**Marquette Law Review**

Volume 34
Issue 1 *Summer 1950*

Article 10

# Easements - Prescription - Presumption of Adverseness

Paul F. Krumholz

Easements — Prescription — Presumption of Adverseness — In an action to quiet title to land the defendant counter-claimed alleging a prescriptive easement over part of the land owned by the plaintiff which the trial court found to have been used as a driveway by the defendants and their predecessors in title, continuously, openly and adversely for over thirty years. It was shown that both parties had used the driveway since 1916. There had been no controversy over the use of it by both, or objections by either against the other's use, nor had there been any specific claims asserted by defendants or their predecessors in title to a right to use the driveway. There was also no evidence of express permission to use having been given by the plaintiff, and the joint use of the driveway was peaceful except for one or two instances when guests at the defendant's house left their automobiles on the plaintiff's property and they were immediately removed when he protested. *Held:* when it is shown that there has been the use of an easement for twenty years unexplained it will be presumed to have been under a claim of right and adverse, and will be sufficient to establish a right by prescription and to authorize the presumption of a grant unless contradicted or explained. *Christenson v. Wikan, 254 Wis. 141, 35 N.W. (2d) 329 (1948).*

In general the elements necessary to establish a prescriptive right are the same as those necessary to establish adverse possession,[1] i.e. the claimant's use of the property must be adverse to the rights of the owner, under claim of right, exclusive, continuous, uninterrupted and with the knowledge and acquiescence of the owner;[2] however, where an easement by prescription is claimed in a driveway, the use need not be exclusive.[3] Where the owner gives permission to use, the use in accord with such permission for any period will not create a right by prescription,[4] even though such permission was merely verbal.[5]

The principal case follows the majority rule in this country and applies to cases where there is no proof of an adverse claim on the part of the claimant or of the giving of permission by the owner.[6] Such is often the case where the dispute concerns a driveway which has been mutually used by the claimant and owner for a long period of years with little or no controversey. Connecticut has not seen fit to follow the majority rule and apply the presumption of adverseness after proof

[1] Lindokken v. Paulson, 224 Wis. 470, 272 N.W. 453 (1937).
[2] Carmody v. Mulrooney, 87 Wis. 552, 58 N.W. 1109 (1894).
[3] St. Ceclia Society v. Universal Car & Service Co., 213 Mich. 569, 182 N.W. 161 (1921).
[4] Wiesner v. Jaeger, 175 Wis. 281, 184 N.W. 1038 (1921).
[5] Bontz v. Stear, 285 Ill. 599, 121 N.E. 176 (1918).
[6] Smith v. Pennington, 122 Ky. 355, 91 S.W. 730, 8 L.R.A.(NS)149 (1906).

of use for the statutory period. The court of that state in the *Bradley Fish Co.* case[7] states:

> "The circumstances of this class of cases are so varied and it is so important that every circumstance should be taken into consideration, that we doubt the propriety of laying down universal and absolute rules of law as to the effect in evidence of particular facts. . . . Whether long continued use of an easement is adverse or is in subordination to the title of the true owners is . . . a matter of fact to be decided like other facts upon evidence and upon the circumstances of each particular case."

Under such rule the claimant retains the customary burden[8] of proving the elements necessary to establish a prescriptive right.

Under the majority rule, followed in the principal case, the presumption places the burden on the owner to show or explain the use by proof of some license, indulgence or special contract giving permission to use, and therefore overcoming the presumption of adverseness.[9] The presumption has been held not to have been rebutted by proof only of friendship or close social relations of the parties,[10] nor where the parties were brothers and there was no evidence of conversation between them as to the character of the use.[11] In the *Carmody* case,[12] the claimant and the owners were brothers-in-law and both worked and repaired the way and nothing was ever said as to the right of the claimant to use the way. The court held that the presumption of adverse use properly applied to such case. It was held to apply also where there was no evidence whatever as to any arrangement between the parties;[13] and where there was evidence as to arrangements between the owner and a third person as to use of the way but not as between the owner and the claimant.[14] The rule also applies where the claimant had received permission to use the "east" way but had also, without permission, used the "west" way in which the easement was claimed.[15]

The owner in the principal case relied on *Martin v. Meyer*[16] as applying here. The court distinguished it from the principal case, as in that case the evidence while showing that both parties had worked the driveway and had no formal agreement as to its use, nevertheless did show that the owner's predecessor had refused the claimant's

---

[7] Bradley's Fish Co. v. Dudley, 37 Conn. 136 (1870), accord Jacobs v. Brewster 354 Mo. 723, 190 S.W. (2d) 894 (1945).
[8] Bontz v. Stear, supra note 5.
[9] Carmody v. Mulrooney, supra note 2.
[10] Sheppard v. Gilbert, 212 Wis. 1, 249 N.W. 54 (1933).
[11] Burnham v. Burnham, 103 Md. 409, 156 A. 823 (1931).
[12] Carmody v. Mulrooney, supra note 2.
[13] Wilkins v. Nicolai, 99 Wis. 178, 74 N.W. 103 (1898).
[14] Kieffer v. Fox, 193 Wis. 361, 214 N.W. 441 (1927).
[15] Schroeder v. Moeley, 182 Wis. 484, 196 N.W. 843, 170 A.L.R. 782 (1924).
[16] Martin v. Meyer, 241 Wis. 219, 5 N.W. (2d) 788 (1942).

offer to purchase and after a quarrel had told the claimant that he could use the driveway so long as he was a good neighbor. The court said that this showed permission and sufficiently explained the claimant's subsequent use and rebutted the presumption that such use was adverse.

The principal case shows that the Wisconsin Court will follow the majority rule and presume that use for the statutory period was adverse where there is proof only of verbal protests against the use on specific occasions but no evidence of the owner's having given any permission or indulgence to so use.

PAUL F. KRUMHOLZ

---

**Constitutional Law — Curfew Law Constitutional** — Calvin W. Goodwin and his wife, Sophia D. Goodwin were convicted in the municipal court of violating an ordinance of the City of Portland, making it unlawful for any person to roam or be upon any street between the hours of 1:00 and 5:00 o'clock A.M. without having and disclosing a lawful purpose. They appealed. The circuit court sustained their demurrers, which alleged that the complaint did not state a cause of action and that the ordinance violated the Fourteenth Amendment. The City appealed. *Held:* Reversed. The Supreme court stated: "the real question is whether an ordinance such as this bears a sufficiently close relation to the peace, safety and welfare of the public so far as to justify the inconvenience to which law abiding citizens may occasionally be submitted." The court found that the ordinance bears a reasonable relation to the evil at which it is directed. *City of Portland v. Goodwin, 210 Pac. (2d) 577 (Oregon 1949).*

Such ordinances come under the police power of the governing authority, for everything contrary to public policy or inimical to the public interest is the subject of the exercise of the state's police power.[1] This is true because the possession of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.[2] It is a general rule that in order for a police measure to be reasonable, the means adopted must be reasonably necessary and appropriate for the accomplishment of legitimate objects falling within the scope of the power.[3] It has also been held that a state in suppressing what it regards as a public evil may adopt any reasonable measures which it may deem necessary, and the reasonableness of a police regulation is not necessarily what is best, but what is fairly ap-

[1] Gross v. Commonwealth, 256 Ky. 19, 75 S.W. (2d) 558 (1934).
[2] Gundling v. City of Chicago, 177 U.S. 183, 20 S.Ct. 633, 44 L.Ed. 725 (1900).
[3] 11 C.J. 1075, 303.