Comment:

Reporter’s Note

Case Citations - by Jurisdiction

A prescriptive use of land that meets the requirements set forth in § 2.17 creates a servitude. A prescriptive use is either

(1) a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or

(2) a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude.

Cross-References:

Section 2.1, Creation of a Servitude; § 2.9, Exception to the Statute of Frauds; § 2.10, Servitudes Created by Estoppel; § 2.11, Servitudes Created by Implication; § 2.15, Servitudes Created by Necessity; § 2.18, Acquisition of Servitudes by Governmental Bodies and the Public; § 4.1, Interpretation of Servitudes; § 4.3, Duration of a Servitude; § 4.8, Location, Relocation, and Dimensions of a Servitude; § 4.9, Servient Owner’s Right to Use Estate Burdened by a Servitude; § 4.10, Use Rights Conferred by a Servitude; § 4.13, Duties of Repair and Maintenance; Chapter 7, Modification and Termination of Servitudes; § 7.14, Extinguishment of Servitude Benefits Under Recording Act; Chapter 8, Enforcement of Servitudes.

Comment:

a. Rationale. Prescription operates in two distinct factual situations. In the first, a person begins using property without the consent or authority of the owner and acquires a servitude if the use continues for the prescriptive period and the other requirements of § 2.17 are met. In the second situation, people try to create a servitude but fail, initially because they do not fully articulate their intent or reduce their agreement to writing, or because they fail to comply with some other formal requirement imposed in the jurisdiction. If they proceed to act as though they have been successful in creating the servitude, and continue to do so for the prescriptive period, the servitude is created by prescription if the other requirements of § 2.17 are met. In this second situation, prescription performs a title-curing function. Observance of the terms of the servitude for the prescriptive period substitutes for compliance with the required formality because it provides satisfactory proof of the existence and terms of the servitude and resolves any doubts as to the parties’ intent that may have been created by their failure to comply with the formality.

Although this title-curing function of prescription has always been present in American servitudes law, the courts’ and commentators’ focus on statute-of-limitations theory (see § 2.17, Comment b) has generated a vocabulary that tends to obscure it. Traditionally, prescriptive uses are described as necessarily hostile or adverse. To fit uses made pursuant to oral
grants and other intended, but imperfectly created, servitudes within the hostile or adverse category, courts and commentators explain that the use derogates from the owner’s title, or that the use is adverse because it can be made wrongful by revocation of the license created by the imperfect servitude. Although these explanations work most of the time, courts occasionally take the hostile requirement literally and reach the erroneous conclusion that use pursuant to an oral grant cannot give rise to a prescriptive right because it is not adverse.

To avoid these convoluted explanations and the errors that follow literal applications of the terms “adverse” and “hostile”, this section adopts a definition of prescriptive uses that straightforwardly recognizes the two types of uses that can lead to prescriptive rights. Adoption of this approach is made possible by the recognition that American law includes an independent doctrine of acquisitive prescription, based on passage of time, in addition to prescription based on the statute of limitations, as set forth in § 2.17, Comment b.

b. Definitions and scope: prescriptive uses described by subsections (1) and (2). An “adverse” use as that term is used in subsection (1) is a use made without the consent of the landowner, or holder of the property interest used, and without other authorization. Adverse uses create causes of action in tort for interference with property rights. The causes of action are usually actions for trespass, nuisance, or waste. Subsection (1) uses are adverse or hostile to the property owner in the ordinary sense of the words.

Prescriptive uses under subsection (2) must be made pursuant to the terms of an intended but imperfectly created servitude. “Intended” means that the property owner and user intended to create a servitude—an interest that would run with land, and that would either be irrevocable, or would be revocable only after a period of time, or under limited and specific conditions. It means that the defect in creating the servitude is not a defect of intent: there is no claim of fraud in the inducement, lack of capacity of the grantor, or duress.

“Imperfectly created” means that the parties failed to comply with a formal requirement imposed by law for creation of the servitude. Since the only formal requirement recognized by this Restatement is compliance with the Statute of Frauds (see §§ 2.1-2.8), subsection (2) will only apply when the parties failed to articulate their intent to create a servitude or failed to reduce it to writing. In jurisdictions that continue to apply the old requirements for creation of servitudes, subsection (2) will apply to a broader range of failures. A servitude may be imperfectly created because the parties failed to use separate documents for the simultaneous conveyance of an easement to one person and the servient estate to another (see § 2.6), or because the creating parties lacked horizontal privity (see § 2.4). Prescription can cure either of these defects under the rules stated in this section and § 2.17. It can also be used to cure other defects arising from special requirements imposed in a jurisdiction if the purpose to be served by compliance with the required formality is substantially met by the parties’ observance of the servitude arrangement for the prescriptive period, or if the harm of frustrating the expectations generated by their observance of the intended servitude outweighs the harm caused by failure to comply with the required formality.

Subsection (2) does not apply to defects that are substantive rather than formal. If the party purporting to burden property does not own the property, or lacks the power to create the servitude, the defect is substantive. Use that would have been authorized by the servitude that failed on account of a substantive defect is a prescriptive use only if it qualifies as an adverse use under subsection (1). If an intended servitude fails because it is illegal or violates public policy, the defect cannot be cured by prescription. If a servitude fails because the benefit or burden does not touch or concern land in a jurisdiction that continues to apply the traditional doctrine, the defect is probably substantive rather than formal (see § 3.2). However, if the touch or concern requirement does not reflect a judgment that the servitude violates public policy, or that the parties did not intend to create a servitude, failure to touch or concern may be simply formal, in which case the defect can be cured by prescription.

Subsection (2) is written to include a use made pursuant to an intended servitude and enjoyment of the benefit of an intended servitude. Although there is some overlap between the terms “use” and “enjoyment,” subsection (2) employs both terms to capture the range of servitudes that can be perfected by prescription. If the intended servitude is a profit, affirmative easement, or restrictive covenant, the claimant can be described as using the property pursuant to the terms of the intended servitude. However, if the servitude is an affirmative covenant, the claimant is not really “using” the burdened property by receiving the promised performance. The second clause of subsection (2)—“enjoying the benefit of” the intended servitude—is included to cover acquisition of affirmative covenant benefits by prescription.

c. Relationship between uses described in subsections (1) and (2). The critical difference between uses covered by
subsections (1) and (2) is the presence or absence of an intended but imperfectly created servitude as defined in Comment b. With respect to uses that would constitute trespass or nuisance in the absence of the intended servitude, it makes little difference whether the use is classified as falling under subsection (1) or (2). Either way, the use will result in a prescriptive servitude if the requirements of § 2.17 are met. However, if the use or enjoyment claimed to establish a prescriptive right would not be tortious, even if it had not been authorized by an intended servitude, finding that the use was made pursuant to an intended but imperfectly created servitude under subsection (2) is necessary to the establishment of prescriptive rights. If a use is not tortious and is not made pursuant to an intended servitude, it is not a prescriptive use. No matter how long continued, it cannot give rise to a servitude by prescription. See § 2.17, Comment d, for the reasons that servitude benefits that can be acquired in the absence of an intended servitude are limited to uses involving physical entry or annoyance on the burdened land.

Illustrations:

1. O, the owner of Blackacre, built a levee on Whiteacre, the adjacent property, to protect Blackacre from floodwaters. O did not ask for or receive permission, or make any agreement with the owner of Whiteacre. In the absence of other facts or circumstances, O’s use of Whiteacre is adverse within the meaning of subsection (1).

2. A, the owner of Whiteacre, orally granted O, the owner of Blackacre, a perpetual right of way for use of the existing road across Whiteacre for access to Blackacre. O regularly uses the road. O’s use is pursuant to the terms of an intended but imperfectly created servitude within the meaning of subsection (2). Without the oral grant, and in the absence of other facts or circumstances, O’s use would be adverse within the meaning of subsection (1).

3. The Developer of Green Acres, a 200-lot subdivision, executed a declaration of servitudes that created a homeowners association, transferred a clubhouse and recreational facilities to the association, automatically made all lot owners members of the association, and imposed obligations on each lot owner to pay assessments to cover the expenses of the association, including maintenance of facilities owned by the homeowners association. Copies of the declaration were provided to all prospective purchasers, but it was not recorded until after 10 lots had been sold and their deeds recorded. The deeds did not refer to the declaration but stated that the property was conveyed subject to easements and restrictions of record. The remaining 190 lots were sold after the declaration was recorded. The homeowners association is levying assessments and receiving payments from owners of the 10 lots. It is enjoying the benefit of an intended but imperfectly created servitude within the meaning of subsection (2).

Under the rule stated in § 2.9, a servitude is created despite failure to comply with the Statute of Frauds if the beneficiary has so changed position that injustice can be avoided only by giving effect to the parties’ intent to create a servitude. To create a servitude under § 2.9, it is not necessary that the use be maintained openly or notoriously, or continued for the prescriptive period. Conversely, to create the servitude by prescription, it is not necessary to establish that injustice can be avoided only by creation of the servitude.

The agreement to create a servitude that will give rise to a prescriptive use under subsection (2) may be implied from the circumstances or actions of the parties. The same facts that give rise to implication of intent to create an irrevocable servitude in one jurisdiction may give rise to implication of intent to create a revocable license in another (see Comment g). If the agreement implied is an agreement to create a servitude, the use is a prescriptive use. If the agreement implied is for creation of a license, the use cannot give rise to a servitude by prescription, but may, possibly, give rise to creation of a servitude by estoppel under the rule stated in § 2.10. Under § 2.10 a servitude is not created unless injustice can be avoided only by establishment of the servitude.

Sections 2.11 through 2.14 set forth the rules governing establishment of servitudes where the intent to create a servitude arises by implication from the facts and circumstances surrounding a conveyance of some other interest in land. Agreements implied on the basis of conduct other than conveyance of other interests in the land involved can give rise to servitudes by prescription. If the agreement to create the servitude is implied from the circumstances surrounding the conveyance under §§
2.11 through 2.14, however, the servitude arises immediately on the conveyance. If the agreement is implied by other conduct of the parties, use for the prescriptive period is required to establish the servitude under this section and § 2.17.

Illustrations:

4. O, the owner of Blackacre, and A, the owner of Whiteacre, orally agreed to create mutual easements for use of a common drive to be built along their common boundary. They both used the driveway for 20 years for access to the garages at the rear of their lots. The prescriptive period in the jurisdiction is 15 years. Under these facts, the conclusion would be justified that servitudes by prescription had been acquired in favor of both Blackacre and Whiteacre for use of the common drive. If the evidence established that the owner of either parcel had substantially changed position in reliance on the existence of the easement, and that injustice could be avoided only by giving effect to the parties’ intent to create the servitude, the conclusion would be justified that a servitude had also been acquired under the rule stated in § 2.9, Exception to the Statute of Frauds.

5. Same facts as Illustration 4, except that there is no evidence of either an oral grant or a grant of permission. If the conclusion is drawn that an intent to create an irrevocable right to use the common drive is implied by construction and use of the drive, the conclusion would be justified that a servitude has been created by prescription. Alternatively, if the conclusion is reached that the parties originally intended to create revocable licenses, rather than servitudes, the conclusion would be justified that a servitude was created only if the facts justify a conclusion that the requirements of § 2.10 for creation of a servitude by estoppel have been met. Under § 2.10, a servitude is established if it is concluded that the permission was given under circumstances in which it was reasonable to foresee that the other user would substantially change position believing that the permission would not be revoked, that the user did substantially change position in reliance on that belief, and that injustice could be avoided only by establishment of the servitude.

6. O, the owner of Blackacre, orally granted an easement to A, the owner of Whiteacre, for passage of sunlight across Blackacre to the solar collectors on Whiteacre. The solar collectors were used for the prescriptive period without interference. After the prescriptive period had passed, O began to build a structure that would block the passage of sunlight to A’s collectors. In the absence of other facts or circumstances, the conclusion would be justified that prescription has cured the defect in A’s claim to the benefit of a servitude for sunlight. (Note that A might also have acquired a servitude under § 2.09, Exception to the Statute of Frauds.)

e. Prescriptive users. Prescriptive uses need not be made personally by the owner of the claimed prescriptive servitude, but may be made by tenants, customers, guests, and visitors of the claimant. Use by people providing services to the claimed dominant estate like meter readers, mail carriers, school buses, and delivery services may also contribute to the prescriptive use. However, use by strangers and members of the general public does not qualify as prescriptive use to establish servitude rights in an individual. See § 2.18 for acquisition of prescriptive servitudes by the public.

f. Adverse uses, subsection (1). To be adverse, as the term is used in this section, a use must create a cause of action for interference with an interest in property like trespass, nuisance, or interference with a servitude benefit. To be adverse, the use must be made without authority and without permission of the property owner. Thus, uses made pursuant to licenses are not adverse, nor are uses made pursuant to servitudes created expressly, by implication, or by necessity. (See §§ 2.1 through 2.15 for creation of servitudes by means other than prescription, and § 2.18 for servitudes created by dedication and condemnation.)

Illustrations:

7. Without asking or receiving permission, O, the owner of Blackacre, constructed and began to use a driveway across Whiteacre, which belongs to A. In the absence of other facts or circumstances, the conclusion would be justified that O’s use of Whiteacre is adverse.

8. Same facts as Illustration 7, except that before constructing the driveway O asked for and received permission from A. In the absence of other facts or circumstances, the conclusion would be justified that O’s use of Whiteacre is not adverse because licensed by A.

9. While O owned both Blackacre and Whiteacre, two adjacent parcels, O constructed a driveway from the public street abutting Blackacre across Blackacre to Whiteacre. O used the driveway for access to both parcels. O conveyed Whiteacre to A by a deed that did not mention any right to use the driveway. Although Whiteacre is not landlocked, it would be expensive to provide an alternative access route. After the conveyance, A continues to use
the drive. In the absence of other facts or circumstances, the conclusion would be justified that A’s use is not adverse because it is authorized under the servitude by implication from prior use created in favor of Whiteacre on the conveyance from O to A under the rule stated in § 2.12.

