is so strong, that in case of a possession adverse in law and in fact the presumption of a grant can not be repelled by evidence. It is conclusive.

The doctrine was applied by courts of law to easements, because the statute of limitations did not apply to them. For the same reason courts must apply it in cases of lands to which the statute does not apply; the reason of the law is the life of the law.

There is nothing in the objection that the statute of limitations does not run against the government, nor until a patent issues ...

A grant has been presumed even against the government on grounds of public policy, and contrary to the known fact.

The doctrine of presumed grant should be sustained on grounds of public policy.

This is especially so in a new country like Ohio, where early records were sometimes not carefully made—where some have been lost.

There are now in the Virginia Military district 40,000 acres covered by entries, never patented, held by occupants more than twenty-one years, who are liable to be harassed by unscrupulous parties, who hunt up fictitious heirs, get patents in their names, and bring suits.
There was but one living man who knew of the existence of the receipt of July 12, 1832, the attorney who filed the bill of May 2, 1845, who, for a wonder, after thirty years, remembered and produced it, and thus saved the title of the last purchaser.

But for this fact his title must have been lost, unless it could have been saved by the doctrine of presumed grant, and that, too, merely on proof of (1) payment of taxes, and (2) the absence of claim by the heirs of James McPherson.

BOOTH, Chief Justice, charged the jury—
that as a general principle, acts of limitation will not run against the State; nor can there be an adverse possession, strictly speaking, against the State such as can be against an individual; yet there are cases where from length of possession—rightful possession—a presumption will arise against the king, or against the State, to quiet the title.

The most solemn papers have been presumed after a great lapse of time: grants; charters; even acts of parliament, have been presumed. So in this country grants and patents from the State are presumed after a great lapse of time in conformity with lawful possession.

In order to establish a prescriptive easement by adverse use, a plaintiff bears the burden of proving the use of another’s property
(a) openly,
(b) notoriously,
(c) adversely to the neighbor’s property rights,
(d) continuously, and
(e) for at least twenty-one years.

The trial court mistakenly used twenty rather than twenty-one years as the period of time required to prove a prescriptive easement and limited its analysis to events occurring after 1973.

Although the time period employed by the trial court in reaching its decision is incorrect, we must affirm the court’s judgment if valid grounds are found upon review to support it.

The party seeking to establish a prescriptive easement has the burden of proving each element of the claim, including adverse use.

Once all the elements required for a prescriptive easement have been established, the landowner may present evidence of permissive use to rebut the adverse nature of the claimant’s use.
A permissive use can never ripen into a prescriptive easement. However, in order for a party to meet its burden of proving adverse use, it is not required to affirmatively disprove the existence of a grant of permission or neighborly accommodation given by the true owner of the property. A party claiming a prescriptive easement satisfies its burden by demonstrating a use which is inconsistent with the title owner’s rights and not subordinate or subservient thereto.

Use of property under a mistaken belief of ownership is sufficient to constitute an adverse use. Further, mere acquiescence by the property owner with knowledge of the use does not negate a claim for a prescriptive easement; a permissive user is one who has been granted a license or permission in fact, whether expressly or by necessary implication.

Tirone also argues that the elements of a prescriptive easement were not established. Tirone complains that Gulas' use of the property was not exclusive, but exclusivity is not an element used to determine whether a prescriptive easement exists. Tirone also argues that Gulas' use of the property was not adverse because she had permission to use it, but the record shows that neither party ever received permission to use any part of the space between their two houses.

Tirone further argues that occasional mowing of property does not constitute an adverse use of property to support the grant of a prescriptive easement. Tirone cites Grace v. Koch (1998), 81 Ohio St.3d. 577, 1998 Ohio 607, 692 N.E.2d 1009, in support. The Grace case is inapposite for a number of reasons. First, Grace was an adverse possession case, not a prescriptive easement case.

In adverse possession, the complainant is seeking complete and exclusive possession to the property, whereas a prescriptive easement is merely a limited right of use and does not infringe on any other right of the servient estate except as defined in the terms of the easement.
An "easement grants such rights as are necessary to the reasonable enjoyment thereof, leaving to the owner of the fee the right to use the property in any manner not inconsistent with the reasonable use of the easement."

The complainant in Grace was required to prove adversity of possession, whereas Gulas, in the instant appeal, needed to prove adversity of use sufficient to establish an easement.

Gulas established much more than occasional mowing. She used the alley for access between the front and back of the property....as a staging area when she had her roof repaired....when she needed to paint the side of her house....in the spring to install air conditioners, and used it again to remove the air conditioners in the fall.

She also used it to monitor her electric meters.

As such, Gulas provided ample evidence of multiple uses that were adverse to Tirone's use of the same property.

To be open and notorious in the context of a prescriptive easement means that Gulas must show that she made no attempt to conceal her use of the property.

Use of property is open and notorious if the use is visible or is of common knowledge to the general public.

The claimant is not required to prove that the title owner had actual knowledge of the claimant's use of the property.

DP&L also argues that the Harrises cannot prove continuous adverse use of the land because DP&L granted the Harisses permission to use the land in 2009, and then revoked their permission to use the land in 2010.

However, the unrebutted facts establish that the Harrises' claim for a prescriptive easement had already matured before this attempt to disrupt their continued use.

However, once the claimant's use of the property has been open, notorious, and adverse to the servient property owner for a continuous period of 21 years, it is irrelevant whether the servient property owner subsequently grants the claimant permission to use the property.

The only way to extinguish a matured prescriptive easement is for the titleholder to obstruct the easement in an open, adverse, and continuous manner for 21 years.

Furthermore, "[a] user's acknowledgment that the title holder has the paramount right will not extinguish a fully matured prescriptive easement."
Clearly, the license agreement was signed in 1993, but this, under the evidence was long after the prescriptive rights had arisen and was executed due to lending requirements ...
...and had no effect upon termination of the established prescriptive easement.
No other evidence sufficient to eliminate the prescriptive property rights was presented.

By accepting its neighbor’s permission to use the drive, plaintiff accepted the neighbor’s superior right and abandoned adversity for that property.
That action extinguished any maturing prescriptive right by destroying the continuity between any prior adverse use and any subsequent adverse use.

