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Article 13

Easements - Neighborly Conduct Results in a Prescriptive Right

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EASEMENTS—NEIGHBORLY CONDUCT RESULTS IN A PRESCRIPTIVE RIGHT

RKO-Stanley Warner Theatres, Inc. (RKO) operated a motion picture theatre in Pittsburgh, Pennsylvania, since 1912. Mellon National Bank and Trust Company (Mellon Bank) owned a bank adjacent to this theatre since 1935. The theatre and bank buildings existed on a common building line prior to the demolition of the bank in 1968. RKO-Theatre had a marquee that extended over the sidewalk in front of its building. From the time the theatre was erected, RKO had used the sidewalk and air space in front of the bank to maintain and change the signs on its marquee. In 1969, the City of Pittsburgh vacated the sidewalk in front of the bank. Mellon Bank was thereby relieved of the easement in favor of the public and received a fee simple title to the sidewalk, free of all encumbrances. They planned to construct a new building which would extend over the 10-foot wide strip that formerly constituted the public sidewalk. The new bank building would physically prevent RKO from maintaining and changing its signs on the marquee. RKO alleged that the construction of the new building on the former sidewalk would interfere with a prescriptive easement in its favor acquired through uninterrupted, continuous, and adverse use for a period in excess of twenty-one years. RKO sued Mellon Bank, the City of Pittsburgh, and the Urban Redevelopment Authority of the City of Pittsburgh. The City of Pittsburgh and the Urban Redevelopment Authority of the City of Pittsburgh moved to dismiss for failure to state a cause of action, and Mellon Bank filed an answer and moved for judgment on the pleadings. All three motions were granted by the district court. On appeal to the United States court of appeals, the dismissals as to the City of Pittsburgh and the Urban Redevelopment Authority were affirmed. The dismissal as to Mellon Bank was vacated and remanded. *RKO-Stanley Warner Theatres, Inc., v. Mellon National Bank and Trust Company*, 436 F.2d 1297 (3rd Cir. 1970).

The issue in this case is whether regular use of a public sidewalk to maintain and change lettering on a marquee will establish a prescriptive easement in that public sidewalk when title to the walk, which is in private hands, is subject to a public easement. The court ruled on the issue saying, "[E]asements against the abutting owner can be established by prescription in a sidewalk, so long as the use is outside the scope of the

public easement."[1] With the presence of the public easement, the court was forced to compare the scope of the public easement with the extent of RKO's private use. If the private use was within the scope of the public easement, no prescriptive easement would be possible as the use is then in common with the public. Only where the private use is outside the scope of the public easement will a prescriptive easement exist. This seems to require owners of land subject to a public easement to distinguish between a use that is common to the public and a use which is not. Those uses not common to the public may ultimately deprive an owner of the use of his land. This then is not simply a case of easement by prescription, because it is complicated by the presence of the public easement in the sidewalk. The adversity of RKO's use of a ladder on the walk is obscured by the presence of the public use. The decision holds that the use of a ladder to maintain and change signs is outside the scope of the public easement and thus is a prescriptive easement against the fee owner. Although the factual situation is limited, the impact on property rights subject to a public easement is substantial. This note will examine the concepts of common use and adversity and will determine the boundaries for the scope of the public easement.

RKO-Theatre did not claim an easement against the City of Pittsburgh but rather against Mellon Bank.[2] It is commonly held that no prescriptive right can be acquired against a city or property dedicated to a public use.[3] In Pennsylvania, when a city, by condemnation or dedication, acquires land for a highway, it does not acquire title to the fee.[4] The public acquires only an easement with the fee remaining in the abutting owner subject to the public easement.[5] The owner of the land retains basic property rights.

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1. RKO-Stanley Warner Theatres, Inc. v. Mellon National Bank and Trust Co., 436 F.2d 1297, 1303 (3rd Cir. 1970).