10. O, the owner of Blackacre and Whiteacre, conveyed Whiteacre to A by a conveyance that landlocked Whiteacre. A uses a road across Blackacre for access to Whiteacre. In the absence of other facts or circumstances, A’s use of Blackacre is not adverse because it is authorized under the servitude by necessity that arose in favor of Whiteacre on O’s conveyance to A under the rule stated in § 2.15.

Uses made in subordination to the property owner are not adverse, even if the property owner has not given permission, and the use is not otherwise authorized. The reason is that the property owner is not put on notice of the need to take steps to protect against the establishment of prescriptive rights. To express the idea that an adverse use cannot be in subordination to the rights of the owner, it is frequently said that the use must be made under claim of right. This does not mean that the user must claim entitlement to a servitude or show color of title, as sometimes mistakenly asserted, but merely that the user must not act in such a way as to lead the owner to believe that no adverse claim is asserted. Use under claim of right may also mean that the user acts as the owner of a servitude would act, as opposed to the way a casual trespasser would act. However, claim of right in this sense adds little to the requirements expressed by the “open or notorious” and continuity requirements set forth in § 2.17.

Recognition of the landowner’s title is not the same as subordination to that title. Subordination requires that the user act with authorization, express or implied, from the landowner, or under a claim that is derivative from the landowner’s title. Use made in defiance of a recognized title is adverse to the title. The fact that the user tried unsuccessfully to purchase a servitude from the landowner does not establish that his subsequent use was subordinate to the landowner’s title.

When a property owner gives permission to use property, the law implies that a license was intended. Unless additional facts suggest otherwise, it is assumed that the parties intended that the property owner retain the right to revoke the license at any time. Permissive uses do not give rise to prescriptive rights, although they may give rise to creation of servitudes by estoppel under the limited circumstances covered in § 2.10.

Neither good faith nor deliberate wrongdoing is required to make a use adverse. A use is adverse even though made in the mistaken, but good faith, belief that the user is entitled to make it, and it is adverse even if the user acknowledges that the land is owned by another and the user has no right to make the use.

Illustrations:

11. A and B are neighbors. B’s property includes a lake. A asked B to sell him an easement for access to the lake and for maintaining a dock for boating, swimming, and fishing. B refused to sell A an easement, but told A that he is welcome to use the lake. In the absence of other facts or circumstances, the conclusion would be justified that A’s subsequent use of B’s property for access to and use of the lake is permissive, not adverse.

12. O, the owner of Blackacre, built a warehouse on Blackacre, locating the loading docks so close to the property line that there was no room for trucks to maneuver to reach the loading docks. O attempted to secure an easement from A, the owner of Whiteacre, but A refused to sell. O’s trucks continued to drive over Whiteacre to gain access to the loading docks. In the absence of other facts or circumstances, the conclusion would be justified that O’s use was adverse.

13. A, the owner of Whiteacre, used a road crossing Blackacre for access to Whiteacre for the prescriptive period believing that it was a public road. In the absence of other facts or circumstances, the conclusion would be justified that A’s use was adverse. A’s mistaken belief that the road was public is irrelevant.

Use by a lessee of the leased premises is subordinate to the title of the lessor, and use by a licensee is permissive with respect to the licensor. Although a use is not adverse with respect to the property interests of the lessor or licensor, it may be adverse to other interests in the claimed servient property. It may also be adverse with respect to other property of the lessor or licensor not covered by the lease or license.

Even though a person may be authorized to make some uses of property, the person may become an adverse user with respect to uses that go beyond the authorized use if the excessive use gives rise to a cause of action for trespass, waste, or other interference with a property interest. Use that is prohibited by a lease or beyond the scope of a license or servitude may be
adverse. Likewise, use by a cotenant is adverse to the interests of the other cotenants if it gives rise to a cause of action for waste, ouster, or other interference with the other cotenants’ property interests. Even if a use by a lessee, licensee, servitude holder, or cotenant is adverse, however, it will not give rise to prescriptive rights unless it is also open or notorious. See § 2.17, Comment h.

Illustrations:

14. O, the owner of Blackacre and Whiteacre, leased Blackacre to A and Whiteacre to B for 49-year terms. Without permission from O or B, A installed a visible pump and water line on Whiteacre that provided water from a well on Whiteacre to serve a resort complex A constructed on Blackacre. Although A’s use of Blackacre is not adverse because subordinate to O’s title, A’s use of Whiteacre is not subordinate to the title of either O or B in Whiteacre. These facts would justify the conclusion that A’s use is adverse to B. Whether it is adverse to O depends on whether O as the reversioner has a cause of action against A. See § 2.17, Comment f.

15. O, the owner of Blackacre, leased Blackacre to A, the owner of Whiteacre, an adjacent property. Without seeking permission from O, A installed a visible pump and waterline on Blackacre to serve a resort complex A built on Whiteacre. Installation of the pump and waterline did not violate any express provision of the lease. Since A’s possession of Blackacre is subordinate to O’s title, these facts would justify the conclusion that A’s use is not adverse to O.

16. A and B are tenants in common of Blackacre. Without seeking permission from B, A built a house on the north half of Blackacre and a driveway through the south half of Blackacre for access to a public highway. Since A and B each have the right to possess all of Blackacre so long as neither ousts the other, the conclusion would be justified that A’s use is not adverse to B.

17. A and B are tenants in common of Blackacre. B owns Whiteacre, an adjoining property, individually. A built a house on Blackacre and, without permission from B, constructed a driveway through Whiteacre to connect Blackacre with a public highway. Since A has no right to use Whiteacre by virtue of the cotenancy relationship in Blackacre, these facts would justify the conclusion that A’s use of Whiteacre is adverse.

18. A and B are tenants in common of Blackacre. A granted a servitude to Power Company to install a transmission line across Blackacre. Since each cotenant has the right to possession of Blackacre, A is entitled to install a transmission line. Unless the facts justify the conclusion that A’s grant of the servitude or Power Company’s subsequent use ousted B, Power Company’s use is not adverse as to B’s interest. (See § 2.3 for the effect of a grant by fewer than all cotenants.)

A use that is initially permissive can become adverse only by express or implied revocation or repudiation of the license. If the initial use is deemed permissive because of facts that overcome a presumption of adverse use, see Comment g, a change in the facts may constitute an implied revocation. Repudiation can be implied by acts that are inconsistent with recognition of the licensor’s superior title. Although it is often said that a license is not transferable, transfer of a permissive use right seldom converts a permissive use into an adverse use.

Illustrations:

19. A and B, who were sisters and very close, owned adjoining properties, Blackacre and Whiteacre. A frequently used a shortcut across B’s land, Whiteacre, for access to her property even though there was other convenient access from Blackacre to a public road. After A sold Blackacre to C, a stranger, C continued to use the shortcut across Whiteacre without seeking permission from B. These facts would justify the conclusion that C’s use of Whiteacre was adverse. Although the transfer of Blackacre, alone, would not constitute a repudiation of the license, the change in relationship between the user and the owner of Whiteacre is sufficient to justify a conclusion that the license from B to A, implied by the closeness of their relationship, was revoked on A’s transfer to C.

20. O, the owner of Blackacre, began using a road across Whiteacre, the adjoining property, for access to a public highway when both properties were wild and unenclosed rural lands. Since Whiteacre was subdivided into a few large enclosed ranchettes, O has continued to use the road. The rule in the jurisdiction is that evidence that the claimed servient estate is wild and unenclosed overcomes the presumption that unexplained use is adverse. These facts would justify the conclusion that O’s use following the subdivision is adverse because the license implied on the basis of the wild unenclosed nature of the servient estate was revoked when the estate was subdivided and enclosed.
A use that begins as adverse can be converted to a permissive or subordinate use if the user agrees to accept a license from the landowner, or if the user acts in such a way that the ordinary landowner would believe that the user has accepted the grant of a license to use the land.

Illustration:
Illustration:
21. O, the owner of Blackacre, sent a letter to A, the owner of Whiteacre, 19 years after A had constructed and begun using a road across Blackacre, advising A that she intended to cut the road off at her boundary, but that she was giving A permission to continue to use the road for a reasonable time to permit him to arrange for alternative access. The prescriptive period is 20 years. A thanked O for her consideration and continued to use the road. These facts would justify the conclusion A’s use has been converted from adverse to permissive because A accepted the proffered license. (See § 2.17, Comment j, for the effect of O’s letter if A refuses to accept the license.)

g. Presumptions as to initial character of use. The question whether a use was adverse, made pursuant to an implied servitude, or permissive, in the inception is often difficult to answer, particularly in cases of long-established uses where the original parties are not available to describe the circumstances of the initial use. Courts have developed a series of presumptions to assist in determining whether the use was permissive or prescriptive.

The lost-grant theory, used as the foundation for prescription for many years, operated on the basis of a presumption that long-continued uses of land were initially authorized by deed, rather than made pursuant to a license given by the owner. After abandonment of the lost-grant theory, the same result was reached by adopting a presumption that an unexplained use continued for the prescriptive period is a prescriptive use, rather than permissive. The majority of American states apply a presumption that an unexplained, open or notorious use of land, continued for the prescriptive period, is adverse, or made pursuant to an implied servitude. This presumption of prescriptive use gives effect to the idea that long-continued uses create expectations of entitlement and favors existing users over newcomers who would disrupt established neighborhood patterns of land use and access.

In states following the majority rule, particular fact situations overcome the presumption of prescriptive use, creating a counter-presumption that the initial use was permissive. Evidence that the claimed servient estate was wild, unenclosed, vacant land overcomes the presumption of prescriptive use in many states, creating a presumption that the use was permissive. Evidence that the use was made in common with the owner of the land, or that the road over which a right of way is claimed was constructed by the owner for his own use, may also overcome the presumption of prescriptive use. Other evidence that will overcome the presumption is that the initial users were closely related, or enjoyed close neighborly relations, or that a custom existed in the neighborhood for neighborly accommodation by permitting use of neighboring land for access to fields and public roads.

The presence of gates across roadways does not necessarily overcome a presumption of prescriptive use. Although it may give rise to an inference that the use is permissive, courts have found prescriptive servitudes in many cases despite the presence of gates. Installation of gates is inherently ambiguous because they may have been intended to keep out hunters and strangers, rather than residents of the area who used the road. The fact that keys are given to users of the road is likewise ambiguous. It may indicate either that the landowner has given permission to the users or that the landowner recognizes their right to use the road.

In a minority of jurisdictions, an unexplained use of land is presumed to have originated with permission. This view probably rests on the perceptions that Americans are both neighborly and litigious, so that an unauthorized use would have been objected to. It furthers a policy favoring development of land and requiring people to pay for burdens they would impose on the land of others. There are a few states that claim to apply no presumption as to the initial character of an unexplained use, but they arrive at a result similar to the states with a presumption of permissive use because the claimant of a prescriptive right carries the burden of proof to show that the use was not permissive.

h. Prescriptive uses under subsection (2): express intent to create the servitude. Two kinds of questions arise in determining whether claimed prescriptive uses qualify under subsection (2). The first question is whether there was an intended servitude. The second question is whether the defect in creation can be cured by prescription. The first question is addressed in this Comment; the second question is addressed in Comment h, supra. If the defect in creation is something other than failure to comply with the Statute of Frauds, the first question is easy to answer. Both the intent to create the servitude and its terms are
set forth in a written instrument.

Illustrations:

22. A and B, owners of adjoining parcels, agreed for themselves, and for their heirs and assigns, that they would share the expenses of constructing and maintaining a levee on B’s land to provide flood protection for both properties. The agreement was recorded. A transferred her land to C, who continued to contribute to the expenses of maintaining the dam for the prescriptive period. C then learned that the covenant does not run with the land because the jurisdiction follows the old English rule requiring horizontal privity (contrary to the rule stated in § 2.4). C refused to contribute further to maintenance of the levee. These facts would justify the conclusion that B’s right to the covenant benefit was perfected by prescription. (Note that the defect in creation of this servitude could not have been cured under § 2.9, and that, if the agreement has become obsolete, C may be able to modify or terminate it under the rules stated in Chapter 7 or 8.)

23. O, the owner of Blackacre, executed and delivered a deed that reserved an easement for use of the driveway on Blackacre for A, the owner of Whiteacre, an adjoining property, and conveyed the fee simple in Blackacre, subject to the easement, to Y. The servitude failed initially because the jurisdiction follows the rule that an easement cannot be created in favor of a stranger (contrary to the rule stated in § 2.6). A used the driveway regularly for the prescriptive period. These facts would justify the conclusion that A has acquired the intended servitude by prescription.

Cases involving uses pursuant to claimed servitudes that were not executed in compliance with the Statute of Frauds present a range of difficulty in determining the existence and terms of the claimed servitude. Failure to spell out the person or property benefited by a servitude may violate the Statute of Frauds. Although the defect is usually cured easily by implication of the benefit under rules stated in §§ 2.11 and 2.14, prescription may be necessary to cure the defect in one of the few states that refuse to allow implication of servitude benefits on the ground that the Statute of Frauds forbids it. Since the intent to create a servitude is clear and the beneficiary is usually obvious, these cases seldom present factual difficulties.

Illustration:

24. The developer of Green Acres, a 20-lot subdivision of single-family dwellings, inserted a provision in each deed restricting use of the lot to single-family use. The deeds did not identify the beneficiaries of the restrictions. All lots were used for single-family residential purposes for the prescriptive period. The provisions did not initially create servitudes in the jurisdiction because the beneficiaries were not identified in the deeds (a result contrary to the rule stated in § 2.14(1)). The conclusion would be justified that all the lots were intended beneficiaries and that observance of the restriction for the prescriptive period cured the defect in creation of the servitude.