However, a prescriptive easement can be extinguished by the title owner’s obstruction of the easement in an open, notorious, adverse, continuous manner for at least twenty-one years.
In other words, an easement can be created by another’s sufficient adverse use, and it can be destroyed by the title owner’s sufficient adverse restriction on such use.
Interruption of the Prescriptive Claim

Prescriptive Easements: Colorado (3)
› Some Jurisdictions have taken the approach that no interruption will occur when an owner constructs a barrier for the purpose of interrupting which is ultimately unsuccessful in defeating the adverse claimant’s use, even when the adverse claimant is temporarily forced to discontinue use.
› Concerned Citizens Taxpayers Ass’n v. State ex rel. Rhodes, 329 N.C. 37, 404 S.E.2d 677 (1991) (installation of multiple barricades not sufficient if it does not prevent use of the easement)

OHIO: Can’t Possess against yourself (1)
Martin v. Yheulon: No. OT-08–048; Ohio App. 2009
› their acquisition of the land they claim as the dominant estate was from James and Ilse Lyons who had purchased the property from Ray and Susan Yheulon in 1984.
› an owner of property cannot use that property adversely to the owner’s own interest.
› the earliest any interest could have been adverse to that of the Yheulons was 1984.
› before 2005, they advised Joseph Martin and Joanne Sutton that the disputed property was private …
› even had there been adverse use, it could not have matured for the necessary 21 years.

OHIO: Does there have to be a House? (2)
Martin v. Yheulon: No. OT-08–048; Ohio App. 2009
› Appellees insist that the adverse use cannot precede the construction of Howard’s house. We find nothing in the law to support this proposition.
› It is the land, not the structure that acts as the dominant estate in a prescriptive easement.
› Consequently, if it can be shown that Josephine Howard, as predecessor in interest to appellants Thomas, met the requirements necessary to establish a prescriptive easement on the disputed property either solely for the period of maturity or in combination with appellants Thomas by tacking, then appellants Thomas have established their claim.

Interrupting a Claim: Colorado (2)
› To interrupt the acquisition of a prescriptive easement before the statutory period has run, the true owner must assert a claim to the land or perform an act that would reinstate the owner’s possession. An owner may interrupt the running of the statutory period by physically limiting access to the property.

Prescriptive Easements: Colorado (4)
› Other Jurisdictions have held it sufficient that the owner erect a physical barrier adequate to, and for the purpose of, interrupting the use by an adverse user, regardless of whether the barrier is defeated by the user or is not effective in permanently defeating the use.
› Dalton v. Real Estate & Improvement Co., 201 Md. 34, 92 A.2d 585 (1952)(planting of railroad ties and gate across road sufficient although passage was still possible);
In our view, a barrier established for the purpose of, and in fact, interrupting an adverse claimant’s use is effective even if it is ultimately removed by the adverse claimant. As with other jurisdictions,

we agree with Justice Oliver Wendell Holmes, Jr., who stated:

We are of opinion that such an assertion of right on the part of the [owner] was sufficient to prevent the gaining of a right of way. A landowner, in order to prevent that result, is not required to battle successfully for his rights. It is enough if he asserts them to the other party by an overt act, which, if the easement existed, would be a cause of action.

The club has shown that it has used the bridle trail without permission since November 1, 1945. The daily riding of individuals and groups mounted on horseback is an open use. Plaintiffs admit knowledge of the activity. Mayfair is chargeable with knowledge of the activity because of the knowledge of the Horns. There is no evidence that plaintiffs or their predecessors in title attempted to interrupt the use of the bridle trail after November 1, 1945, until the filing of the complaint in this action.

The court concludes that the club has established a prescriptive easement for the bridle trail.

The dimension and scope of an easement may be ascertained from the language of the conveyance and the circumstances surrounding the grant.

The court granted OVE a prescriptive easement to continue using the southern parcel as it has been...

There is quite simply nothing to suggest the prescriptive easement grants OVE a “veritable free reign to cross the southern parcel however it should so choose.”

As in the case of prescriptive easements which serve adjacent property, a public prescriptive easement results from a specific type of continuous use. The resulting easement permits the public to continue that same type of use.

In effect, a landowner who forebears from effectively disrupting use of his property by his neighbor or the general public eventually accedes to the continuation of that same use.

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An adjacent landowner’s extended use of his neighbor’s land as a roadway does not justify its later use to reach a different property or as a drainage ditch.

The public’s extended use of property for picnics and recreation may not create an easement to drive vehicles there.

Tirone’s final argument is that the court had no basis to determine that any easement should be granted, so it could not have had sufficient evidence to grant a 2-foot wide easement.

It has been said that “a prescriptive easement is essentially an equitable remedy. Accordingly, the trial court must be afforded broad discretion in fashioning its remedy. Where one or more ways are available, the trial court is entitled to use its discretion and select the most reasonable route under all the circumstances.”

The mere choice of the trial court’s words “No testimony was given as to the physical nature of the easement” does not necessarily mean the absence of some testimony as to the width being no greater than nine feet in width... and some testimony as to installation of stones...

No survey of the lane with a specific legal description was provided.

However, the trial court’s language: “that said easement should be wide enough to permit traffic to pass to and from the defendant’s property” may be interpreted to increase the easement to a double width when the only testimony as to the width was not in excess of nine feet.

We therefore sustain the third Assignment of Error but only to the extent of such width interpretation and remand this cause for clarification of the easement width to conform to the evidence presented as the lane has existed for ingress and egress but affirm the trial court’s decision relative to the existence of the lane by prescriptive right.

two tracts of land fronting on Bannack Street in Dillon; that upon these adjoining tracts of land a two–story brick building was constructed in 1889 by the owners of the respective tracts, ...

...and that upon the property line dividing the same there was erected a party–wall by which the buildings are separated, and that the plaintiffs and defendant and their successors in interest have at all times since the construction thereof owned the party–wall.

"That at the time said wall was constructed the then owners inserted therein a door at the second story of the building by which free passage ...

...was intended to be and was afforded to the respective owners, their tenants and all persons having occasion to pass from one of the buildings to the other,...

...and also afforded a convenient passage from the second story of plaintiffs’ said premises to Bannack street by means of the stairway hereinafter mentioned.
Montana: Long continuous use (3)
Groshean v. Dillmont: 92 Mont. 227; 12 P.2d 273; 1932

- It is then alleged that in the month of August, 1929, the defendant, without the assent of plaintiffs, closed and locked the only door by which the use of the stairway by the plaintiffs could be enjoyed, ...
- ...and likewise closed up the door in the party-wall leading from the upper story of plaintiffs' premises to the stairway, and all of the obstructions are still maintained by the defendant.
- counsel for defendant challenged the sufficiency of the complaint upon the assumption that ...the use of the doorway and stairway by Stringham was, in its inception, permissive—in effect a revocable license.