2. *Id.*

3. City of Lynchburg v. Chesapeake and O. Ry. Co., 170 Va. 108, 195 S.E. 510 (1938). *Accord*, Randall v. Board of Com'rs of Tippecanoe County, 77 Ind. App. 320, 131 N.E. 776 (1921); Finch, Pruyn and Co. v. State, 203 N.Y.S. 165, 122 Misc. 404 (1924); Bellenot v. City of Richmond, 108 Va. 314, 61 S.E. 785 (1908); Virginia Hot Springs v. Lowman, 126 Va. 424, 101 S.E. 326 (1919).

4. For the effect of dedication, *see*, Hoffman v. Pittsburgh, 365 Pa. 386, 75 A.2d 649 (1950); Sterling's Appeal, 111 Pa. 35, 2 A. 105 (1886); Versailles Township Authority of McKeesport, 171 Pa. Super. Ct. 377, 90 A.2d 581 (1952). For the effect of condemnation, *see*, William Laubach and Sons v. Easton, 347 Pa. 542, 32 A.2d 881 (1943); Breinig v. Allegheny County, 332 Pa. 474, 2 A.2d 842 (1938); 3 TIFFANY, REAL PROPERTY § 924 (3rd ed. 1939).

5. Westinghouse Electric Corporation v. U.E.W. Local 601, 353 Pa. 446, 46 A.2d 16 (1946).

In *Westinghouse Electric Corporation v. United Electric Workers Local 601*,[6] striking workers sat on the sidewalk and refused to allow passage into the building. There was a question of whether they had unlawfully seized property belonging to the corporation. The opinion was that "ordinarily the title to property abutting on a public highway extends to the center of the highway, the sidewalk being for all intents and purposes a part of the owner's premises subject only to the public's easement of passage."[7] The owner of land does not surrender his title to the land when it has been subject to an easement by the public. There are also certain "residue rights"[8] in which the owner may exercise full ownership. After a street has been vacated, the title to the street vests in those persons owning the land abutting on it;[9] the owners, thereafter, stand on their private rights.[10]

Mellon Bank held the title to the sidewalk and had basic property rights in it, both before and after the sidewalk was vacated. Mellon Bank's use was not restricted to the scope of the public easement as long as the use was not inconsistent with the public easement.[11] Likewise, Mellon Bank could use the sidewalk "in a reasonable manner for a temporary period, and this right is not subservient to the right of the traveling public."[12] Since Mellon Bank had property rights in spite of the public easement, it would follow that these rights could be protected whenever such protection was needed.

Under a Pennsylvania law, easements can be acquired in property within the boundaries of the street.[13] To prove such an easement, RKO-

6. *Id. Accord*, Minnie Creek Drainage District v. Streeter, 327 Ill. 236, 158 N.E. 383 (1927); Sprague v. Nelson, 6 Pa. D.C. 493, 6 Erie Co. 181 (1924).

7. *Supra* note 5 at 455-56, 46 A.2d at 20.

8. Breinig v. County of Allegheny, 332 Pa. 474, 2 A.2d 842 (1938).

9. Comment, *Real Property—Discontinuance of Dedicated Streets—Disposition of Property*, 45 N.C. L. REV. 564 (1967).

10. Roberts v. New York City, 295 U.S. 264 (1935); Chambersburg Shoe Mfg. Co. v. Cumberland Valley R.R., 240 Pa. 519, 87 A. 968 (1913). *Contra*, Chichester v. Kroman, 221 Ala. 203, 128 So. 166 (1930). *See generally*, 42 CALIF. L. REV. 636 (1954).

11. *Supra* note 1. Uses "within the scope of the public easement" and uses "in any manner not inconsistent with the public easement" are different according to the court. This distinction is vague. *Accord*, Duquesne Light Co. v. Duff, 251 Pa. 607, 97 A. 82 (1916); Sterling's Appeal, 111 Pa. 35, 2 A. 105 (1886); Hindin v. Samuels, 158 Pa. Super. 539, 45 A.2d 370 (1946).