Only slightly more difficult are the cases like Illustration 3 in which the only defect was the failure to record the restrictions before the first deeds were delivered or recorded. If the deeds do not include the servitude terms or incorporate them by reference, the Statute of Frauds is not complied with because the instrument is not signed by the party to be charged (the grantee). The doctrine that acceptance of a deed substitutes for a signature (see § 2.7, Comment g) does not solve the problem. There is usually no factual difficulty with this type of case because the general plan makes the intent to create the servitudes clear and the unrecorded declaration spells out the terms of the intended servitudes.

The factually difficult cases are those in which the claim of prescriptive use is based on an oral grant or agreement to create a servitude. Claims based on oral grants or agreements should be accepted cautiously because they directly thwart the purpose of the Statute of Frauds to force parties to provide written evidence of the existence and terms of interests in land. The evidentiary and substantive cautions relevant in determining whether to apply exceptions to the Statute of Frauds, discussed in § 2.9, are relevant in determining whether there was an oral grant or agreement to create a servitude that brings the claimed prescriptive use within subsection (2) of this section. Clear and convincing evidence is required to establish an oral grant or agreement to create a servitude.

Illustrations:

25. O, the owner of Blackacre, orally granted to A a perpetual easement for sunlight for the solar collectors A had installed to provide heat for A’s house. When O sold Blackacre, O informed D, the purchaser, of the existence of...
A’s easement in the presence of two neighbors. After the prescriptive period had passed, D began construction of a two-story addition that would block sunlight to A’s collectors. In the absence of other facts or circumstances, the conclusion would be justified that the testimony of O and the neighbors as to the existence of A’s easement would support a finding that the oral grant had been made and that the defect in A’s title to the easement has been cured by prescription.

26. Same facts as Illustration 25, except that there is no evidence of an oral grant by O other than A’s testimony. In the absence of other facts or circumstances, the conclusion would be justified that A’s testimony did not provide clear and convincing evidence that the oral grant had been made.

27. O, the owner of Blackacre, which is lakefront property, deeded to A, the owner of Whiteacre, an adjacent inland property, an easement for access to the lake and maintenance of a pier for swimming and boating purposes. They agreed orally that A would construct the pier but that O would maintain it and that O would have the right to moor a boat at the pier and use it for swimming. If the existence and terms of their oral agreements are established by clear and convincing evidence, the conclusion would be justified that use and maintenance of the pier according to the terms of the agreement for the prescriptive period established the servitudes by prescription if the requirements of § 2.17 were met.

i. Prescriptive uses under subsection (2): implied intent to create the servitude. The intended servitude that qualifies a use as prescriptive under subsection (2) may be implied as well as express. The conduct that is most likely to give rise to an inference that the parties intended to create a servitude is the establishment, use, and maintenance of a facility for their common benefit. Prescriptive servitudes have been established on the basis of use of common driveways, boundary fences, dams, and party walls. The prescriptive obligations may include a duty to continue the maintenance of the common facility. Although modern cases tend to explain the result on the ground that the use is adverse, a more convincing explanation is that when the parties built the drive, or began the joint-use arrangement, they intended to create mutual servitudes rather than licenses.

In cases involving common drives, which are by far the most common, the result may depend on the general presumption the jurisdiction applies to determine the initial character of an unexplained use. If the jurisdiction follows the majority position and presumes that unexplained uses are prescriptive, it is likely to conclude that use of a common drive reflects an understanding that the driveway arrangement is not unilaterally revocable by either party. If it follows the minority position and presumes that all unexplained uses are permissive, it is likely to conclude that the driveway arrangement reflects mutual revocable licenses.

In determining whether neighbors who contribute to facilities or services for their mutual benefit are acting on the basis of an implied understanding that the arrangement is revocable by any of them unilaterally, or is binding on them and their successors, the factors that should be considered are the amount of investment made in the common facility, its value to the users, the nature of the continuing obligation required to maintain the service or facility, its effect on the value of the burdened estates, and the likelihood that the parties would have entered into a permanent arrangement without committing it to writing.

Applying these criteria, use of common drives would normally qualify as a prescriptive use. Generally the driveways run along a common boundary and impose relatively little burden on the servient estates. Since they use little land, they seldom interfere significantly with development of the property, and the maintenance obligations involved are usually minimal. Driveway easements are common transactions, and judging by the number of cases involving oral grants, executed parol licenses, and prescriptive claims, they are frequently entered into without written documents.

The other types of common-facility cases in which courts have found servitudes by prescription are cases involving obligations to maintain party walls, boundary fences, and dams. If the amount of the continuing contribution required is relatively low, the benefit provided by the common facility is relatively valuable, the costs to the servient estate are not great, and nonrevocability would have been valuable to the original parties, the inference that they intended a servitude may be justified. Agreements to create servitudes that would severely restrict development of the servient estate or impose potentially high costs should be implied only if the facts clearly justify the inference.

Illustrations:

28. Same facts as Illustration 27, except that there is no direct evidence of an oral agreement. In the absence of other
facts or circumstances, the conclusion would be justified that O’s use of the pier and payment of all the maintenance expenses reflects an arrangement that is not unilaterally revocable by O if use of the pier is relatively valuable to Blackacre and the maintenance costs are not too burdensome.

29. O, the owner of Blackacre, and A, the owner of Whiteacre, agree to construct a common drive along their boundary line. O, a contractor, furnished all the material and labor needed for the drive which is built partly on the land of each. In the absence of other facts or circumstances, the conclusion would be justified that neither was intended to have the right unilaterally to terminate the arrangement. If they use the drive for the prescriptive period, a servitude will be established. (Note that their rights to mutual servitudes might also be established by estoppel under the rule stated in § 2.10.)

Reporter’s Note

Rationale, Comment a. Structurally, this section is similar to Restatement of Property § 458 in separating the treatment of prescriptive uses from some of the other requirements for prescription. Substantively, however, this section breaks new ground in distinguishing between adverse uses, which are genuinely hostile uses, and uses that can produce prescriptive rights but are made with agreement of the servient owner. Section 458 categorized as an adverse use one which was not made in subordination to the owner and which was either wrongful, or, could be made wrongful as to him by the owner of the servient estate.

Instead of lumping together acquisitive prescription by wrongful use and prescription to cure title defects, as the first Restatement did, this Restatement separates the two. Although the results reached under the rules stated in this section are generally consistent with those that would have been reached under the older approach, separating the two types of prescription makes it easier to see the differences between them and to admit that different consequences may follow. Those differences appear primarily with respect to the application of the open or notorious and continuity requirements under § 2.16 and in the ability to acquire the benefit of affirmative and negative covenants.

Prescriptive users, Comment e. To be an adverse user, a person need not have any interest in land, since easements in gross may be acquired by prescription. To acquire an easement appurtenant, however, the adverse user must have either an estate or a servitude to which the claimed servitude can be appurtenant. In LeMay v. General Elec. Co., 114 Misc.2d 445, 451 N.Y.S.2d 990 (Sup.Ct.Spec.Term 1982), the court held that licensees of state-owned lands adjacent to a canal could not acquire prescriptive easements across adjacent lands for access to their licenses. The plaintiffs held revocable, annually renewable permits to use these lands for summer camping, and alleged that they had used an access road across GE’s land for more than 15 years. After GE closed the road, they brought a class action alleging prescriptive rights.

Use by tenants and invitees is use by the dominant owner. Bennett v. Lew, 151 Cal.App.3d 1177, 199 Cal.Rptr. 241 (1984) (grant of preliminary mandatory injunction requiring removal of fence blocking use of driveway on basis of evidence showing that plaintiff’s tenants had used driveway for over 5 years without permission); Carpenter—Union Hills Cemetery Ass’n v. Camp Zoe, Inc., 547 S.W.2d 196 (Mo.Ct.App.1977) (visitors to graves). Homer v. Smith, 866 P.2d 622 (Utah Ct.App.1993) (use by claimant’s customers and tenants satisfies requirements for prescriptive easement). But see Kornbluth v. Kalur, 577 A.2d 1194 (Me.1990) (claimants could not tack period of use of shortcut by people visiting prior owners of property because no privity; evidence did not show that prior owners had used shortcut).

Use by strangers and the general public does not inure to the benefit of an individual prescriptive user. Chournos v. Alkema, 27 Utah 2d 244, 494 P.2d 950 (1972).

Adverse uses, Comment f. Authorized uses are not adverse. Use by a co-tenant, licensee, holder of an easement by necessity or other servitude is usually not adverse because authorized.

Nature Conservancy v. Machipongo Club, Inc., 571 F.2d 1294, modified, 579 F.2d 873 (4th Cir.) (implied grant of permission to Coast Guard for use of road to reach beach for launching boats in stormy weather based on the landowner’s knowledge that access to the beach was necessary and consistently welcoming attitude), cert. denied, 439 U.S. 1047 (1978).
Sapp v. General Development Corp., 472 So.2d 544 (Fla.Dist.Ct.App.1985) (prescriptive easement cannot be established when user is entitled to common-law or statutory way of necessity; servient owner cannot establish a claim of trespass against the dominant owner, although he is entitled to seek compensation for the statutory way).

The Nature Conservancy v. Nakila, 4 Haw. App. 584, 671 P.2d 1025 (1983) (grantee of cotenant holding 85% share had not acquired easement by prescription for a water line because the cotenant’s use was not hostile as to the other cotenants).

Light v. Steward, 128 Ill.App.3d 587, 83 Ill.Dec. 760, 470 N.E.2d 1180 (1984) (use by claimants of claimed easement as guests of prior owner of land they acquired in 1978 cannot be treated as independent of use made by the owner, their host; if his use was permissive, their use during his ownership as his guests was also permissive).

Bob’s Ready to Wear, Inc. v. Weaver, 569 S.W.2d 715 (Ky.Ct.App.1978) (use of parking lot generally open to the public for access to rear entrance of claimant’s store not adverse).

Potomac Elec. Power Co. v. Lytle, 23 Md.App. 530, 328 A.2d 69 (1974) (presumption of adverse use not overcome by evidence that owner had stated “you can always come through my property” because it could have indicated either permission or prior parol grant of an easement).


Bills v. Nunno, 4 Mass.App.Ct. 279, 346 N.E.2d 718 (1976) (plaintiff had acquired prescriptive rights to use a way even though he did not know the identity of the owner or the dimensions of the servient estate; adverseness is found in actual use of the way, and claimant’s uncommunicated mental state is immaterial).

Tadlock v. Otterbine, 767 S.W.2d 366 (Mo.Ct.App.1989) (that claimant might have been entitled to acquire a statutory easement of necessity does not prevent acquisition of a prescriptive easement where there is no common-law easement by necessity and statutory procedure has not been invoked).

Oberle v. Monia, 690 S.W.2d 840 (Mo.Ct.App.1985) (grant of permission found in testimony of servient owner who sold lot to claimants that he understood they would be using the road and had no problems with it; since road was only access to the property, vendor must have intended to give buyers permission to use it).

McDougall v. Castelli, 501 S.W.2d 855 (Mo.Ct.App.1973) (use was adverse; where there was no evidence of unity of title, there could be no easement by necessity).

Cummings v. Canton, 244 Mont. 132, 796 P.2d 574 (1990) (users of public road abandoned by county had not acquired prescriptive easement; traveling on a public road is neither adverse nor exclusive).

Clemans v. Martin, 221 Mont. 483, 719 P.2d 787 (1986) (1983 purchasers did not acquire a prescriptive easement for access because prior owners had used the road only after calling the defendants to let them know they would be using it).

Simacek v. York County Rural Public Power Dist., 220 Neb. 484, 370 N.W.2d 709 (1985) (power line installed under license from railroad that owned right of way not adverse to servient owner until railroad abandoned right of way).

Leach v. Anderl, 218 N.J.Super. 18, 526 A.2d 1096 (App.Div.1987) (easement not used under claim of right for prescription so long as it was easement by necessity).

Garmond v. Kinney, 91 N.M. 646, 579 P.2d 178 (1978) (use not adverse since plaintiff’s predecessor had been required to obtain permission to cross defendant’s land as condition to obtaining special use permit from U.S. Forest Service before subdividing land).

Coggins v. Fox, 34 N.C.App. 138, 237 S.E.2d 332 (1977) (directed verdict for landowner upheld where uses were only 2-3 times per year for hunting and berry picking, and there was evidence that some of claimants had asked for permission to use
the road).

Willis v. Holley, 925 P.2d 539 (Okla.1996) (where use was initially permissive, no presumption of adverse use arises from long-continued use).

Sanders v. Mansfield, 1998 WL 57532 (Tenn.Ct.App.1998) (requirements that use be adverse and that owner of servient tenement know and acquiesce to the use are not contradictory; use is adverse if claim of right is adverse to the title or interest of servient owner; owner is not required to actively resist use of easement).


Conley v. Conley, 168 W.Va. 500, 285 S.E.2d 140 (1981) (use pursuant to unauthorized grant of permission by licensee, known to owner of servient estate, was adverse).

Petersen v. Port of Seattle, 94 Wash. 2d 479, 618 P.2d 67 (1980) (use of airspace over land near airport not under claim of right; port paid unimpacted value of land to sellers in the area whose land port wished to acquire and participated in community program to find alternative uses for land adversely affected by airport activity).

Yeckel v. Connell, 508 P.2d 1200 (Wyo.1973) (user who testified he had asked permission to use the road before driving cattle on it and that he would not have taken his cattle on the road if he knew the owners had an oat or hay crop down had not established that his use was adverse; establishment of prescriptive rights was sought to provide access to a 480-acre parcel sold for a subdivision development).

A use is adverse even though made in the mistaken but good-faith belief that the user is entitled to use it. Gilardi v. Hallam, 30 Cal.3d 317, 178 Cal.Rptr. 624, 636 P.2d 588 (1981), held that when an occupier enters land mistakenly believing he is the owner, possession and use are adverse unless it is established by substantial evidence that he recognized the potential claim of the record owner and expressly or impliedly reflected the intent to claim the disputed land only if record title was determined in his favor.