Montana: Permission not presumed (4)
Groshean v. Dillmont: 92 Mont. 227; 12 P.2d 273; 1932

- We do not see our way clear to take that view. There is no evidence to sustain it. We are unable to draw an inference to that effect.
- ...it is more reasonable to infer that Stringham, as a consideration for constructing the party-wall, was to receive as of right free passage from his building by way of the stairway to Bannack Street.
- Otherwise, why should he have erected the party-wall, of which Gardner was to have an equal share, on the dividing line, and why should Gardner have built a stairway alongside the party-wall within his own premises terminating on the second floor at a doorway which the two cut through the wall?

Montana: Initial Use was Adverse (5)
Groshean v. Dillmont: 92 Mont. 227; 12 P.2d 273; 1932

- In our view the logical inference is that Stringham began his use under a claim of right.
- In the absence of any evidence on the subject, the presumption under the circumstances shown here would be that Stringham held under a claim of right and not by license of Gardner, and the same is true as to the successors in interest of each.
- In order to overcome that presumption, thereby saving its title from the encumbrance of an easement, the burden is on the defendant to show that the use was permissive.

Montana: Code confers new title (6)
Groshean v. Dillmont: 92 Mont. 227; 12 P.2d 273; 1932

- "Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all" (sec. 6818, Rev. Codes 1921; Rude v. Marshall, 54 Mont. 27, 166 P. 298; Hays v. De Atley, 65 Mont. 558, 212 P. 296, 298).
- and the title to an easement acquired by prescription is as effective as though evidenced by a deed

Montana: Title was perfected (7)
Groshean v. Dillmont: 92 Mont. 227; 12 P.2d 273; 1932

- No matter how the easement was acquired, mere nonuser for a less time than that required by the statute of limitations for the perfection of the easement raises no presumption of abandonment.
- After the right to use the doorway and the stairway, including as an incident the right to pass through the door at the street, became an appurtenance to plaintiffs' premises, the right of plaintiffs or their predecessors in interest thereto could only be divested by deed, prescription or by abandonment, and there is no proof of either.

Tacking and Prescriptive Easements
In order to tack adverse uses, it must be established that:
(a) the party and her predecessor are in privity,
(b) the property was sequentially and continuously used,
(c) the property was used in the same or similar manner, and
(d) that the use was open, notorious, and adverse to the title holder’s interest.

To do so, plaintiff must establish that:
(a) persons in privity,
(b) sequentially and continuously used the disputed property,
(c) in the same or similar manner,
(d) openly,
(e) notoriously,
(f) adversely to the title holder’s interests, and
(g) for at least twenty-one years.

One cannot use property adversely to one’s own interests.

In order to establish an easement by prescription, the party claiming it must prove that the use was adverse, exclusive, and uninterrupted for a period of twenty years...

...an exception to the presumption exists when property in controversy consists of unenclosed and unimproved wild lands or woodlands.

Thus, when unenclosed and unimproved wildlands or woodlands are involved, the presumption is that the use was permissive, and the burden of proving that the use was adverse or under a claim of right is upon the one asserting these rights.

"It may be presumed that use of the land is permissive, because it is the custom of neighboring owners to travel over such land for pleasure or convenience, and the owners usually make no objection to their doing so."

We note that Wilson and Leekley both recognized that, in determining whether a prescriptive easement exists, permission will be presumed in the case of wooded, unenclosed land.

It is nonetheless clear to us that the woodlands exception is the law in Maryland.

The Court then suggested that the woodlands exception be applied only to “unimproved property.”

The court explained the rationale behind the presumption, stating:

[In the case of unenclosed woodlands, permission is presumed because, otherwise, an owner could not allow his neighbor to pass and repass over a trail, upon his open, unenclosed land without danger of having an adverse title successfully set against him.

Moreover, a landowner who quietly acquiesces in the use of a path, or road, across his uncultivated land, resulting in no injury to him, but in great convenience to his neighbor, ought not to have thereby lost his rights.
State as a Party to Prescriptive Easement Claim

State as a Party to Prescriptive Easement Claim

It is well-settled that a municipal corporation holds only a determinable fee for land used as streets or alleys. State ex rel. Bedard v. Lockbourne (1990), 69 Ohio App.3d 452.

The adjacent landowners retain the reversionary interest in the land when the city abandons its use. Id.

2305.05 Real estate dedicated to public uses.

If a street or alley, or any part thereof, laid out and shown on the recorded plat of a municipal corporation, has not been opened to the public use and occupancy of the citizens thereof, or other persons, and has been enclosed with a fence by the owners of the inlots, lots, or outlots lying on, adjacent to, or along such street or alley, or part thereof, and has remained in the open, uninterrupted use, adverse possession, and occupancy of such owners for the period of twenty-one years, and if such street, alley, inlot, or outlot is a part of the tract of land so laid out by the original proprietors, ...

...the public easement therein shall be extinguished and the right of such municipal corporation, the citizens thereof, or other persons, and the legislative authority of such municipal corporation and the legal authorities thereof, to use, control, or occupy so much of such street or alley as has been fenced, used, possessed, and occupied, shall be barred, except to the owners of such inlots or outlots lying on, adjacent to, or along such streets or alleys who have occupied them in the manner mentioned in this section.

Effective Date: 10-01-1953.

2305.05 provides an exception to a municipality's immunity from adverse possession of its streets and highways where a street or highway has not been open for public use.

We also have found two Ohio cases, both from Cuyahoga County, that state that municipal corporations are not subject to property loss by adverse possession or prescription, but both cases turn on adverse possession.

In Brown, the Ohio Supreme Court applied adverse possession against property held in trust by a local board of education.

In Cincinnati v. First Presbyterian Church and Cincinnati v. Evans, adverse possession was granted against a municipality because large and valuable structures were built on the city's property, ruling out any possibility that the municipality permitted the encroachment.
The modern trend in Ohio has been to shield municipalities from adverse possession and, we believe by analogy, from prescription. We hold that the property of a municipality is not subject to prescription or adverse possession, except as specifically provided by R.C. 2305.05. We also do not believe that a distinction based on whether a municipality uses the property for a proprietary or a governmental function is warranted in modern times.

The disputed land is presently located under a 500 foot stretch of Pioneer Trail Road, a small thoroughfare which runs east-to-west through the City of Aurora and connects two major highways. The disputed span of roadway has existed in some form since prior to 1927, and has been used by the public throughout its existence. The road was initially paved at some point in the 1960's, and has remained in that state to the present.

In 1927, in attempting to develop the entire tract, the land company submitted a subdivision plat to the Portage County Board of Commissioners. The subdivision plan divided the "Blauch" tract into various sublots, and also provided for creation of a new eighty-foot-wide right-of-way which would bisect the development. This planned right-of-way was designated on the plan as "Pioneer Trail" road. However, it was not situated on the subdivision map in the same location as the actual roadway already in use. Instead, the planned right-of-way was located south of the existing road.