12. *Supra* note 1, at 1303. North Manheim Township v. Arnold, 119 Pa. 380, 13 A. 444 (1888).

13. PA. STAT. tit. 53, § 1948 (1957), which states that where any street has been lawfully vacated, "any action, at law or equity, by any person, to enforce any right in said street, . . . or easement in the ground embraced within the boundaries

Theatre first had to establish to the court's satisfaction all of the elements of an easement by prescription. In Pennsylvania these are the open, notorious, continuous, uninterrupted, and adverse use of land for twenty-one years.[14] The presence of the public easement complicated the establishment of an easement by prescription. The court said: "Any use of the sidewalk within the scope of the public easement is not adverse to Mellon Bank and cannot serve as the basis for the acquisition of a prescriptive easement."[15] The court thus seemed to narrow the question to the existence of adversity. For a use to be adverse it must be against the rights of the property owner. If a use is considered part of the public easement, there is no adversity possible because the use is not wrongful as to the owner.[16] RKO's success on its claim for a prescriptive easement depended on the use being outside the scope of the public easement. Once outside, the use can be adverse to the private rights of the owner. Any use not within the scope of the public easement is an infringement on the abutting owner and he may enjoin it.[17] Where an abutting owner has private rights in a street, distinguishable from the rights of the public, his rights may be acquired by adverse possession.[18] Mellon Bank thus had certain private property rights—those outside the scope of the public easement—in which RKO could acquire prescriptive easement rights. The critical point is what the *scope* of the public easement is and what *uses* lie within it.

Certain uses of a sidewalk fall into a borderline category between public uses and private uses. In *Hindin v. Samuels*,[19] it was determined that "[n]o person, corporation, or individual has the right to make a special or exceptional use of the public highway not common to all citizens except by grant from the sovereign power."[20]

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of the same, by reason of ownership of, or interest in, . . . shall be brought within one year after the vacation of said street. . . ."

14. Spring City Foundry Co. v. Carey, 434 Pa. 193, 252 A.2d 666 (1969). *See also*, Dozier v. Krmpotich, 227 Minn. 503, 35 N.W.2d 696 (1949); Shaffer v. Baylor's Lake Ass'n, 392 Pa. 493, 141 A.2d 583 (1958); Mitchell v. Bovard, 279 Pa. 50, 123 A. 588 (1924); KRATOVIL, REAL ESTATE LAW, 442-4 (4th ed. 1964); RESTATEMENT OF PROPERTY §§ 458-460 (1944); Cook, *Legal Analysis in the Law of Prescriptive Easements*, 15 So. CAL. L. REV. 44 (1941); Taylor, *Titles to Land by Adverse Possession*, 20 IOWA L.R. 551 (1935); 45 N.C. L. REV. 284 (1966).

15. *Supra* note 1, at 1301. *See*, RESTATEMENT OF PROPERTY § 458 (1944); 2 AMERICAN LAW OF PROPERTY § 8.55 (A.J. CASNER ed. 1952).

16. *Supra* note 1, at 1301.

17. Reichert v. St. Louis & S.F. Ry., 51 Ark. 491, 11 S.W. 696 (1889).

18. Rupley v. Fraser, 132 Minn. 311, 156 N.W. 350 (1916). *Cf.* Hoxie v. Gibson, 150 Ark. 432, 234 S.W. 490 (1921).

19. 158 Pa. Super. Ct. 539, 45 A.2d 370 (1946).

20. *Id.* at 542, 45 A.2d at 372.