Schulz v. Syvertsen, 219 Conn. 81, 591 A.2d 804 (1991) (use of pathway to beach under mistaken belief it was right of way described in the deed is adverse).

Illustration 13 is based on Cardenas v. Kurpuweit, 116 Idaho 739, 779 P.2d 414 (1989), which held that a mistaken belief that a road was public did not prevent the user from acquiring a prescriptive easement, overruling prior Idaho decisions that subjective beliefs affect adversity of use.

Mumrow v. Riddle, 67 Mich.App. 693, 242 N.W.2d 489 (1976), held the use adverse even though within an unimproved highway right of way and the claimant mistakenly believed he had a right to establish a drive in a publicly owned right of way. The court also held that the servient owner’s failure to object does not make use permissive, and defined “adverse use” as use inconsistent with the right of the owner without permission asked or given, and such as would entitle the owner to a cause of action against the intruder.


Glidden v. Belden, 684 A.2d 1306 (Me.1996) (user’s state of mind is relevant to proof that use is adverse under claim of right; mistaken belief that road was town way precludes any inference that use was accompanied by assertion of claim of right to use in disregard to owners’ rights). But belief that town has a right of way in addition to a private way claimed by user does not prevent establishment of prescriptive right. Blackmer v. Williams, 437 A.2d 858 (Me.1981) (belief that town had a right of way over road does not preclude use by individual under claim of right; permissive use by one party does not prevent other users from establishing independent claims of right).

Wiedman v. Trinity Evangelical Lutheran Church, 188 Mont. 10, 610 P.2d 1149 (1980) (45 years’ use of way not hostile because begun under belief that way would be dedicated for public street).
Anderson v. Felten, 96 Nev. 537, 612 P.2d 216 (1980) (infrequent and sporadic use by person who did not think he had a right of way but had a right to use the road because it had been there a long time did not establish prescriptive easement).

Chaney v. Haynes, 458 S.E.2d 451 (Va.1995) (essence of adverse use is intentional assertion of claim hostile to ownership right of another; use under mistaken belief of a recorded right cannot be adverse so long as the mistake continues; use of property under mistaken belief that it was land described in express easement is not adverse).

The requirement that the owner “acquiesce” in the adverse use, a vestige of the lost-grant theory previously used to justify prescriptive claims (see § 2.16, Comment g), is sometimes applied in modern cases to prevent users who defy the owner’s requests that the user cease trespassing from acquiring prescriptive rights. Glidden v. Belden, 684 A.2d 1306 (Me.1996) (proof of owner’s acquiescence is essential element in establishing prescriptive easement; evidence that owner explicitly refused to recognize claimant’s asserted right of way and told users he did not want them to use the road demonstrated nonacquiescence). In the absence of proof of nonacquiescence, acquiescence may be presumed from failure to object. S.D. Warren Co. v. Vernon, 697 A.2d 1280 (Me.1997) (acquiescence implies passive assent or submission to use as distinguished from granting of permission; acquiescence may be presumed from showing that use was open, notorious, and uninterrupted).

In most states, however, acquiescence simply means the owner failed to interrupt the use by legal or physical means (see Comment j for discussion of effective interruption). See, e.g., Rafanelli v. Dale, 924 P.2d 242 (Mont.1996) (owners acquiesced in use of ranch road by failing to obstruct or interrupt the use; requests that users stop using road, posting of no-trespass signs, and expectation that permission be sought before use of road did not indicate nonacquiescence).

Use is not adverse if made in subordination to the rights of the property owner. Claim of right means only that use is not made in subordination to owner’s title.

Massey v. Price, 480 S.W.2d 337 (Ark.1972) (no prescriptive right to maintain a driveway across a portion of neighbor’s property had been established because the person who built it stated that she knew she was going on the neighbor’s property and she “just assumed” the neighbor did not object and that she had his permission).

Crandall v. Gould, 711 A.2d 682 (Conn.1998) (although claim of right ordinarily means without recognition of rights of the owner, claimants who used drive in violation of injunction for more than prescriptive period cannot acquire prescriptive easement; court will not condone or encourage violation of permanent injunctions protecting property rights by interpreting claim of right requirement to permit acquisition of prescriptive rights by use that violates injunction).

Robert S. Weiss & Co. v. Mullins, 196 Conn. 614, 495 A.2d 1006 (1985) (claim of right means without recognition of the rights of the owner of the servient tenement; it does not require that the claim be actually brought to the attention of the owner of the fee); Phillips v. Bonadies, 136 A. 684 (Conn.1927) (claim of right means nothing more than a user “as of right”—that is, without recognition of the right of the landowner).

Riggenbach v. Smith, 144 Ga.App. 24, 240 S.E.2d 299 (1977) (jury finding that use was adverse sustained even though plaintiff stated on cross-examination that he had used the road with permission of the previous landowners; verdict sustained on evidence of use and maintenance of road and lack of evidence that he ever sought permission).

Blackmer v. Williams, 437 A.2d 858 (Me.1981) (permissive use by one party does not prevent other users from establishing independent claims of right).

Iverson v. Fjoslien, 298 Minn. 168, 213 N.W.2d 627 (1973) (tenant under 99-year lease of hunting rights from owner of 1/5 undivided interest did not use adversely to owners of other 4/5ths; seeking lease from owners of 4/5ths undivided interests is acknowledgement of their title).

Offering to purchase a servitude does not make subsequent use subordinate to the title of the property owner if the offer is rejected and the use continues.

Illustration 12 is based on Warsaw v. Chicago Metallic Ceilings, Inc., 35 Cal.3d 564, 676 P.2d 584, 199 Cal.Rptr. 773 (1984) (user who tried unsuccessfully to buy access rights from neighbor 3 times and continued to use neighbor’s land for statutory period without consent acquired easement by prescription).
Rafanelli v. Dale, 924 P.2d 242 (Mont.1996) (failure of easement claimant to object to statement in appraisal report that access to dominant estate was with permission of owners of servient estate not inconsistent with claim of prescriptive easement; appraisal obtained in course of failed negotiations for purchase of interest in dominant estate by servient estate owner; negotiation was attempt to solidify access right without incurring expense of litigation).

Stamm v. Kehrer, 222 Mont. 167, 720 P.2d 1194 (1986) (presumption of adverse use not rebutted by offer to buy part of area from servient owner in 1951, or by letter attempting to make use permissive in 1975 when evidence showed that use began in 1929).

In Brown v. Sneider, 9 Mass.App.Ct. 329, 400 N.E.2d 1322 ( Ct.App.1980), neighbors for many years exchanged deeds in 1974 after discovering that defendant’s drive crossed plaintiff’s property. Easements were granted to plaintiff for a garden and to defendant for a driveway. Shortly thereafter plaintiff began complaining that defendant was misusing the driveway easement by parking on it. The court held that defendant had acquired the easement for parking by prescription by use from 1953 to 1973. Even though the last two years of the prescriptive period occurred after negotiations for the exchange of easements began, defendant’s use was not permissive.


Agreement by adverse user to changes in use of servitude at request of servient owner does not indicate subordination to owner’s title. Osburn v. Supreme Express & Transfer Co., 590 S.W.2d 360 (Mo.Ct.App.1979) (relocation of dock at request of servient owner after servient owner agreed to install new access steps did not indicate permissive use or break continuity of prescriptive use).

Neither good faith nor deliberate wrongdoing is required for adverse use.

City of Tonawanda v. Ellicott Creek Homeowners Ass’n, 86 A.D.2d 118, 449 N.Y.S.2d 116 (1982), appeal dismissed, 58 N.Y.2d 824 (1983) (admission that title of the land rested in another did not defeat claim to easement by prescription, although it would defeat a claim to title by adverse possession).

Hay v. Stevens, 262 Or. 193, 497 P.2d 362 (1972) (adverse use of pathways from plaintiffs’ land to the beach not negated by disavowal of ownership of the land and statement that they would have discontinued use if the defendants had made them stop; a use is adverse even if made in recognition of the wrongfulness of the use and of the authority of the owner to prevent it).

In Dunbar v. Heinrich, 95 Wash. 2d 20, 622 P.2d 812 (1980), the court rejected precedents requiring that the claimant by prescription hold a subjective good-faith claim of right to the servitude. It held that the claimant who believed for several years that the road was public, but continued to use it after learning that it was private, had acquired an easement by prescription.


Use that begins as permissive does not become adverse unless the license (created by grant of permission) is repudiated.

Hunter v. Shields, 953 P.2d 588 (Idaho 1998) (use by licensee even after license expired was not adverse; to hold that permission granted automatically expired on transfer of benefited property would impose too great a burden on servient owner).

Boggs v. Burton, 547 S.W.2d 786 (Ky.Ct.App.1977) (benefit of covenant granting servient owner right to tap into any gas line constructed over servient estate and to purchase gas at rate of $.40 per thousand cubic feet not acquired by prescription by person who had maintained distribution system to 70 residential customers since 1943; evidence showed that original use was permissive; subsequent assignments by gas distributors did not convert use to adverse).

Delk v. Hill, 89 N.C.App. 83, 365 S.E.2d 218 (1988), review denied, 370 S.E.2d 244 (N.C.1988), held that use begun under
an oral grant of an easement was permissive because the oral grant created a license, but that, on the death of the licensee, the license terminated and use by his successors was adverse.

Chournos v. Alkema, 27 Utah 2d 244, 494 P.2d 950 (1972) (private way acquired by prescriptive use, as well as by implication, even though road was originally built with permission of the servient owner).

A request for permission after the prescriptive period has run does not extinguish a servitude previously acquired by prescription, but may indicate that no servitude was previously acquired because the earlier use was not adverse.

Zehner v. Fink, 19 Md.App. 338, 311 A.2d 477 (1973) (request for permission after prescriptive period has expired does not affect previously acquired easement unless request indicates that the prior use was not under claim of right).

Kusmierz v. Herman, 569 N.Y.S.2d 312 (App.Div.1991) (admission in 1976 that plaintiffs owned disputed strip did not necessarily destroy a matured prescriptive right where defendant alleged prescriptive use by predecessors in title back at least to 1930 and possibly back into 1800s).

Walley v. Iraca, 360 Pa.Super. 436, 520 A.2d 886 (1987) (claimant’s request for permission to use the road more than 30 years after he claimed to have begun using it under claim of right was relevant in determining claimant’s credibility in claiming to have used the road continuously during that period, though not sufficient to establish that use was permissive since it took place after period had run).

Use by lessees and cotenants must be examined carefully to determine whether and as to whom it may be adverse.

Illustration 14 is based on Ludwig v. Gosline, 191 N.J.Super. 188, 465 A.2d 946 (App.Div.1983) (lessee acquired easement by prescription against leasehold estate on adjacent property; fact that both parties had same lessor was irrelevant).

Illustration 16 is based on United States v. 43.12 Acres of Land, 554 F.Supp. 1039 (W.D.Mo.1983) (use by tenant of both alleged dominant and servient estate cannot be adverse to servient estate).

Illustration 18 is based on Crigger v. Florida Power Corp., 436 So.2d 937 (Fla.Dist.Ct.App.1983), appeal after remand, 469 So.2d 941 (Fla.App.1985) (power company grantee of easement from 1/8 owner did not acquire prescriptive rights against the remaining 7/8ths because use was not hostile as to them).

Thornhill v. Caroline Hunt Trust Est., 594 So.2d 1150 (Miss.1992) (installation and maintenance of pipeline pursuant to grant of right of way over homestead property void for lack of wife’s joinder held permissive on ground that ineffective grant was license).

Presumptions as to initial character of use, Comment g.

Presumption That Unexplained Use Is Adverse

The majority of states recognize a presumption of adverse use arising from evidence of use for the prescriptive period without evidence establishing that the initial use was permissive. United States v. 43.12 Acres of Land, 554 F.Supp. 1039 (W.D.Mo.1983) (open, notorious, continuous, and uninterrupted use for longer than 10-year period raises a presumption that the use was adverse and under claim of right); Brown v. Ware, 129 Ariz. 249, 630 P.2d 545 (Ct.App.1981); MacDonald Properties, Inc. v. Bel-Air Country Club, 72 Cal.App.3d 693, 140 Cal.Rptr. 367 (1977) (undisputed use for 5-year prescriptive period raises presumption of claim of right and puts burden on party resisting easement to prove permissive use); Durbin v. Bonanza Corp., 716 P.2d 1124 (Colo.Ct.App.1986) (presumption of adverse use from use of easement for more than 18 years); Auslaender v. MacMillan, 696 P.2d 836 (Colo.Ct.App.1984) (prescriptive right established by 18 years’ use of road after abandonment by State Highway Commission); Chancey v. Georgia Power Co., 238 Ga. 397, 233 S.E.2d 365 (1977) (presumption strengthened by erection of valuable improvements for use of easement); Marshall v. Blair, 946 P.2d 975 (Idaho 1997) (evidence of use of road by general public rebuts presumption that long-continued use of road is adverse and shifts burden to claimant to show that use was not permissive; construction of gate, care for portion of lane, disregard of
no trespassing signs established that use was not permissive and was in excess of public use); Lorang v. Hunt, 107 Idaho 802, 693 P.2d 448 (1984) (presumption of adverse use arises from proof of elements without evidence as to how the use began).

Light v. Steward, 128 Ill.App.3d 587, 83 Ill.Dec. 760, 470 N.E.2d 1180 (1984) (rebuttable presumption of adversity arises from open, uninterrupted, continuous, and exclusive use for more than 20 years if the origin of the way is not shown); Smith v. Mervis, 38 Ill.App.3d 731, 348 N.E.2d 463 (1976) (use for 20 years gives rise to presumption of adversity); Greencro, Inc. v. May, 506 N.E.2d 42 (Ind.Ct.App.1987) (open and notorious use for the period establishes a rebuttable presumption of adverse use); Jost v. Resta, 536 A.2d 1113 (Me.1988) (unmolested open and continuous use of way for 20 years with knowledge and acquiescence of owner raises presumption that use was adverse and under claim of right); Potomac Elec. Power Co. v. Lytle, 23 Md.App. 530, 328 A.2d 69 (1974) (presumption of adverse use not overcome by evidence that owner had stated “you can always come through my property” because it could have indicated either permission or prior parol grant of an easement); Zehner v. Fink, 19 Md.App. 338, 311 A.2d 477 (1973) (use of a right of way for 20 years is presumed to be adverse and under a claim of right).