The Beljons were also aware that the pre-existing Pioneer Trail Road was not on the same area of land which had been designated for the planned right-of-way. As a result, the Beljons told their children that the public's use of the existing road was by the family's permission, and that they had the ability to revoke the use at any time. Furthermore, at some point in the 1960's, Jon placed signs near the road indicating that the existing pavement was a private driveway.

Through the years, certain problems developed as a result of the public's continuing use of the paved roadway. Whenever discussions were had as to the problems with the paved road, some city officials would make statements supporting the Beljons' position that the land under the disputed roadway did not belong to the city. In 1993, for example, the city law director stated in a written memorandum that if the city wanted to improve the existing road, it would be necessary to appropriate the underlying property.

Under Ohio law, prescriptive easements are not generally favored because it has the effect of depriving the property owner of his rights in the land without any compensation. Nevertheless, our state has traditionally recognized that the public can acquire an easement by prescription even when there is no official acceptance or private dedication. It is equally well-settled that public roads and streets can be established by the "prescription" method.
The maker of the affidavit was Christopher Courtney, a professional engineer and surveyor.

...personally conducted an extensive review of the history of the disputed road,

"As a result of the aforementioned review and field work it is my opinion that Pioneer Trail Road has remained in the same location since at least 1900."

"As a result of the aforementioned review and field work it is my opinion that Pioneer Trail Road has remained open for public travel since at least 1900."

Taken as a whole, Courtney's averments constituted some evidence pertaining to each of the five elements for a prescriptive easement.

Despite the fact that the nature of "public travel" in 1900 was significantly different than the modern "automobile" era, the key point is that the disputed roadway was being used on a regular basis by individuals other than the current property owner in a mode consistent with traveling in that era.

Thus, since the roadway was subject to "public" use, that use was clearly open and notorious.

During the entire summary judgment proceeding at the trial level, the Beljon defendants never presented a countering affidavit of a different surveyor who reached a conflicting conclusion as to when the disputed roadway was first used by the public.

Therefore, since the Courtney affidavit had some probative value on the elements for a prescriptive easement, the magistrate and trial court correctly relied upon the affidavit in deciding whether to grant summary judgment.

Under Ohio law, a prescriptive easement cannot be extinguished by subsequent inconsistent acts of the user.

"After the prescriptive easement results from adverse use, the user does not forfeit the established easement by acting as if it did not exist."

Pursuant to the uncontested averments in Courtney's affidavit, the city's prescriptive easement was fully established by 1921.

As a result, the Beljon defendants' evidentiary items as to the inconsistent statements of city officials 60 or 70 years later were rendered irrelevant.

The same is also true of their evidence concerning their parents' belief that they held paramount title to the underlying land and the city's use was based solely upon their permission.

Expanding a Private Easement By Prescription
OHIO: Statute of Frauds & Prescription (1)

- Revised Code Section 1335.04, the Statute of Frauds, states that no interest in land shall be granted except by a writing, "or by act and operation of law."
- It is clear, from a simple reading of the statute, that a prescriptive easement, being an interest in land created "by act and operation of law," rather than by formal conveyance, does not require a writing.

OHIO: Expanding Easement by Prescription (2)

- Appellants claim, nevertheless, that the effect of the parties’ actions, and the trial court’s determination regarding the same, was to expand the easement of record into a much larger easement by prescription without benefit of a writing and in violation of the statute...
- We find such arguments to be imaginative but completely devoid of legal merit.

Prescriptive Easements
For Trails

Public Prescriptive Easement: Colorado (1)
Gold Hill v. TSG Ski: 2015 COA 177

- Section 43–2–201(1)(c) provides that "[a]ll roads over private lands that have been used adversely without interruption or objection on the part of the owners of such lands for twenty consecutive years" are declared to be public highways.
- To establish a public prescriptive easement under the section, a party must show: (1) a “claim of right”; (2) public use adverse to the landowner’s interest; (3) such use continued for the requisite twenty-year period; and (4) actual or implied knowledge of the public use by the landowner and no objection to such use.

Evidence of Prescription: Colorado (2)
Gold Hill v. TSG Ski: 2015 COA 177

- The trial court found that the twenty-year prescriptive period began in 1927 with the identification of the "entire Wasatch trail... including the portion across the Modena... [and the] portion [of the East Fork trail] in the general area of the Gertrude" ... 
- ...on a hand-drawn United States Forest Service (USFS) map. The court concluded that the map served both as evidence of established public use and of the overt act necessary for the "claim of right" requirement.
The court also noted several other acts by SMC and the USFS that, collectively, were sufficient to provide notice of the public claim of right, including: (1) Board of County Commissioners of Ouray County meeting minutes from 1879 declaring:

- a County trail from San Miguel Park up Bear Creek to a point about three miles from the mouth of said creek at which point the trail to fork, one in a S.E. direction to the summit of the range connecting with the Silverton trail, the other up the west fork about one mile to the summit of the range connecting with the Turkey Creek trail

We first address what constitutes a "road" for purposes of public prescription under section 43-2-201(1)(c). In Simon v. Pettit, 687 P.2d 1299 (Colo. 1984), the claimed public "roads" were two "narrow but well-defined footpaths" across private property that members of the public had used for recreational access for the twenty year statutory period.

Our previous decision in Hale v. Sullivan, 146 Colo. 512, 362 P.2d 402 (1961), provided for a broad definition of "road." In Simon we adopted a more restrictive definition.

We held that the legislature did not intend the synonymous terms "road" or "public highway" in section 43-2-201(1)(c) to include all footpaths in Colorado used adversely to the landowner by members of the public for twenty years or more. However, the legislature did intend that the courts consider the characteristics, conditions, and locations of the ways in applying the statute.

We concluded that the public entity responsible for maintaining public roads in the jurisdiction must take some action, formal or informal, indicating its intention to treat the right of way as a public road.

Following a nonjury trial, Supreme Court rendered a written decision finding that plaintiffs had established a prescriptive easement in a walkway from the front of their house to the driveway, a prescriptive easement to access the driveway over two walkways in the back of the house, but had failed to prove a prescriptive easement to park on the driveway or in a rear parking area on defendants' property.

The findings of prescriptive easements must be reversed.

As for the access to the driveway from the front walkway, both parties acknowledge that there is no prescriptive easement since the front walkway and the area of the driveway accessed thereby are entirely in areas already owned by plaintiffs.

A person cannot have an easement in his or her own land.