The "common" use referred to is the public's common and equal right to make reasonable use of the highway for ordinary travel and transportation.[21] The right includes a general "easement of passage"[22] and "the right to stop temporarily for business necessity, accident or the ordinary exigencies of travel."[23] In *Benner v. Junker*,[24] a bakery loaded its trucks in front of another's residence and used the sidewalk. The court felt that occasional loading could be tolerated; "but when it is done continually, day after day, then it becomes an appropriation of the plaintiffs' property by the defendant for the purposes of his business, [and] an invasion of the plaintiffs' right of property . . . ."[25] Thus, reasonable commercial needs requiring temporary obstructions are permitted[26] and are within the scope of the public easement.[27] However, constantly recurring, although temporary, obstructions are not within the scope of the public easement. In light of these two types of temporary obstructions, the use of RKO's ladder is not to be considered within the scope of the public easement. The reasonableness of this determination will be examined next.

Once the public has acquired an easement for land to be used as a highway or sidewalk, no person has the right to use the easement to the exclusion of the public, or use it permanently for private purposes.[28] Generally speaking, the public has rights to unobstructed and uninterrupted use of the highway or sidewalk.[29] But this is not to say that any interference or obstruction of the highway or sidewalk is illegal or a nuisance. The rights of the public can be invaded if justified on the ground of necessity.[30] In *Commonwealth v. Passmore*,[31] the defendant placed

21. City of Boston v. N.W. Perry, Inc., 304 Mass. 18, 22 N.E.2d 627 (1939); In Re Opinion of the Justices, 297 Mass. 559, 8 N.E.2d 179 (1937); Commonwealth v. Surridge, 265 Mass. 425, 164 N.E. 480 (1928).

22. *Supra* note 5, at 456, 46 A.2d at 20.

23. *Supra* note 8, at 479, 2 A.2d at 846-47.

24. 190 Pa. 423, 43 A. 72 (1899).

25. *Id.* at 426, 43 A. at 73.

26. City of Birmingham v. Hood-McPherson Realty Co., 233 Ala. 352, 172 So. 114 (1937).

27. North Manheim Township v. Arnold, 119 Pa. 380, 13 A. 444 (1888).

28. White v. State, 99 Ga. 16, 26 S.E. 742 (1896); Silverman v. Usen, 128 Me. 349, 147 A. 421 (1929); Theobold v. Louisville, N.O. & T. Ry. Co., 66 Miss. 279, 6 So. 230 (1889); Jaynes v. Omaha Ry., 53 Neb. 631, 74 N.W. 67 (1898); O'Hanlin v. Carter Oil Co., 54 W. Va. 510, 46 S.E. 565 (1904).

29. People v. Amdur, 123 Cal. App. 2d Supp. 951, 267 P.2d 445 (1954); City of Chicago v. Rhine, 363 Ill. 619, 2 N.E.2d 905 (1936).

30. Cloverdale Homes v. Town of Cloverdale, 182 Ala. 419, 62 So. 712 (1913); Harbuck v. Richland Box Co., 204 Ga. 352, 49 S.E.2d 883 (1948); Rief v.

certain goods he intended to auction on the sidewalk. The goods rendered public passage less convenient but did not entirely obstruct it. The court held the use unlawful but went on to say that necessity will justify actions which may otherwise be nuisances. Also, the necessity need not be absolute; it must only be reasonable. The court set down a few examples it considered reasonable uses of the public sidewalk: building materials, provided they were placed in a reasonable manner and used within a reasonable time, and goods placed by merchants for the purpose of moving them into or out of the building within a reasonable time. The court said:

> If necessity is obvious, and the privilege used in a reasonable manner, so as to incommode as little as possible the neighborhood and others, the general rule is so far disbursed with, up the principles of private as well as public convenience.[32]

In *Brey v. Rosenfeld*,[33] a truck was parked at right angles to the curb, which partly blocked the street; and the driver was delivering cement to a building through a chute, which entirely blocked the sidewalk. The court held that there was no evidence that the driver was unlawfully using the public easement to unload the cement. The court held: "Temporary, reasonable and necessary obstructions of a public highway, and there need be no *absolute* necessity, are not invasions of the public easement of travel; a reasonable necessity is sufficient."[34] The delivery of materials across the sidewalk by means of a chute which did not take an unreasonable time was thus considered a mere temporary inconvenience to travelers. The use was not unlawful and not a nuisance and was within the scope of the public easement.[35] It thus appears lawful for persons and property to be temporarily at rest on the public streets and sidewalks if no unreasonable obstruction or use occurs. Reasonable has been defined as "according to the usages of reasonable men, having due regard for the public convenience."[36] This definition was used in *Fisher v. Los*