Brooks, Gill & Co. v. Landmark Properties, 23 Mass.App.Ct. 528, 503 N.E.2d 983 (1987) (unexplained use of easement for 20 years raises presumption that use is adverse and under claim of right); Widmayer v. Leonard, 422 Mich. 280, 373 N.W.2d 538 (1985); Block v. Sexton, 577 N.W.2d 521 (Mich.1998); Nordin v. Kuno, 287 N.W.2d 923 (Minn.1980); Burns v. Pflechecki, 301 Minn. 445, 223 N.W.2d 133 (1974) (open, visible, continuous, and unmolested use for 15 years inconsistent with rights of owner and under circumstances from which owner’s knowledge and acquiescence may be inferred gives rise to presumption that use is under claim of right and adverse); Neale v. Kottwitz, 769 S.W.2d 474 (Mo.Ct.App.1989) (presumption of adverse use raised by evidence of use for logging, pasturing cattle, and farming since 1918 not rebutted; permission given to use the road after prescriptive period had elapsed had no effect); Day v. Grisham, 571 S.W.2d 473 (Mo.Ct.App.1978) (evidence of successive periods of open use of strip as a road since 1895 without evidence to explain how it began raised presumption of adverse use); Lemont Land Corp. v. Rogers, 887 P.2d 724 (Mont.1994) (presumption of adverse use arises after claimant establishes that use was open and notorious, continuous and uninterrupted); Parker v. Elder, 233 Mont. 75, 758 P.2d 292 (1988), appeal after remand, 836 P.2d 1236 (Mont.1992) (testimony of use of road by prior owners from 1917 to 1941 for access from the homestead to the county road raised presumption of adverse use sufficient to establish prescriptive easement prior to claimed grant of permission); Thomas v. Barnum, 211 Mont. 137, 684 P.2d 1106 (1984) (presumption exists to overcome general infirmity of human nature, difficulty of preserving muniments of title, and to promote public policy of supporting long and uninterrupted possessions); Mountain View Cemetery v. Granger, 175 Mont. 351, 574 P.2d 254 (1978) (presumption of adverse use raised by evidence that road had been maintained and plowed by cemetery for 45 years and used by 10 to 600 cars daily for access to cemetery); Yecny v. Day, 174 Mont. 442, 571 P.2d 386 (1977) (use of fenced private lane maintained without asking permission since before 1941 raised presumption of adverse use not overcome where there was no evidence demonstrating that use was result of neighborly accommodation); Lunceford v. Trenk, 163 Mont. 504, 518 P.2d 266 (1974) (open, notorious, exclusive use for 5 years raises presumption that such use is under claim of right and adverse and is sufficient to establish a title by prescription and to authorize presumption of a lost grant; failure to object is acquiescence not license).

Brocco v. Mileo, 170 A.D.2d 732, 565 N.Y.S.2d 602 (App.Div.1991) (evidence of use from 1929 to 1965 raised presumption that use was adverse and under a claim of right, not rebutted by evidence of permission granted after 1969, since easement acquired after 15 years); Reiss v. Maynard, 148 A.D.2d 996, 539 N.Y.S.2d 228 (1989), appeal after remand, 566 N.Y.S.2d 808 (N.Y.A.D.1991) (seasonal use of a roadway for access to claimant’s shooting preserve for 19 years raised presumption of adverse use); Kusmierz v. Baan, 144 A.D.2d 829, 534 N.Y.S.2d 786 (App.Div.1988) (open, notorious, and continuous use raises presumption that use is adverse; burden shifts to land owners to show that use was permissive); Solimini v. Pytlovany, 144 A.D.2d 801, 534 N.Y.S.2d 769 (App.Div.1988) (defendants’ proof that they warned plaintiffs to keep their child away from the eaves of their house, requested them not to heap snow at their basement windows, and that plaintiffs offered to pay for the right to use the eaves was insufficient as a matter of law to rebut presumption of hostility arising from proof of exclusive use and maintenance of driveway for 13 years without objection from defendants); Rendler v. Lincoln County, 76 Or.App. 339, 709 P.2d 721 (1985) (presumption arises from open and continuous use for prescriptive period); but see, Chambers v. Disney, 65 Or.App. 684, 672 P.2d 711 (1983) (presumption weakening); Keefer v. Jones, 467 Pa. 544, 359 A.2d 735 (1976) (burden on servient owner to show use began on permissive basis); Homer v. Smith, 866 P.2d 622 (Utah Ct.App.1993) (law presumes use of another’s property is adverse if elements of prescriptive easement are otherwise satisfied); Russell v. Pare, 132 Vt. 397, 321 A.2d 77, 72 A.L.R.3d 637 (1974) (open and notorious use gives rise to presumption of claim of right); Umbarger v. Phillips, 240 Va. 120, 393 S.E.2d 198 (1990) (open, visible, continuous, and exclusive use for more than 20 years is presumed adverse; daily use for over 40 years as sole access to home raised presumption);
68, 360 S.E.2d 179 (1987) (open, visible, continuous, unmolested use for 20 years presumed under claim of right); Markham v. Hall, 215 Va. 683, 212 S.E.2d 302 (1975) (presumption of adversity did not arise because there was evidence that permissive use of the road began in 1918); Ludke v. Egan, 87 Wis.2d 221, 274 N.W.2d 641 (1979) (unexplained 20-year use presumed adverse under claim of right).

**Evidence That Overcomes General Presumption of Nonpermissive Use**

**a. Wild, vacant, and unenclosed land.** Evidence that the claimed servient estate was wild, vacant, and unenclosed overcomes the general presumption that unexplained use is adverse. Stahl v. Thompson, 6 Ark.App. 275, 641 S.W.2d 721 (1982) (wild, unenclosed, and unimproved); Durbin v. Bonanza Corp., 716 P.2d 1124 (Colo.Ct.App.1986) (vacant, unenclosed, and unoccupied); Henderson v. Cam Development Co., 190 Ga.App. 199, 378 S.E.2d 495 (1989) (land containing picnic area and old dilapidated barn was not “wild” land within meaning of Georgia statute providing 20-year period for prescription rather than 7-year period provided for improved land); Wood v. Hoglund, 963 P.2d 383 (Idaho 1998) (presumption of adverse use applies if land is improved even if also wild and unenclosed); Melendez v. Hintz, 111 Idaho 401, 724 P.2d 137 (1986) (wild and unenclosed); Christle v. Scott, 110 Idaho 829, 718 P.2d 1267 ( Ct.App.1986) (unimproved, wild, and remote); West v. Smith, 95 Idaho 550, 511 P.2d 1326 (1973) (property where claimant maintained houseboat was moored to pilings and catwalk connecting it to shore not wild land, even though unimproved); Light v. Steward, 128 Ill.App.3d 587, 83 Ill.Dec. 760, 470 N.E.2d 1180 (1984) (vacant and unenclosed); Gill Grain Co. v. Poos, 707 S.W.2d 434 (Mo.Ct.App.1986) (exception does not apply to unenclosed land; where use is not wild, rough, or unsettled); Carpenter—Union Hills Cemetery Ass’n v. Camp Zoe, Inc., 547 S.W.2d 196 (Mo.Ct.App.1977) (wild and unenclosed land exception did not apply to road that passed through area of farm homes and buildings, 2 school houses, hay field, fenced areas, cemetery, and summer camp).

Gerberding v. Schnakenberg, 216 Neb. 200, 343 N.W.2d 62 (1984) (unenclosed). Connot v. Bowden, 189 Neb. 97, 200 N.W.2d 126 (1972) (“In the vast holdings of grazing lands in western Nebraska, many well-defined trails may be found which are accessible to all through gates provided. Entry by nonowners of the land for various purposes cannot ordinarily be deemed to be adverse. It is not under claim of right but generally recognized as permissive in nature.”). But see Svoboda v. Johnson, 204 Neb. 57, 281 N.W.2d 892 (1979) (presumption of hostile use arises with respect to unenclosed land if there is a well-defined path or roadway).


**b. Facility built and used by owner.** The presumption of nonpermissive use is often overcome by evidence that the road or other facility used was built by the owner of the claimed servient estate and used by the owner during the claimed prescriptive period. In some states, the owner of the servient estate need show only that the road was in existence when the claimed adverse use began. Durbin v. Bonanza Corp., 716 P.2d 1124 (Colo.Ct.App.1986) (proof that owner of servient estate constructed passageway at own expense); Bomareto v. Snow., 516 P.2d 443 (Colo.Ct.App.1973) (presumption of hostility arising from 18 years’ use does not apply to joint use of a drive with the owner of the land, but does apply to drive used solely for access to claimant’s property); Melendez v. Hintz, 111 Idaho 401, 724 P.2d 137 (1986) (presumption of adverse use overcome when owner constructs a way for own use and others use it in a way that does not interfere); Gerberding v. Schnakenberg, 216 Neb. 200, 343 N.W.2d 62 (1984) (road opened by landowner for his own purposes); Wilfon v. Cyril Hampel 1985 Trust, 105 Nev. 607, 781 P.2d 769 (1989) (long use of road to service propane tank and billboard did not justify a finding that the use was adverse where the evidence did not establish that the road was built by anyone other than landowner and neighbor’s use did not interfere with landowner’s use); Jackson v. Hicks, 95 Nev. 826, 604 P.2d 105 (1979) (neighbor’s use and maintenance of road established by servient owner for his own use which does not interfere with servient owner’s use); Gilman v. McCrary, 97 N.M. 376, 640 P.2d 482 (1982) (use of road in common with servient owner not presumptively permissive).
Stone v. Henry Enterprises, Inc., 95 Or.App. 355, 768 P.2d 442 (1989), applied rule from Woods v. Hart, 254 Or. 434, 458 P.2d 945 (1969), that evidence that the claimant has used an established way in a manner that did not interfere with the owner’s use rebuts the presumption of adverseness that arises from uninterrupted use for the prescriptive period. Read v. Dokey, 92 Or.App. 298, 758 P.2d 399 (1988) (presumption of adversity from 10 years’ open, continuous use rebutted if there is no evidence to show that claimant built the road and claimant’s use was not exclusive); Chambers v. Disney, 65 Or.App. 684, 672 P.2d 711 (1983) (court becoming more reluctant to find adverse use; more reasonable to assume that use of road, in existence since at least 1892, across 9600-acre ranch to 40-acre parcel was pursuant to friendly arrangement than to assume user was making adverse claim; joint use rebuts any presumption of adversity); Trewin v. Hunter, 271 Or. 245, 531 P.2d 899 (1975) (presumption that road used in common by dominant and servient owner was constructed by servient owner for own benefit).

In Texas, use of a road in common with the servient owner is presumed permissive whether or not the servient owner built the road. Wilson v. McGuffin, 749 S.W.2d 606 (Tex.Ct.App.1988) (use of road by claimant that does not exclude use by landowner is not adverse); Brooks v. Jones, 578 S.W.2d 669 (Tex.1979); Othen v. Rosier, 148 Tex. 485, 226 S.W.2d 622 (1950). Evidence that use of the road by the claimant interfered with use by the servient owner overcomes the rebuttal of the presumption of adverse use. Bulatovich v. Easton, 435 N.E.2d 997 (Ind.Ct.App.1982) (use of drive interfered with servient owner’s ability to park on drive so exception for drive built by owner used by others without interference did not apply).

c. Close relationship between claimant and land owner. Evidence that the claimed adverse user and owner or possessor of the claimed servient estate enjoyed a close relationship as kin or as neighbors may overcome the presumption that unexplained use is adverse. Chaconas v. Meyers, 465 A.2d 379 (D.C.Ct.App.1983) (presumption of adverse claim raised by 15 years of open and continuous use rebutted by evidence of friendly interaction, neighborly accommodation, and facilitation of use by claimant); Deboe v. Flick, 172 Ill.App.3d 673, 122 Ill.Dec. 520, 526 N.E.2d 913 (1988) (evidence of friendly relations among neighbors overcomes presumption that use of adjoining driveway was adverse); Reed v. Soltys, 106 Mich.App. 341, 308 N.W.2d 201 (1981) (evidence that neighbors were friends); Burns v. Plachecki, 301 Minn. 445, 223 N.W.2d 133 (1974) (close family relationship between parties’ predecessors created implication that use of road was permissive); Pickar v. Erickson, 382 N.W.2d 536 (Minn.Ct.App.1986); Brown v. Tintinger, 245 Mont. 373, 801 P.2d 607 (1990) (testimony of prior owner that he was good friends with the claimant and that claimant “definitely” had his permission to use the road was sufficient basis to overcome the presumption of adverse use); Ewan v. Stenberg, 168 Mont. 63, 541 P.2d 60 (1975) (neighborly cooperation between friendly ranchers prevented acquisition of prescriptive right to trail cattle down from summer pasture each fall; posting of property during hunting season did not affect permissive character of plaintiff’s use).

Cope v. Cope, 158 Mont. 388, 493 P.2d 336 (1971), held no prescriptive easement had been acquired by a landlocked owner against adjacent land owned by family members. Permissive nature of the use can be inferred from the family relationship and the presence of five gates through which the road passed. To negate the permissive character of the use, the claimant would have to show a distinct and positive assertion of a right hostile to the servient owner or a clear, positive, and continued disavowal of title by the servient owner. The court noted that the presence of gates that must be opened by the user is generally strong evidence of permissive use.