With regard to the alleged prescriptive easements in the rear walkways, one of the elements of a prescriptive easement is hostile use, which does not arise when the use is permissive, and "permission can be inferred where . . . the relationship between the parties is one of neighborly cooperation and accommodation"

see Estate of Becker v Murtagh,
Drainage & Prescription

Ohio: Prescriptive Right for Drainage (1)
Simmons v. Trumbull Co. Engineer:
No. 2007–T–0049; Ohio App. 2007

- On or about February 16, 2004, appellant Trumbull County Engineer entered the lands of the appellee property owners with a private contractor and excavated, with a backhoe and Bobcat bulldozer, a ditch from Hallock–Young Road through the appellees’ properties.

- The ditch’s purpose was to channel excess water away from Hallock–Young Road, which had recently flooded,

- …prior to the excavation of the ditch, the properties possessed no preexisting trench or channel which served to carry water over appellees’ respective properties.

Ohio: Prescriptive Right for Drainage (2)
Simmons v. Trumbull Co. Engineer:
No. 2007–T–0049; Ohio App. 2007

- “[t]here was insufficient, if any, evidence that the pre-existing swale performed the function of carrying excess water into the drain remotely let alone continuously when there was heavy rain.”

Ohio: Prescriptive Right for Drainage (3)
Simmons v. Trumbull Co. Engineer:
No. 2007–T–0049; Ohio App. 2007

- “The Court does find that there was uncontradicted testimony by Defendants and on their behalf that the swale was present on or about the subject properties for a period considerably more than twenty one (21) years.

- Furthermore, there was also competent and credible testimony by Defendants’ witnesses that this swale would serve the function of carrying excess water into the drain.

Ohio: Prescriptive Right for Drainage (4)
Simmons v. Trumbull Co. Engineer:
No. 2007–T–0049; Ohio App. 2007

- However, there was insufficient, if any, evidence that the pre-existing swale performed that function even on remote occasions, let alone continuously when there was heavy rain.

- The Court finds from the evidence *** that Defendants have failed to establish the elements of a claim for prescriptive easement in this case.”

Ohio: Surface Flow Adverse?? (5)
Simmons v. Trumbull Co. Engineer:
No. 2007–T–0049; Ohio App. 2007

- Specifically, appellants contend topographical maps demonstrate land contours which would permit water flow from the south to the northwest, the specific direction the trench was dug.

- Appellants assert the 15 inch pipe pushed water onto appellees’ respective properties from the time of its installation, some time subsequent to 1936, thereby providing clear and convincing evidence of the continuous nature of the County’s use.
Appellants’ argument, although establishing that the County directed water from the south side of Hallock-Yongh Road to the north, fails to show that this water followed a specific, regular, and/or continuous path to the area in which the drain was installed. Appellants’ only evidence of such a path was premised upon abstracted inferences relating to the topography of the subject properties.

However, the topographical analysis merely proves that the contours in the ground would permit water to flow in this direction; it does not demonstrate that water actually and continuously flowed in this direction. In fact, witness testimony suggested quite a different conclusion.

It is fundamental to an easement by prescription that the use to which the servient estate is put be substantially the same for the entire prescriptive period.

Once an easement has been finally established it can only be altered by mutual agreement, injury to the servient tenement, or the changed needs of the dominant tenement, or owner of the easement. To do otherwise would affect the value of and prevent the improvement of the servient tenement and encourage litigation, and would amount to the taking of private property of one person by another. Under the civil law, however, the servient owner may alter the servitude if the same convenience is afforded the dominant owner under similar conditions, and a few common law cases are similar.
...he is only one landowner, and the elimination of his view is only one factor to be considered.

No prescriptive right to the use of light and air over the property of an adjoining landowner can be acquired.

State ex rel. Schiederer v. Preston (1960), 170 Ohio St. 542, 546, 11 O.O.2d 369, 371, 166 N.E.2d 748, 751;

Letts v. Kessler (1896), 54 Ohio St. 73, 82, 42 N.E. 765, 766–767.

There is no private right to a view without an express easement, and the Cincinnati Zoning Code does not confer one.

Thus, although this court has often recognized that there may be an implied grant of an easement of access to property...

...it has held "that the law of implied grants * * * should not be applied to easements for light and air over the premises of another in any case."

Furthermore, "the concept of adverse use includes ... the ingredient that the conduct is either inherently wrongful or wrongful at the election of such potential servient owner"—in this case, Stiglitz.

... As such, "American courts have refused to allow the acquisition by prescription of easements of light and air."

This rule flows from the basic principle that the "actual enjoyment of the air and light by the owner of the house is upon his own land only," and that "the owner of the adjoining lands has submitted to nothing which actually encroached upon his rights.

As a general principle, a property owner cannot hold an adverse interest against him or herself.

... ("No easement by prescription can commence or exist while the dominant and servient estates are held by one and the same person.");

However, a use cannot be adverse where the user has full legal title to the underlying property, and consequently, the ability to use the land in whatever legal fashion he or she sees fit.

To fall within the province of prescriptive easement law, the "dominant and servient tenements must, therefore, belong to different persons."

...a negative easement cannot be created by prescription.

...("An easement in the unobstructed passage of light and air cannot be acquired by prescription."). ...("American courts have wisely refused to allow the acquisition by prescription of easements of light and air ..."). In fact, this "is the rule now established in all the American States, with a single exception, [Delaware]"...[KK-????]

This rule flows from the basic principle that the "actual enjoyment of the air and light by the owner of the house is upon his own land only," and that "the owner of the adjoining lands has submitted to nothing which actually encroached upon his rights.

Statutes of Limitations & Subterranean pipes
Underground Trespass: Penn: (4)
Lewy v. Fricke: 166 Pa. 536; 31 A. 261; 1895

» The surface is visible and accessible. The owner may know of its condition without trespassing on others and for that reason he is bound to know.
» The interior of the earth is invisible and inaccessible to the owner of the surface unless he is engaged in mining operations upon his own land; and then he can reach no part of his own coal stratum except that which he is actually removing.

Underground Trespass: Penn: (5)
Lewy v. Fricke: 166 Pa. 536; 31 A. 261; 1895

» If an adjoining landowner reaches the plaintiff’s coal through subterranean ways that reach the surface on his own land and are under his actual control, ...the vigilance the law requires of the plaintiff upon the surface is powerless to detect the invasion by his neighbor of the coal one hundred feet under the surface.