Mountain State Tel. and Tel. Co., 63 Idaho 418, 120 P.2d 823 (1941); *But see*, Young v. Rothrock, 121 Iowa 588, 96 N.W. 1105 (1903).

31. 1 S. & R. 217 (Pa. 1814). *See also*, Smith v. Locke Coal Co., 265 Mass. 524, 161 N.E. 381 (1929).

32. Commonwealth v. Passmore, *supra*, note 31 at 220.

33. 72 R.I. 28, 48 A.2d 177 (1946).

34. *Id.* at 31-32, 48 A.2d at 179. *See also*, Tolman Co. v. City of Chicago, 240 Ill. 268, 88 N.E. 488 (1909); 3 DILLION ON MUNICIPAL CORPORATIONS § 1168 (5th ed. 1911).

35. Smith v. Locke Coal Co., 265 Mass. 524, 161 N.E. 381 (1929); O'Neill v. City of Port Jervis, 253 N.Y. 423, 171 N.E. 694 (1930); Gates & Son Co. v. City of Richmond, 103 Va. 702, 49 S.E. 965 (1905).

36. N.W. Longenecker v. Wichita Railroad & Light Co., 80 Kan. 413, at 420, 102 P. 492, at 495 (1909).

Angeles Pacific Co.,[37] where the defendant placed freight on the sidewalk for forty minutes and the plaintiff was injured when he stumbled over it. The case involved an alleged act of negligence committed by the defendant. In applying the reasonable use test, the court reasoned that the sidewalk would be of no use to abutting owners if it could not be used for an "appreciable period of time,"[38] since, in transporting goods to and from the store, it is at times necessary to deposit them on the sidewalk.

It would seem, then, that the reasonableness of the use of a public easement depends on a number of factors. The characterization and propriety of any particular use will depend on the amount of time it requires, its degree of necessity, where the use takes place, and all attendant and surrounding circumstances.[39] Owners of businesses which abut on the public easement of a highway and sidewalk are in a peculiar predicament. They are faced with the public's paramount right to unobstructed travel while at the same time, they at times, need the use of the sidewalk and street for business purposes. Although the courts have held that the fundamental right of enjoyment of the highway and sidewalks is in the public,[40] the owners of land abutting on sidewalks or streets may be permitted to encroach or obstruct them to a limited extent for necessary business purposes as long as these purposes do not interfere unreasonably with the public right of travel.[41]

No one has an inherent right to conduct a private business on the public streets or sidewalks or obstruct permanently the sidewalks or streets;[42] but one may use the streets and sidewalks to some extent to barter, trade, or prosecute his business or trade to a reasonable degree.[43] Of course, the rights of an abutting owner to use the public easement for business purposes is not determined by the nature or character of his business, but rather by the extent to which the public is inconvenienced or the extent to which the reasonable enjoyment of adjacent property

37. Fisher v. Los Angeles Pacific Co., 21 Cal. App. 677, at 682, 132 P. 767, at 769 (1913).

38. *Id.* at 682, 132 P. at 769.

39. Harold v. Jones, 86 Ala. 274, 5 So. 438 (1889); Flynn v. Taylor, 127 N.Y. 596, 28 N.E. 418 (1891).

40. *See, e.g.*, People v. Amdur, *supra*, note 29; Chicago v. Rhine, *supra*, note 29.