Wilfon v. Cyril Hampel 1985 Trust, 105 Nev. 607, 781 P.2d 769 (1989) (neighbor’s use held to be result of neighborly accommodation); Leach v. Anderl, 218 N.J.Super. 18, 526 A.2d 1096 (App.Div.1987) (presumption rebutted by evidence of neighborly relation between parties); Boumis v. Caetano, 140 A.D.2d 401, 528 N.Y.S.2d 104 (1988) (presumption of adverse use rebutted by evidence that plaintiff’s predecessor had a relationship of cooperation and accommodation with defendants and had asked for and received permission to use defendant’s part of the alley); Hassinger v. Kline, 91 A.D.2d 988, 457 N.Y.S.2d 847 (1983) (neighborly relation between parties’ predecessors created implication that use of road was permissive); Weinberg v. Shafler, 68 A.D.2d 944, 414 N.Y.S.2d 61 (1979), aff’d, 50 N.Y.2d 876, 430 N.Y.S.2d 55, 407 N.E.2d 1351 (1980) (no prescriptive easement established by use of path to swimming area for 32 years because presumption of hostility rebutted by showing that servient lands belonged to members of the same family); Granston v. Callahan, 52 Wash.App.288, 759 P.2d 462 (1988) (use by 2 brothers of each other’s property for walk, driveway, and other improvements presumed to be permissive because of close family relation).

Contra, Homer v. Smith, 866 P.2d 622 (Utah Ct.App.1993) (evidence of family ties does not create a presumption that would overcome normal presumption and shift burden to claimant to show that use was adverse).
Additional evidence may overcome the rebuttal of the presumption of adverse use by evidence of a close relationship. Burrows v. Dintlemann, 41 Ill.App.3d 83, 353 N.E.2d 708 (1976) (presumption of permissive use arising out of neighborly relation and vacant, unenclosed nature of land overcome by evidence that user had successfully objected to efforts to block the road and had made statements to servient owner that he had a right to use road); Reed v. Piedimonte, 138 A.D.2d 937, 526 N.Y.S.2d 273 (1988) (claim of neighborly accommodation negated by erection of temporary barriers to claimant’s use of driveway on several occasions).

do. Local custom of neighborly accommodation. The presumption that an unexplained use is adverse is overcome in some states by evidence of a local custom of neighborly accommodation. Greenwalt Family Trust v. Kehler, 885 P.2d 421 (Mont.1994) (local custom of allowing neighbors to cross the edges of neighboring fields is considered permission preventing acquisition of prescriptive rights). cf. Lemont Land Corp. v. Rogers, 887 P.2d 724 (Mont.1994) (presumption of adverse use not overcome where there was no affirmative evidence of local custom); Thomas v. Barnum, 211 Mont. 137, 684 P.2d 1106 (1984) (presumption of hostility not rebutted by evidence that road was probably built by homesteaders around 1900 where old-timer testified that all used the road without permission and no one needed permission); Crites v. Koch, 49 Wash.App. 171, 741 P.2d 1005 (1987) (common practice of farmers to cross and park equipment on neighbors’ fields was neighborly accommodation and did not give rise to prescriptive rights).

Presumption That Unexplained Use Is Permissive

A minority of states presumes that use of land belonging to another is permissive. Hollis v. Tomlinson, 585 So.2d 862 (Ala.1991); Carr v. Turner, 575 So.2d 1066 (Ala.1991) (presumption of permissive use); Ford v. Alabama By—Products Corp., 392 So.2d 217 (Ala.1980) (lengthy use of road through wooded land does not overcome presumption that use is permissive); Cotton v. May, 301 So.2d 168 (Ala.1974) (unexplained use of land is presumed a neighborly accommodation; presumption not overcome by testimony of witnesses that they never had to ask permission to use the road to get to claimant’s farm); Hendrix v. Creel, 292 Ala. 541, 297 So.2d 364 (1974) (proof that city had maintained drainage ditches on private land for over 20 years not sufficient to sustain claim by neighbors that city had acquired a prescriptive easement that could not be blocked by land owner because no proof that use was not permissive); Fesperman v. Grier, 294 Ala. 163, 313 So.2d 525 (1975) (evidence that claimants used drive exclusively except when servient owner asked permission to use it overcame presumption of permissive use); Crigger v. Florida Power Corp., 436 So.2d 937 (Fla.Dist.Ct.App.1983); Deseret Ranches of Florida, Inc. v. Bowman, 389 So.2d 1072 (Fla.Dist.Ct.App.1980); Dethlefs v. Beau Maison Dev. Corp., 511 So.2d 112 (Miss.1987) (in the absence of evidence as to who installed underground drain pipe use presumed permissive); Dickinson v. Pake, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900-01 (1974); Johnson v. Stanley, 96 N.C.App. 72, 384 S.E.2d 577 (1989) (60 years’ use as primary means to reach plaintiff’s farm from highway did not overcome presumption); Amos v. Bateman, 68 N.C.App. 46, 314 S.E.2d 129 (1984) (presumption of permissive use strengthened by familial relation); Clifton v. Fesperman, 50 N.C.App. 178, 272 S.E.2d 624 (1980) (presumption of permissive use not overcome by evidence that 10-foot strip had been used since 1944 for access to claimant’s land); Caribou Four Corners, Inc. v. Chapple-Hawkes, Inc., 643 P.2d 468 (Wyo.1982) (prescriptive easements are not favored; it is judicially unpopular to take another’s land; entry into another’s possession is presumed permissive without evidence of hostility); Weiss v. Pedersen, 933 P.2d 495 (Wyo.1997) (claimant bears burden to show that use of easement was hostile or adverse; use is presumed permissive even though it is open, notorious, continuous, and uninterrupted for prescriptive period).

Evidence That Overcomes Presumption of Permissive Use

a. Sole access to dominant estate. Evidence that the claimed servitude provides the sole access to the claimed dominant estate has been held to overcome the general presumption of permissive use. Apley v. Tagert, 584 So.2d 816 (Ala.1991) (sole access to house used for over 30 years by claimants, visitors, delivery people, mail carriers, garbage collectors, and meter readers); Roberts v. Wilbur, 554 So.2d 1029 (Ala.1989) (evidence that claimant had lived in house served by road since 1938 and that road may have been only means of access for many years sufficient to support trial court’s finding of adverse use); Fisher v. Higginbotham, 406 So.2d 888 (Ala.1981) (evidence that road had been used for more than 20 years for access to a dwelling and provided only means of vehicular access sufficient to overcome presumption of permissive user); Potts v. Burnette, 301 N.C. 663, 273 S.E.2d 285 (1981) (evidence of 50 years’ use of road giving sole access to claimant’s property sufficient to support finding of hostility); Richardson v. Brennan, 92 Nev. 236, 548 P.2d 1370 (1976) (no presumption of
permissive use of drive arises where road was only means of access to dominant estate and was not established by owner of servient estate for his own use); Dickinson v. Pake, 284 N.C. 576, 201 S.E.2d 897 (1974) (presumption of permissive use overcome by evidence that road used by locals since 1915 was sole access to property from 1938, when plaintiff’s mother moved there with 4 children, until 1968 when defendant blocked it, and claimants performed what slight amount of maintenance was required, and testified that they believed the road was theirs).

b. Maintenance or other contribution by user: Evidence that the user invested in facilities for enjoyment of the claimed servitude may overcome the presumption of permissive use. Delk v. Hill, 89 N.C.App. 83, 365 S.E.2d 218 (1988) (presumption rebutted by evidence that claimant’s predecessor bought the right of way, maintained it, and incurred expenses to relocate it at defendant’s request only because they believed they owned it); Perry v. Williams, 84 N.C.App. 527, 353 S.E.2d 226 (1987) (evidence of maintenance by claimants and statements that they believed they had right to use road sufficient to overcome presumption of permissive use); Walter v. Martinson, 276 Or. 411, 555 P.2d 21 (1976) (evidence that road in existence since 1897 had been built by claimant’s predecessor and used since then by claimant and predecessor without asking permission established prescriptive rights); Gray v. McDonald, 46 Wash.2d 574, 283 P.2d 135 (1955) (presumption of permissive use overcome by evidence that claimants had used street from 1910 on, had declined offer to sell them an interest in it in 1938, paid maintenance expenses, and complained if servient owner parked cars in it).

No general presumption. In a few states, no presumption as to the initial character of the use arises from evidence of use for the prescriptive period. The burden is on the claimant to show that the use was not permissive.

Swift v. Kniffen, 706 P.2d 296 (Alaska 1985) (remanded for determination whether owner intended to permit use of road in subdivision or whether claimant’s continued use was result of acquiescence); Chapin v. Talbot, 13 Ark.App. 53, 679 S.W.2d 219 (1984) (mere use for 7 years is not enough to give rise to presumption of a grant; some additional circumstance required that indicates use not merely permissive; use coupled with maintenance sufficient to support finding of adverse use); Reynolds v. Soffer, 190 Conn. 184, 459 A.2d 1027 (1983) (no presumption of permissive use, even when the land is open, unenclosed, and unimproved; claimant must show by fair preponderance of the evidence that use was adverse); Vigeant v. Donel Realty Trust, 130 N.H. 406, 540 A.2d 1243 (1988) (no prescriptive easement because claimant failed to prove that use prior to 1950 was not permissive); Altieri v. Dolan, 423 A.2d 482 (R.I.1980) (no presumption from long-continued use); Smith v. Breen, 26 Wash. App. 802, 614 P.2d 671 (1980) (Washington rejects common-law presumption that adversity is presumed from use without challenge for the statutory period; unchallenged use is a circumstance from which an inference may be drawn that use was adverse); Crites v. Koch, 49 Wash.App. 171, 741 P.2d 1005 (1987) (initial use is presumed to be permissive; unchallenged use for prescriptive period is circumstance from which finding of adverse use may be drawn).

Presence of Gates Inconclusive

The presence of gates across an easement is not conclusive evidence that the use is by permission of the landowner. The gates may have been intended for some purpose other than assertion of the landowner’s paramount title as to the claimed adverse user.

Pfeifer v. Dunn, 257 Ark. 863, 520 S.W.2d 718 (1975), held that landowner’s failure to object to erection of a gate by common users of a road built across the edges of their several adjacent parcels to replace a prior public road that had washed away did not establish that the use was permissive. The gate was to protect all owners along the road from public use and vandalism.


Light v. Steward, 128 Ill.App.3d 587, 83 Ill.Dec. 760, 470 N.E.2d 1180 (1984) (fact that there was a gate between claimed servient estate and public road did not negate adverse use of private drive for access to public road); Parker v. Elder, 233 Mont. 75, 758 P.2d 292 (1988) (presence of gates did not rebut the presumption of adverse use where evidence showed that gate was to control cattle rather than people).

gate not regarded as hindrance by hunters and local ranchers who used the road did not overcome presumption of hostile use); Garrett v. Jackson, 183 Mont. 505, 600 P.2d 1177 (1979) (presumption of adverse use not rebutted by evidence that user rewired fence after cutting gate because rewiring was to protect livestock, or by request for written easement when denial was followed by continued use of the road); Montana State Fish & Game Comm’n v. Cronin, 179 Mont. 481, 587 P.2d 395 (1978) (presence of gate is not alone sufficient to establish permissive use).

Critchlow v. Critchlow, 532 P.2d 216 (Utah 1975), held that use of a mountain road across a tract lying between two tracts owned by the Critchlows to run and salt cattle during the spring and fall migrations was not adverse. Although the owners of the intervening tract had locked out the Critchlows on more than one occasion, they had furnished them with a key to open the gate.

Crane v. Crane, 683 P.2d 1062 (Utah 1984) (provision of key to gate by servient owner to claimant of easement to drive cattle through in spring and fall did not negate hostility of use; easement claimant testified that they would (and some years did) simply cut the fences if they were locked out; provision of key may have been recognition of their right to use the trail).

Prescriptive uses under subsection (2): express intent to create the servitude. Comment h. There is little disagreement that use pursuant to an oral grant or agreement to create a servitude is a prescriptive use. Although the use is not tortious, courts have generally characterized it as adverse. Under the approach taken in this section, the use would be characterized as prescriptive because made pursuant to an imperfectly created servitude, rather than adverse. See Annotation, Adverse Possession Under Parol Gift of Land, 43 A.L.R.2d 6 (1955) (there is almost no conflict in principle that possessor under parol gift is adverse possessor; Virginia is the exception, holding that possession is permissive). Long-term observance of subdivision or common-interest-community covenants may also cure formal defects in creation arising from recording problems or failure to comply with other required formalities.

Reynolds v. Soffer, 190 Conn. 184, 459 A.2d 1027 (1983) (that deeds to both alleged dominant and servient estates refer to easement is prima facie evidence of adverse use); Klar Crest Realty, Inc. v. Rajon Realty Corp., 190 Conn. 163, 459 A.2d 1021, 1024 (1983) (grant of easement, ineffective as to a portion of the road not owned by the grantor, confirmed that use was adverse and made under a claim of right); DiPaola v. Housing Auth., 33 Conn.Sup. 576, 363 A.2d 753 (1976) (installation of water tank and use of right of way to service it pursuant to agreement to convey land in which tank was located and easement for right of way was use under claim of right even though conveyance never made); Klein v. DeRosa, 137 Conn. 586, 589, 79 A.2d 773, 775 (1951) (“We have frequently recognized the significance of an ineffective grant or unenforceable agreement as a basis for establishing the adverse character of use or possession.”).

McLean v. Turtle Cove Prop. Ass’n, Inc., 475 S.E.2d 718 (Ga.Ct.App.1996) (failure to record a supplementary declaration of covenants for each addition made to development, pursuant to requirement set forth in original declaration did not prevent association from collecting assessments from lots in the many additions made to development; plats of additions referenced the original declaration, and association and landowners acted on assumption that all additions were subject to original declaration for more than 20 years; all landowners had paid dues and association provided maintenance of common areas and other benefits to all lot owners).