NJ – Subterranean Trespass (1)
Diamond v. NJ Bell Telephone Co.: 51 N.J. 594; 242 A.2d 622; 1968

» In 1957, defendant Bell Telephone Company installed an underground conduit on plaintiffs’ property in Morristown.
» The conduit was installed over plaintiffs’ sewer line and, allegedly, the work was performed in such a negligent manner as to break the “clean-outs” on the sewer line.
» As a result, sediment gradually accumulated in the line until, on February 1, 1966, a back-up occurred and plaintiffs’ property was flooded. Until that moment, plaintiffs had been unaware of any damage or malfunction in the sewer line.

NJ – Subterranean Trespass (2)
Diamond v. NJ Bell Telephone Co.: 51 N.J. 594; 242 A.2d 622; 1968

» In July 1966, approximately five months after the sewer line became clogged, plaintiffs instituted a negligence action against the two defendants. Defendants moved for judgment on the pleadings on the basis that the action was barred by the statute of limitations. The trial court denied the motion.

NJ – Subterranean Trespass (3)
Diamond v. NJ Bell Telephone Co.: 51 N.J. 594; 242 A.2d 622; 1968

» Traditionally, “a plaintiff’s cause of action accrues for limitation purposes when he suffers actual consequential damage or loss from the defendant’s negligence.”
» ...The back-up did not occur until 1966 and the negligence suit was filed in that same year. At oral argument, however, it became evident that plaintiffs’ damages consist primarily of the costs of repairing the broken sewer “clean-outs” -- harm sustained upon the installation of the underground conduit in 1957. Under the customary rule that ignorance of a claim does not toll the running of the limitations period ...this suit would have been barred after 1963.

NJ – Subterranean Trespass (4)
Diamond v. NJ Bell Telephone Co.: 51 N.J. 594; 242 A.2d 622; 1968

» We must, therefore, consider the applicability of the recently evolved discovery rule. Under that doctrine, a cause of action accrues only when the plaintiff knows or should reasonably know of his injury. In that manner he is relieved of the impossible task of asserting a claim before its existence may reasonably be known to him.
» In New Jersey, the discovery rule has, to date, been applied only in certain limited circumstances -- ...and in the case of a negligent land survey (New Market Poultry Farms, Inc. v. Fellows, supra).
» We have recognized, however, that other situations may well be appropriate for extension of the same salutary rule.
Many courts have recognized the obvious inequity of allowing a limitations period to expire while actionable harm is hidden beneath the surface of the earth, unascertainable either by ordinary observation or by special alertness on the part of a landowner. In the early case of *Lewey v. H.C. Frick Coke Co.*, 166 Pa. 536, 31 A. 261 (1895), defendants had tunneled deep under the plaintiff's adjacent property and removed 4,000 bushels of coal. Eleven years later plaintiff first became aware of the trespass and sued for damages. Defendants raised in opposition the statute of limitations normally applicable to trespass actions.

In rejecting that defense, the Pennsylvania Supreme Court held that the statute of limitations did not commence against an underground trespass until the time of actual discovery of the trespass, or until the moment when discovery reasonably became possible. The court commented:

"To require an owner, under such circumstances, to take notice of a trespass upon his underlying coal at the time it takes place, is to require an impossibility; and to hold that the statute begins to run at the date of the trespass is in most cases to take away the remedy of the injured party before he can know that an injury has been done him. A result so absurd and so unjust ought not to be possible."

The underlying principle, that a cause of action for underground harm not susceptible to observation does not accrue until the harm can reasonably be ascertained, is equally valid in this jurisdiction. That this is not a mining area only ensures that this factual complex requiring application of the discovery rule is likely to recur infrequently. Moreover, we reject any theoretical distinctions based on totally secretive operations or active concealment by defendants in the mining cases. As the *Lewey* decision illustrates, it is not these considerations, but rather the helpless position of plaintiffs, which dictate application of a discovery rule...

Located in the pit was a headgate nozzle attached to a four inch underground water pipe. This water line traversed defendants' land for a distance of about 800 feet and eventually emerged on plaintiffs' land. When the plaintiff and his parents moved on their land in 1908, the water was carried in an open ditch known as the Loveland ditch. About 1912 the ditch was replaced with cedar pipe laid under the ditch route. In 1953, the cedar pipe was replaced with galvanized iron pipe.

In front of the pit and in the ditch were four screens for the purpose of collecting debris. This intake area was enclosed by a wooden fence about five feet high and twenty-five feet in diameter for the purpose of protecting the water source from destruction and pollution by livestock.

"To establish the existence of an easement by prescription, the party so claiming must show open, notorious, exclusive, adverse, continuous and uninterrupted use of the easement claimed for the full, statutory period."

With reference to the first contention, defendants argue an underground water line does not have the element of open and visible use; that being underground, there is no interference or conflict in use of the surface land.
Montana: “Prudent Man Test” (4)
O’Connor v. Brodie: 153 Mont. 129; 454 P.2d 920; 1969

- Were the circumstances of the adverse possession sufficient to put a prudent man upon inquiry?
- Defendants argue that they had neither actual nor constructive notice of the water line at the time they acquired the property.
- It is difficult to believe that the defendants, engaged in the business of housing development, would not have inspected the property they were acquiring.
- A casual inspection would have disclosed the fenced enclosure with its intake system and attached underground water line. *A prudent man would have inquired.*

Neighboringly Accommodation Gates and Joint Driveways

OHIO: Neighborly Accommodation (2)
Gulas v. Tirone: 184 Ohio App. 3d 143; 2009

- Prescriptive easements are not favored in law because they deprive the legal property owner of rights without compensation.

OHIO: Neighborly Accommodation (3)
Gulas v. Tirone: 184 Ohio App. 3d 143; 2009

- Tirone’s second argument is that he allowed Gulas to use the property out of neighborly accommodation, and that this permission negates the element of adversity and defeats a claim for a prescriptive easement. Tirone is correct that a use is not adverse if the landowner gave permission as a neighborly accommodation.
- On the other hand, “a use does not necessarily become permissive simply because the property owner does nothing to prevent it out of indifference, laziness, acquiescence, or ‘neighborly accommodation.’”

- It is proof that actual permission was granted that is determinative, and not the descriptive label of “neighborly accommodation”.
- We have held: “‘acquiescence by the property owner with knowledge of the use does not negate a claim for prescriptive easement.’

Colorado: Gates and Prescription (1)
Maralex v. Chamberlain: 320 P.3d 399; 2014

- The use of a roadway for the statutory period, if unexplained, is presumed to be under a claim or assertion of right, and therefore adverse.”
- However, use is not adverse if a landowner permits the use.
- Where a gate is erected across a private road, any use of the road is presumed to be permissive.
- By constructing a gate across a road, a landowner conveys the clear message that any public use of that road is with the landowner’s permission only; and the public’s use is not adverse.
- This is true even if the gate is unlocked.
Colorado: Gates and Prescription (2)
Maralex v. Chamberlain: 320 P.3d 399; 2014

- Existence of a gate, however, is not irrefutable evidence that use is permissive because a gate "may be erected for purposes other than obstruction of public travel."
- Nor is the fact that keys are provided to users of a gated road conclusive evidence of permissive use. Giving someone a key to a locked gate may indicate that the landowner permits the user to access the road or it may indicate the landowner recognizes a user's right to use the road.
- That is, depending upon the circumstances, evidence that a person has a key to a locked gate may be inconclusive as to whether the use is permissive.

Ohio: Gates and Prescriptive Claims (1)
Merry v. Clark: No. CT2002–0004; Ohio App. 2002

- The evidence indicates that a lane existed at least from the 1920's leading from East Wheeling Road across the Clark farm to the Moore farm.
- At times a cable was stretched across the lane.
- Also, due to thefts occurring, two locked gates were installed at some time, one near the East Wheeling Road and one at the Moore farm.
- Marion Moore and the former owner of the Clark farm, Mr. Taylor had keys to the gates.
- The gates were installed by verbal agreement between the then owners.

Ohio: Gates and Prescriptive Claims (2)
Merry v. Clark: No. CT2002–0004; Ohio App. 2002

- Evidence was produced that, as a Bank lending requirement, a license agreement (defendant's Exhibit E), relative to use and maintenance of the lane was executed between appellants and Phillip A. Nelson and Judith E. Nelson on February 12, 1993 and recorded in Vol. 1075 p. 127.

Ohio: Exclusive Use?? (4)
Merry v. Clark: No. CT2002–0004; Ohio App. 2002

- While there is some doubt that all of such elements are required, in Ohio to establish a prescriptive easement, …at least the non-permissive use must be open, continuous and adverse for a period exceeding 21 years.
Where one . . . has used a right of way for twenty years unexplained, it is but fair to presume the user is under a claim of right, unless it appears to have been by permission. In other words, the use of a way over the lands of another whenever one sees fit, and without asking leave, is an adverse use, and the burden is upon the owner of the land, to show that the use of the way was by license or contract inconsistent with a claim of right.

The presumption applies in Maryland only when the use over the twenty-year period is "unexplained" -- that is, when the claimant of the easement has used the property as he or she sees fit, without asking for or receiving permission to do so.

The requirement that the use be exclusive simply means that the claim of user must not depend on the claim of someone else.

Once the presumption of adverse use is applied, a servient owner may rebut it.

Mavromoustakos would have us adopt the reasoning of Chaconas v. Meyers, 465 A.2d 379 (D.C. 1983), decided by the District of Columbia Court of Appeals. In that case, the servient landowner had not objected to the user of a part of his yard to access another piece of property. In fact, the servient owner had maintained constant friendly contact with the user and, on several occasions, had restrained his dog so that the dominant user could pass over his property unimpeded.

The Court of Appeals, placing great weight on the actions taken by the servient owner, held that such evidence of "neighborly accommodation" was sufficient to rebut the presumption of adverse use.

We decline to adopt this approach for the simple reason that the District of Columbia shifts the burden of persuasion in these cases differently than Maryland. In the District, in order to rebut the presumption of adverse use, the servient owner need only present contrary evidence of permissive use, either express or implied.

In Maryland, by contrast, in order to rebut the presumption of adverse use, the servient owner must do more than merely present evidence of permission -- he or she must prove its existence by affirmative evidence.

As in most civil actions, the claimant satisfies this requirement upon a showing that it is more likely than not that the land was used with permission or license.
Permission v. Acquiescence: NJ (4)
Kruvant v. 12-22 Woodland Avenue
138 N.J. Super. 1; 350 A.2d 102; 1975

- user by plaintiffs and their predecessors in interest of this driveway was adverse and under a claim of right. There is no evidence in the record to rebut that presumption.
- The burden of proof was upon defendants to rebut the same if, in fact, it could be rebutted. Evidence of mere acquiescence in, as distinguished from permission for, such use on the part of the owners of the servient estate is insufficient for the purpose.

Acquiescence vs. Permission: Maryland: (3)

- When a person has used a right of way openly, continuously, and without explanation for twenty years, it is presumed that the use has been adverse under a claim of right.
- The burden then shifts to the landowner to show that the use was [not adverse, but rather] permissive.
- In a situation where "use begins adversely," the servient owner's "[m]ere failure to protest is not permission but acquiescence."

Prescription: Permissive Use: Maryland: (4)

- To establish permission, failure to protest must be combined "with other indications of permission." But a presumption of adversity "will not arise if the use . . . appears to have been by permission."
- i.e., where any "appearance of permission permeates the record."

Montana: Acquiescence vs. Neighborly Use: (1)
Lyndes v. Green: 374 Mont. 510; 325 P.3d 1225; 2014

- Montana law recognizes that land use based upon "mere neighborly accommodation" is not adverse use and cannot ripen into a claim for a prescriptive easement.
- However, it is well established that a landowner's passive acquiescence to another's use of his land is not evidence of permissive use.
- Implied acquiescence is not the same as permission. On the contrary, possession has been held to be adverse where possession was with forbearance of the title holder who was aware of another's possession and failed to prohibit it.

Montana: Acquiescence vs. Permission: (2)
Lyndes v. Green: 374 Mont. 510; 325 P.3d 1225; 2014

- "It must be apparent, therefore, that 'acquiescence' and 'permission' as used in the connection are not synonymous. 'Acquiescence' regardless of what it might mean otherwise, means, when used in this connection, passive conduct on the part of the owner of the servient estate consisting of failure on his part to assert his paramount rights against the invasion thereof by the adverse user. 'Permission' means more than mere acquiescence; it denotes the grant of a permission in fact or a license."
Montana: Acquiescence vs. Permission (4)
Lyndes v. Green: 374 Mont. 510; 325 P.3d 1225; 2014

- The fact that these landowners did not fight Hertzlers over the use of the road because they wanted to get along and be good neighbors does not transform Hertzlers’ claim into one based upon mere neighborly accommodation.
- It is established that the proponent of a prescriptive easement and the owner of the servient tenement can cooperate and avoid conflict without defeating the claim of prescriptive right.

Prescriptive Easements
For Trees and Shrubbery

Trees, Trespass, and Humor: Penn: (1)
Jones v. Wagner: 624 A.2d 166 (1993) (Pa)

- As we have noted, a trespass occurs by a mere overhang.
- Furthermore, given the rather unremarkable observation that trees will tend to grow, the trespass, even if remedied once, is bound to recur just as soon as the trees or shrubbery regenerate.