National Properties Corp. v. Polk County, 386 N.W.2d 98 (Iowa 1986) (drainage-ditch easements created by prescription where original entry is under oral agreement or express consent and party claiming easement expends substantial money or labor and usage has continued more than 10 years).

Kirby v. Hook, 701 A.2d 397 (Md.1997) (use pursuant to oral grant of easement for pipeline for water from spring was adverse).

Thornhill v. Caroline Hunt Trust Estate, 594 So.2d 1150 (Miss.1992), held that installation and maintenance of a pipeline, pursuant to right-of-way grant over homestead property void for failure of the wife to join in the conveyance, was permissive because the grantee received only a license by the void grant. This case is inconsistent with the rule stated in this section in holding that the use was permissive. As to the husband, the use was prescriptive under subsection (2) because made pursuant to an ineffective grant. As to the wife, the use was adverse under the rule stated in subsection (1) because not authorized by her.

Hodges v. Lambeth, 731 S.W.2d 880 (Mo.Ct.App.1987) (belligerence not required; use is adverse if user does not recognize
any authority in those against whom it is claimed to prevent or permit its continuance; deed providing for easement and representations by both grantor and owner of servient estate that road was open and available for their use established that grantees of alleged dominant estate used under claim of right).

Staudinger v. DeVries, 177 Mont. 189, 581 P.2d 1 (1978) (use of road by farmers and residents who split costs of maintenance with servient owner’s predecessor, who testified that they used the road without restriction, was sufficient to raise presumption of acquiescence by owner rather than permission; users testified they used and installed livestock passes in fences across road without permission). The facts in the case would justify the conclusion that there was an implied agreement to create a servitude.

Kimco Add’n, Inc. v. Lower Platte South Nat. Res. Dist., 232 Neb. 289, 440 N.W.2d 456 (1989), held that a use that began with express permission of the landowner did not become adverse when the landowner confirmed it with a written easement that was not recorded. In reaching this conclusion, the court relied on McCaslin v. Meysenburg, 228 Neb. 748, 424 N.W.2d 331 (1988), which held that title to a strip of land used pursuant to an unrecorded easement had not been acquired by adverse possession because the use did not change and the user did not give notice that title was claimed rather than an easement. Although the court characterized the use pursuant to the unrecorded easement as permissive, the statement must be understood in context. Use pursuant to the easement was not wrongful and thus could not found a claim to title by adverse possession. However, use pursuant to the unrecorded easement should have been sufficient to perfect title to the easement, a claim that was not raised in the case.

Darsaklis v. Schildt, 218 Neb. 605, 358 N.W.2d 186 (1984) (oral agreement to accept a reasonable amount of waste water, but not enough to do damage, not definite enough to constitute contract to grant an easement; discharge of waste-irrigation water was permissive use).

Washburn v. Esser, 9 Wash.App. 169, 511 P.2d 1387 (1973), held that the owners of four adjacent lots who shared the cost of construction and repair of an access road to a lake pursuant to an oral agreement acquired prescriptive rights to use the road. The use by each was adverse even though agreed to because the oral agreement established that it was under a claim of right.

Wheeling Stamping Co. v. Warwood Land Co., 412 S.E.2d 253 (W.Va.1991), held that use by railroad for right of way pursuant to unrecorded 1872 “release” executed by landowners in favor of railroad established a prescriptive easement, not title by adverse possession, where release could not be located and records did not reflect the interest granted.

Prescriptive uses under subsection (2): implied intent to create the servitude, Comment i.Use of common drives, fences, party walls, and other common facilities can give rise to prescriptive rights without express agreement to create a servitude. Although courts often explain the result by describing the use as adverse, the explanation offered in this section is that construction and use of the common facility imply the existence of an agreement to create a servitude. Courts that refuse to recognize prescriptive rights arising out of use of common drives and other facilities tend to be those which presume that unexplained uses are permissive rather than adverse (see Reporter’s Note to Comment g, supra).

Apley v. Tagert, 584 So.2d 816 (Ala.1991) (prescriptive easement acquired in road passing serially over properties of claimant and servient owner and paved by both).


Frandorson Properties v. Northwestern Mut. Life Ins. Co., 744 F.Supp. 154 (W.D.Mich.1990) (prescriptive easement does not arise out of mutual use of a driveway until mutuality ends and adverse user commences and continues for statutory period; distinct and positive assertion of right hostile to owner and brought home to him is necessary to begin period).


Krinke v. Faricy, 304 Minn. 450, 231 N.W.2d 491 (1975), applied the presumption of adverse use to use of a common driveway.

Jacobs v. Brewster, 190 S.W.2d 894 (Mo.1945) (after construction of common garage and drive along boundary at joint expense, use was not permissive but as of right; letter written by 1 owner 2 years later stating that he did not think it wise to grant formal easements because he wanted to reserve the right to tear up the drive and build a fence did not change the character of the use to permissive or interrupt the adverse use).

Poepping v. Neil, 159 Mont. 488, 499 P.2d 319 (1972), held that evidence of joint use of a driveway and access road by adjoining neighbors indicated permissive use.

Masid v. First State Bank, 213 Neb. 431, 329 N.W.2d 560 (1983) (use of alley by neighbors who each contribute land is mutually adverse to separate and exclusive use by either and if continued for prescriptive period establishes mutual easements).

Fischer v. Grinsbergs, 198 Neb. 329, 252 N.W.2d 619 (1977) (adopts majority view that use of common drive along boundary is presumed adverse).

Plaza v. Flak, 7 N.J. 215, 81 A.2d 137, 27 A.L.R.2d 324 (1951) (general rule is that where adjoining proprietors lay out a way between their lands, each devoting some portion of their premises to the purpose, and the area is used for the prescriptive period, neither can obstruct or close that portion within his own land; mutual use of the whole of the way is adverse to separate or exclusive use by either).

Kaufman v. Eidelberg, 78 A.D.2d 674, 432 N.Y.S.2d 401 (1980) (use of concrete path between 2 houses for access to rear side door and backyard by delivery men and others for over 40 years established prescriptive rights).

Cannon v. Sikora, 142 A.D.2d 662, 531 N.Y.S.2d 99 (1988) (shared use of a driveway for the prescriptive period raises a presumption of adverse use; claimant’s contribution to the cost of paving the drive and for removal of snow and debris indicated that use was not merely the result of neighborly accommodation).

Borruso v. Morreale, 129 A.D.2d 604, 514 N.Y.S.2d 99 (1987) (common drive along boundary; burden on servient owner to establish that use was permissive).

Slater v. Ward, 92 A.D.2d 667, 460 N.Y.S.2d 150 (1983) (use of common drive hostile even though there was family relationship where parties’ predecessors testified that they used the drive regularly without asking for or receiving permission).


Altieri v. Dolan, 423 A.2d 482 (R.I.1980), indicates that Rhode Island does not recognize any presumption of adverse use from long-continued use, nor does it recognize the rule of Plaza v. Flak, 7 N.J. 215, 81 A.2d 137 (1951), that mutual use of a common driveway is adverse. The court upheld the trial court’s finding that use of a common drive for 40 years by neighbors who shared expenses and snow removal and operated in a friendly manner was not adverse. Plaintiffs are required to show some affirmative act constituting notice to defendant that their occupancy was hostile to the owner.

Illustration 29 is based on Keebler v. Street, 673 S.W.2d 154 (Tenn.Ct.App.1984) (where adjoining owners establish a driveway using part of land of each, use for the prescriptive period raises a presumption that use was adverse).

Smith v. Breen, 26 Wash. App. 802, 614 P.2d 671 (1980), held, that mutual prescriptive easements were established in a dirt road running astride the boundary line, which had been used jointly and amicably from the 1930s until about 1966. The court distinguished this case from those where one party has used a road solely on another’s land in common with the servient owner, where initial use is presumed permissive. Where each party uses the other’s land there is acquiescence in the easement and initial use is presumed adverse.
Prazma v. Kaehne, 768 P.2d 586 (Wyo.1989) (construction of new roadway by adjacent landowners, pursuant to agreement in 1932 to give access to their ranches and subsequent use was permissive).

Rights to continued use of a party wall for support can be acquired by prescription if the use is open or notorious. Like cases involving other common facilities, these are more easily understood as reflecting use pursuant to an implied agreement to create a servitude.


Cases can be found establishing prescriptive rights to continue to receive contribution toward the maintenance of joint facilities. See, e.g., Whittenton Mfg. Co. v. Staples, 164 Mass. 319, 41 N.E. 441, 29 L.R.A. 500 (1895) (right to receive payment for part of annual cost of maintaining dam). English law recognizes an easement requiring a neighboring landowner to repair his fences, which can be acquired by prescription, see R. Megarry & H. M. W. Wade, The Law of Real Property 908 (5th ed. 1984).

Other situations may provide the basis for an inference that the parties acted pursuant to an intended servitude.

Crescent Harbor Water Co. v. Lyseng, 51 Wash.App. 337, 753 P.2d 555 (1988), held that use by a water company for the well, pump, and pipes of the water system was adverse even though they were located on land belonging to two of the company’s three incorporators. From the articles of incorporation stating that the sole purpose of the corporation was to own the water system served by the well on the property and the fact that the corporation had assumed total responsibility for maintenance of the system, the only inference that could be drawn was that the original owners intended to grant the company a permanent right of access to and use of the well and water system. Use under those circumstances is adverse. Evidence of a former owner (a successor to the incorporators) that she believed the corporation used the well as of right was admissible on the question of adversity.

**Case Citations - by Jurisdiction**

Colo.
Colo.App.
Conn.
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2008. Coms. (f) and (g) quot. in sup. Landowner sued neighbor, seeking, in part, to bar neighbor from using a road over landowner’s property to access neighbor’s garage, and neighbor counterclaimed, alleging that he had a prescriptive easement over the road. After a bench trial, the trial court entered judgment for landowner. Vacating in part and remanding, this court concluded, inter alia, that the trial court erred in finding that neighbor failed to overcome a presumption that his use of the road was permissive. The court held that, after neighbor showed that he and his predecessor had used the road in an open, visible, continuous, and unchallenged manner for the requisite statutory period without having received express permission to do so, the proper presumption was that the use was under a claim of right, and the burden shifted to landowner to show that the use was with express or implied permission. Spaulding v. Pouliot, 218 Ariz. 196, 181 P.3d 243, 247-249.

Ariz.App.2002. Cit. in disc., cit. and quot. in sup., com. (a) quot. in sup., com. (b) cit. in sup., illus. 4 quot. in ftn. in sup. Putative dominant estate owner brought suit against putative servient estate owner to obtain an easement by prescription for portion of driveway extending onto defendant’s land. The trial court granted summary judgment for defendant. Reversing and remanding, this court held, inter alia, that an easement by prescription was created after the parties’ predecessors in title, who had orally agreed to the easement but had never recorded it, acted, together with their grantees, to recognize the easement for a period in excess of the prescriptive period of 10 years. Paxson v. Glovitz, 203 Ariz. 63, 50 P.3d 420, 423, 424, 426.


2013. Com. (f) cit. in sup. Property owner sued owners of two adjacent properties, seeking to establish a prescriptive easement over two access roads on defendants’ properties. After a nonjury trial, the trial court granted judgment in favor of defendants. Affirming, this court held that plaintiff was not entitled to a prescriptive easement, because plaintiff used the roads with express permission from one defendant, which had granted plaintiff a nonexclusive easement to use the roads on the two properties; in addition, plaintiff was equitably estopped from denying that that defendant had authority to grant an easement over the other defendant’s property. The court noted that a prescriptive easement was established by use of land for a period of five years that was open and notorious, continuous and uninterrupted, and adverse to the true owner, and that use with the owner’s permission was not adverse to the owner. Windsor Pacific LLC v. Samwood Co., Inc., 213 Cal.App.4th 263, 271, 152 Cal.Rptr.3d 518, 525.

Colo.

2008. Cit. in case quot. in sup. §§ 2.16-2.17. Dominant-estate owner sued servient-estate owners to enforce her alleged right to use an easement, which was expressly granted for sewer and water pipes and alley purposes, as a right-of-way for vehicle access between her property and another alley; defendants counterclaimed, among other things, that use of the easement as a right-of-way was terminated by adverse possession. The trial court entered judgment for plaintiff; the court of appeals reversed and remanded. This court reversed the court of appeals’ decision and affirmed the trial court’s ruling, holding, as a matter of first impression, that defendants’ use of the easement area was not adverse to plaintiff’s right to use the easement as a right-of-way, and did not trigger the statutorily mandated period of time for adverse possession, until plaintiff needed to use the easement in 2003. The court noted that the elements of a claim to terminate an easement by adverse possession mirrored the elements of a claim to create one by adverse possession. Matoush v. Lovingood, 177 P.3d 1262, 1270.

Colo.2004. Cit. in case quot. in diss. op., com. (f) cit. in diss. op. County sued owners of mining claims, seeking declaratory judgment that a route across owners’ property was a public road. Trial court granted county summary judgment, and court of appeals affirmed. This court reversed and remanded, holding that county failed to meet statutory claim-of-right requirement for establishment of a public road by prescription across the lands. Dissent disagreed with majority’s requirement that, for a public highway to be established by prescription, an official government entity had to make some formal action that the
majority called a “claim of right.” It argued that the court required only a showing of adverse use, which was synonymous with use under a claim of right. McIntyre v. Board of County Com’rs, Gunnison County, 86 P.3d 402, 418, 420, on remand 2006 WL 1844486 (Colo.App.2006).