Prescriptive Easements & Trees: Penn: (1)
Koresko v. Farley: 844 A.2d 607; 2004

- Neighbors assign as error the failure to recognize a prescriptive easement for encroaching tree roots and overhanging branches.
- A prescriptive easement is a right to use another’s property which is not inconsistent with the owner’s rights and which is acquired by a use that is open, notorious, and uninterrupted for a period of twenty-one (21) years.
- A prescriptive easement, once acquired, may not be restricted unreasonably by the possessor of the land subject to the easement.

Prescriptive Easements & Trees: Penn: (2)
Koresko v. Farley: 844 A.2d 607; 2004

- In Jones v. Wagner, … the Superior Court held that overhanging tree branches are a trespass.
- However, in discussing the appropriateness of self-help, the Superior Court mused in a note:
- …a continuing trespass is not a trespass at all if the actor causing the trespass has obtained an easement by adverse possession.
- We cannot help but wonder whether the continued presence of encroaching tree branches, held openly, notoriously, hostilely, and continually for 21 years would create a prescriptive easement in the airspace which they hang.

Prescriptive Easements & Trees: Penn: (3)
Koresko v. Farley: 844 A.2d 607; 2004

- We conclude Neighbors fail to state a claim for prescriptive easement as a matter of law, for several reasons.
- First, encroaching tree roots and limbs by themselves cannot notify a landowner of a claim to use the ground.
- Second, no Pennsylvania case recognizes such easements.
- Third, well-reasoned authority from another jurisdiction persuades us that such easements should not be recognized.
- Finally, the potential of widespread uncertainty occasioned by such easements convinces us that they should not be recognized as a matter of public policy.
Prescriptive Easements & Trees: Penn: (4)
Koresko v. Farley: 844 A.2d 607; 2004

- Encroaching tree parts, by themselves, do not establish "open and notorious" use of the land.
- Neither roots below ground nor branches above ground fairly notify an owner of a claim for use at the surface.
- In the absence of additional circumstances, such as use of the ground for maintenance or collection of leaves or fruit, roots and branches alone do not alert an owner that his exclusive dominion of the ground is challenged.

...analogous to our Supreme Court's decision that the known presence of windows near a lot line does not create a prescriptive easement for light and air.

Prescriptive Easements & Trees: Penn: (5)
Koresko v. Farley: 844 A.2d 607; 2004

- The result reached here will be distasteful to all who treasure trees.
- Judicial notice can be taken that trees growing over property boundaries and streets, around utility lines, and under sidewalks are common in Pennsylvania.

Amusing Prescriptive Claims

Ohio: Easement vs. Fee Claims (2)
Harris v. Dayton Power & Light: 56 N.E.3d 399; 2016

- The elements necessary to prove a quiet title action seeking fee simple title to real property are different than the elements necessary to prove a prescriptive easement. To acquire fee simple title to real property by adverse possession, a party must establish, by clear and convincing evidence, that the claimant has possessed the land in an open, notorious, exclusive, adverse, and continuous manner for at least 21 years.

Ohio: Easement vs. Fee Claims (3)
Harris v. Dayton Power & Light: 56 N.E.3d 399; 2016

- "The distinction between the elements required to acquire a prescriptive easement and those required to acquire title by adverse possession is limited to the land's exclusive use.
- Acquiring an easement by prescription differs from acquiring title by adverse possession, in that exclusivity is not an element required to establish an easement by prescription."
OHIO: Open & Notorious (4)
Harris v. Dayton Power & Light: 56 N.E.3d 399; 2016

→ Property is used “openly” when it is used “without attempted concealment.” …
→ …and it is used “notoriously” when its use is “known to some who might reasonably be expected to communicate their knowledge to the owner if he maintained a reasonable degree of supervision over his premises.” …
→ …the Harrises and their predecessors openly and notoriously used the railroad right-of-way to access their two parcels of property, without concealment, and in a manner of which the owner should, in the exercise of reasonable diligence, have had knowledge.

OHIO: Tackling & Continuity (6)
Harris v. Dayton Power & Light: 56 N.E.3d 399; 2016

→ When calculating the years of continuous adverse use, it has been held that the continuity is not broken by a change of ownership between family members.
→ “[In order to show that the adversity element existed for twenty-one years, the occupier may ‘tack’ his adverse use with the adverse use of his predecessors in privity.”

Prescriptive Easement by beavers:
Dawson v. Wade: 257 Ga. 552; 361 S.E.2d 181; 1987

→ We must disagree with the trial court concerning the status of the beaver dams in the applicable segment of Reedy Creek. The dams are not the handiwork of Wade, and he can enjoy no prescriptive right to their continued existence, O.C.G.A. § 44-5-161 and 175.
→ The case of Brown v. Tomlinson, 246 Ga. 513 (272 SE2d 258) (1980), is inapplicable to the circumstances of this case. There, the dam was erected through human agency and with common consent of riparian owners, including the complainant’s predecessor in title.

Prescriptive Easement by beavers:
Dawson v. Wade: 257 Ga. 552; 361 S.E.2d 181; 1987

→ Dissenting Opinion:
→ It is true the dam in Brown’s case was constructed by human effort but I do not believe that should alter the rights of the parties in this case. Here the dams were a natural occurrence allowed by the parties to continue for over 20 years. The beavers were the agency. I would analogize this to a mountain stream being dammed by a landslide to form a lake. I suggest after sufficient time passes the riparian owners have a right in the continuing existence of the lake sufficient to prevent anyone from destroying it by removing the dam.

OHIO: Rebuttable Presumption – Adverse (5)
Harris v. Dayton Power & Light: 56 N.E.3d 399; 2016

→ “Use of a claimed prescriptive easement is ‘adverse’ when it is without the permission of, or inconsistent with the rights of the true property owner.”
→ Pertinent to the case before us, it has been recognized that “[w]here one uses a way over the land of another without permission as a way incident to his own land, and continues to do so with the knowledge of the owner, such use is, of itself, adverse.”

OHIO: Mode of Use Changed?? (7)
Harris v. Dayton Power & Light: 56 N.E.3d 399; 2016

→ DP&L argues that the Harrises failed to establish that their use of the property was continuous for at least 21 years because their mode of use changed.
→ The Harrises and their predecessors did not use the railroad land for farming or for recreational activities — they used it for ingress and egress from one parcel to the other.
→ Whether the Harrises are crossing the line with cows, horses, pigs, or ATV’s is immaterial; the purpose for which the easement was used has consistently been for ingress and egress between the two parcels.