Colo.2002. Cit. and quot. in sup. and diss. op., cit. generally in diss. op., com. (a) cit. and quot. in sup. and cit. in diss. op., com. (f) cit. in diss. op. and quot. in fn. to diss. op., com. (g) quot. in fn. to diss. op., com. (h) cit. and quot. in fn. to diss. op., com. (i) cit. in diss. op. and cit. in fn. to diss. op. Owners of farmlands, as successors in title to original settlers of Mexican land grant, exercised rights to enter and use mountainous parcel of land for over 100 years until landowner fenced land and excluded them. Successors sued landowner, alleging substantive claims of rights, including rights to graze livestock, gather firewood and timber, hunt, fish, and recreate. On remand, trial court entered judgment for landowner, and the court of appeals affirmed. This court implied access rights in plaintiffs to property for reasonable grazing, firewood, and timber, but rejected the claims for hunting, fishing, and recreation. The court determined that Colorado law would recognize implied easements in the form of profits, and that plaintiffs had established an easement by prescription. Dissent argued that adoption of the second prong of Restatement Third, Property (Servitudes) § 2.16, which could create a prescriptive right in the context of permissive, consensual use, was contrary to Colorado law. Lobato v. Taylor, 71 P.3d 938, 950. 953-954, 956, 969-971.

Colo.App.2008. Com. (g) cit. in sup. Landowner sued neighbors, asserting entitlement to an access easement on a road over neighbors’ property. After a bench trial, the trial court ruled in favor of plaintiff. Vacating and remanding, this court held that questions of fact remained as to whether plaintiff’s predecessors’ historic use of the road was permissive since 1937 and, if not, whether their adverse use was interrupted by permission in 1951, when defendants’ predecessors began locking a gate across the road and gave plaintiff’s predecessors the key. The court pointed out that there was evidence that the gate existed to constrain cattle, rather than to obstruct public travel, and reasoned that defendants’ predecessors’ actions were ambiguous because they could be construed as acknowledging plaintiff’s predecessors’ right to use the road. Brown v. Faatz, 197 P.3d 245, 250, 251.

Colo.App.2008. Cit. in disc. §§ 2.16-2.17. Owner of unpatented mining claims sued landowners, arguing that it had an easement across defendants’ property. The trial court, inter alia, entered judgment, after a bench trial, dismissing plaintiff’s implied-easement claim. Affirming, this court held that the trial court did not err in concluding that plaintiff failed to establish an implied easement. The court rejected plaintiff’s argument that circumstances surrounding the federal government’s creation of an access road in the 1940s, other than prior use of the road, created an implied easement appurtenant to the federal land where plaintiff’s mining claims were located; in addition, plaintiff made no argument that the trial court erred in entering judgment against it on its claim for a prescriptive easement and easement by estoppel, nor did it argue that it could establish any of the four traditional implied easements—easements implied from prior use, implied from map or boundary reference, implied from a general plan, or created by necessity. Precious Offerings Mineral Exchange, Inc. v. McLain, 194 P.3d 455, 458.

Colo.App.2006. Cit. in sup. Dominant-estate owner sued servient-estate owners to enforce her rights under an express easement for sewer and water pipes and alley purposes. The trial court entered judgment for plaintiff, ruling that the easement for alley purposes continued to burden the servient estate because there was no evidence that plaintiff intended to abandon the easement. Reversing and remanding, this court held that the trial court applied the wrong legal standard when it ruled that plaintiff’s easement was not modified or partly extinguished by prescription, since abandonment was not an element of termination by prescription. The court explained that, in Colorado, an easement could be partly or wholly extinguished on proof that the servient owner’s use of the land was adverse to the use of the easement, was open or notorious, and had continued without effective interruption for 18 years. Matoush v. Lovingood, 159 P.3d 741, 743.

Colo.App.2006. Cit. and quot. in case cit. in disc. Property owners brought quiet-title action against owner of adjacent property, who counterclaimed for, inter alia, a prescriptive easement. The trial court found, among other things, that
defendant had a prescriptive easement to a driveway over plaintiffs’ properties. This court vacated as to the driveway easement, holding that plaintiffs’ construction of a large earthen berm across the driveway, which plaintiffs let stand for several days before removing it, physically interrupted defendant’s use during the prescriptive period, and therefore no prescriptive easement was obtained. Trask v. Nozisko, 134 P.3d 544, 552.

**Conn.**

2009. Com. (g) quot. in ftn. Landowner sued owner of abutting property, seeking a declaratory judgment that she had acquired a prescriptive easement for purposes of ingress and egress over a paved, 16-foot right-of-way located on defendant’s property. The trial court entered judgment for plaintiff. Affirming, this court held, inter alia, that, for purposes of determining whether plaintiff’s use of the right-of-way was adverse to the various servient owners’ interests during the prescriptive period, the trial court could reasonably have inferred that plaintiff had not received permission to use the right-of-way by virtue of the fact that the record was devoid of any indication that such permission had been given. The court noted that, despite language in some of its cases suggesting that it approved of a presumption of adversity, Connecticut courts in this state looked to the facts and circumstances of the particular case rather than relying on such a presumption; nevertheless, the court long had held that evidence of the open and notorious use of property during the prescriptive period would support an inference that the use was adverse. Slack v. Greene, 294 Conn. 418, 434, 984 A.2d 734, 745.

**Conn.App.**

2008. Cit. in disc., com. (f) quot. in disc. and ftn., illus. 19 cit. and quot. in disc. and cit. but dist. Neighbor brought suit against parking-lot owner, seeking an injunction ordering defendant to remove certain fences that defendant had erected impeding the use of alleged right-of-way easements. The trial court entered judgment for defendant, finding that plaintiff had not acquired prescriptive easements over defendant’s property because any use that plaintiff had made of defendant’s property was by permission. Affirming, this court held, inter alia, that defendant’s permission given to plaintiff’s first predecessors-in-interest was not implicitly revoked or repudiated when they sold their property to second predecessors; any change in the nature of the relationship, i.e., that of neighboring commercial lessors, upon sale was not so significant as to legally oblige a finding that the license was implicitly revoked. Zabaneh v. Dan Beard Associates, LLC, 105 Conn.App. 134, 146-148, 937 A.2d 706, 714-716.

2005. Quot. in ftn. Property owner sued neighbors, seeking an injunction restraining neighbors from obstructing a right-of-way leading to his parcel with their deck and shrubs, a declaratory judgment that he had acquired a prescriptive easement for the purpose of parking vehicles within the right-of-way, and damages. The trial court declared that plaintiff had established the easement for parking but denied him the requested injunction, ruling that the portion of the easement obstructed by the deck and shrubs was extinguished. This court affirmed, holding, inter alia, that the trial court properly applied the theory of adverse use in determining that plaintiff’s easement was partially extinguished, and that defendants’ use of the contested portion was sufficiently adverse, continuous, open, and uninterrupted for the requisite period. Boccanfuso v. Conner, 89 Conn.App. 260, 283, 873 A.2d 208, 224.

**Del.Ch.**

2001. Com. (h), illus. 19 cit. in ftn. (citing § 2.16 of T.D. No. 3, 1993. § 2.16 has since been revised; see Official Text). Homeowners sued neighboring church after church erected a gate across an alley that ran along the rear of both parties’ properties. Homeowners, claiming right to use entire alley, sought injunctive relief and damages for trespass, conversion, and nuisance. This court granted church partial summary judgment, holding that homeowners did not establish an express easement in the alley. However, homeowners had prescriptive easement to use the portion of the alley between the gate and the street as a driveway and could possibly prove their right to use a small portion of the alley beyond gate to maneuver their cars when entering or leaving their garage. Homeowners’ use of alley for strolls or visits to neighbors was insufficient to support prescriptive easement to use entire length of alley. Anolick v. Holy Trinity Greek Orthodox Church,
Inc., 787 A.2d 732, 742.

Me.

Me.2002. Com. (g) quot. in diss. op. After school placed a barrier across a road that neighboring property owners had used for recreational activities, neighbors sued school, alleging that a public easement had been established. Trial court entered judgment finding that a public, prescriptive easement existed across school’s property. This court vacated trial court’s judgment, holding that public recreational use of private land was presumed to be permissive, and the record failed to support finding of adversity necessary to establish a public, prescriptive easement. Dissent argued that majority created a new and unwarranted presumption of permission in the law of prescriptive easements. It asserted that evidence did not compel a finding that school actively permitted public’s use. Lyons v. Baptist School of Christian Training, 2002 ME 137, 804 A.2d 364, 377-378.


Mich.App.2007. Cit. and quot. in sup., cit. in case cit. in sup., com. (a) quot. in sup. Owners of eastern half of lot sued owners of western half of lot, claiming entitlement to a prescriptive easement over a driveway on western half of lot. The trial court granted summary judgment for defendants. Reversing and remanding, this court held, inter alia, that plaintiffs’ use of the driveway was made pursuant to an intended but imperfectly created servitude. Concluding that the original owner of both halves of the lot intended to create an easement, the court noted that the city had required him to do so in connection with his plan to split the lot, and that his attorney drafted a proposed easement, but that, for whatever reason, the easement was never signed and recorded before the lot was split and deeded to the parties. Mulcahy v. Verhines, 276 Mich.App. 693, 742 N.W.2d 393, 397, 398.

Mich.App.2000. Quot. in sup., coms. (a) and (f) quot. in sup., com. (b) cit. in sup. Property owner sued to enjoin neighboring business from interfering with owner’s use of an area at the rear of owner’s building to load and unload vehicles. Trial court held that the parties’ express easement agreement did not contemplate owner’s loading or unloading of vehicles, but that owner had established a prescriptive easement for this purpose. This court affirmed, holding that the owner’s use, made pursuant to a mistaken interpretation of the easement’s scope, constituted prescriptive use. Plymouth Canton Community Crier, Inc. v. Prose, 242 Mich.App. 676, 619 N.W.2d 725, 727-730.

Mont.

Mont.2003. Cit. but dist., com. (e) cit. but dist. Property owners sought to establish prescriptive easement on a road that crossed adjacent property, seeking compensatory and punitive damages for adjacent owner’s interference with easement. Trial court granted adjacent owner partial summary judgment. Reversing and remanding, this court held, inter alia, that period in which plaintiffs’ brother used and occupied land counted toward prescriptive-easement period. Cook v. Hartman, 317 Mont. 343, 351, 77 P.3d 231, 237.

N.M.

N.M.2002. Cit. in sup., coms. (b) and (g) cit. in sup. Members of the public who had crossed landowners’ property for many years to access public trails within a state park sued landowners, claiming that plaintiffs were entitled to an easement by prescription across landowners’ property. Affirming the trial court’s entry of judgment for defendants, this court held that plaintiffs failed to prove the elements of a prescriptive easement by clear and convincing evidence. The court stated that substantial evidence supported the trial court’s finding of permissive use, there was testimony at trial that the use was not open, and plaintiffs failed to show that the location of the alleged easement did not change during the prescriptive period.

S.D.
S.D.2003. Cit. in disc. Restaurant owners sued mall owner for a declaratory judgment that they had the right to use an adjacent mall parking lot for customer parking and truck deliveries. The trial court granted summary judgment for defendant. Affirming in part, this court held, inter alia, that routine use of the mall parking lot by restaurant patrons and delivery trucks did not give rise to a prescriptive easement, since defendant permitted such use of the lot, and plaintiffs established no claim of right from which defendant could have acquired notice of the adverse claim. Thompson v. E.I.G. Palace Mall, LLC, 2003 SD 12, 657 N.W.2d 300, 303.

Vt.
Vt.1998. Com. (a) cit. in disc. (citing § 2.16 of T.D. No. 3, 1993. § 2.16 has since been revised; see Official Text). Owners of cider mill, an area tourist attraction, sought determination that they were entitled to a prescriptive easement over a driveway separating their property from that of a neighboring church. The trial court entered judgment for church. Affirming, this court held, in part, that 12 V.S.A. § 462, which protected property belonging to religious institutions from claims of adverse possession, was not unconstitutional; that the doctrine of presumed grants did not affect the applicability of § 462; and that, even if the court could presume a lost grant, such a presumption was rebutted by the existence of the right of reentry retained by original grantor of church’s property. Chittenden v. Waterbury Center Community Church, Inc., 168 Vt. 478, 726 A.2d 20, 28.

W.Va.
W.Va.2010. Quot. in ftn., com. (b) quot. in sup., coms. (e) and (g) quot. in ftn., com. (f) cit. and quot. in sup. Property owner brought a quiet-title action against neighbors, alleging that he had a prescriptive easement to use a gravel lane to access a public road from his property. The trial court entered judgment on a jury verdict for plaintiff. Reversing and remanding, this court held that plaintiff failed to establish the creation of a prescriptive easement. The court reasoned that plaintiff failed to prove that his use of the gravel lane was adverse, because he did not show that defendants owned the land on which the lane rested; while plaintiff’s and his predecessor’s use of the lane was uninterrupted for a 10-year period, there was no evidence that the use was continuous; plaintiff could not prove that the adverse use was actually known to the owner, or so open, notorious, and visible that a reasonable owner would have recognized the adverse use, since he could not identify the owner; and plaintiff did not introduce clear evidence of the precise location of the land that was adversely used. O’Dell v. Stegall, 226 W.Va. 590, 703 S.E.2d 561, 578, 583, 584, 586.

Wis.
Wis.1994. Cit. in disc., com. (d) at 12 cit. generally in disc. and in ftn. (citing § 2.16 of T.D. No. 3, 1993. § 2.16 has since been revised; see Official Text). In a declaratory judgment action, the trial court held that defendant shooting club’s hunting and fishing rights to plaintiff landowners’ property was an easement with which plaintiffs’ proposed development would unreasonably interfere. The intermediate appellate court reversed, holding that an assertion of defendant’s property rights, which it characterized as a profit a prendre, would be barred by a limitation statute that was shorter than the extended statute for claims concerning an easement. This court reversed the intermediate appellate court, holding that the term “easement” encompassed both easements and profits. The court said that, even though the Tentative Drafts of the Restatement (Third) appeared to act as a bellwether reviving the term “profit,” the Tentative Drafts created virtually no meaningful distinction between profits and easements. Figliuzzi v. Carcajou Shooting Club, 184 Wis.2d 572, 516 N.W.2d 410, 416.