41. Tolman & Co. v. City of Chicago, 240 Ill. 268, 88 N.E. 488 (1909); Etchison v. Frederick City, 123 Md. 283, 91 A. 161 (1914); Flynn v. Taylor, 127 N.Y. 596, 28 N.E. 418 (1891); McCarten v. Flagler, 69 Hun. 134, 23 N.Y.S. 263 (Sup. Ct. 1893).

42. Clem v. LaGrange, 169 Ga. 51, 149 S.E. 638 (1929); People v. Wolper, 350 Ill. 461, 183 N.E. 451 (1932).

43. Henkel v. Detroit, 49 Mich. 249, 13 N.W. 611 (1882).

is infringed.[44] In a municipality, abutting owners have a limited right to use the street and sidewalk for business purposes in a reasonable manner and for temporary periods of time.[45] Reasonable business needs and lawful obstructions of the public easement have included, among other things, temporary loading and unloading of merchandise,[46] depositing building materials,[47] goods, and fuel,[48] and vehicles standing for a reasonable time.[49]

There is a definite policy underlying what is a reasonable use and what is an unreasonable use of public easements. As modes of commerce increase and change, uses of the public easement once considered a burden on the abutting owner, are no longer strictly limited to the uses of public travel.[50] Abutting owners of businesses can obstruct the street and sidewalk and interfere with the public right of travel and still be within the lawful use of the public easement. It is only when the use of the highway is beyond the scope of the easement that a user commits a wrong against the owner of the fee.[51] Unreasonable business needs and unlawful obstruction of the public easement have included, among other things, maintaining a place of private business in front of another property,[52] permanent buildings and other structures,[53] projections over highway,[54]

44. Knapp & Cowles Mfg. Co. v. New York, N.H. & H.R. Co., 76 Conn. 311, 56 A. 512 (1903); Brauer v. Baltimore Refrigerating & Heating Co., 99 Md. 367, 58 A. 21 (1904); James v. Burchett, 15 Wash. 2d 119, 129 P.2d 790 (1942).

45. Breinig v. County of Allegheny, 332 Pa. 474, 2 A.2d 842 (1938). *Accord* Lane v. San Diego Electric Ry., 208 Cal. 29, 280 P. 109 (1929); City of Evansville v. Cunningham, 138 Ind. App. 39, 202 N.E.2d 284 (1964); Kelly v. Otterstedt, 80 N.Y.S. 1008, 80 App. Div. 398 (1903); Plummer v. Village of Swanton, 133 Ohio 623, 15 N.E.2d 349 (1938); Rose v. Abeel Bros., 4 Tenn. App. 431 (1927).

46. Haggenjos v. City of Chicago, 336 Ill. 573, 168 N.E. 661 (1929); Gerdes v. Christopher & Simpson Architectural Iron & Foundry Co., 124 Mo. 347, 27 S.W. 615 (1894); Rachmel v. Clark, 205 Pa. 314, 54 A. 1027 (1929).

47. Haggenjos v. City of Chicago, *supra*, note 46; Gerdes v. Christopher & Simpson Architectural Iron & Foundry Co., *supra*, note 46; Rachmel v. Clark, *supra*, note 46.

48. Piollet v. Simmers, 106 Pa. 95, 51 Am. R. 496 (1884); Loberg v. Town of Amherst, 87 Wisc. 634, 58 N.W. 1048 (1894).

49. Lane v. San Diego Electric Ry., 208 Cal. 29, 280 P. 109 (1929).

50. Pittsburg Nat'l Bank v. Equitable Gas Co., 421 Pa. 468, 220 A.2d 12 (1966); *See*, 96 U. PA. L. REV. 256 (1947).

51. State v. Muola, 119 Conn. 323, at 326, 176 A. 401, at 403 (1935).

52. Bell Bros. Trucking Co. v. Kelly, 277 Ky. 781, 127 S.W.2d 831 (1939); Commonwealth v. Surridge, 265 Mass. 425, 164 N.E. 480 (1929).

53. Capital Transit Co. v. Hazen, 93 F.2d 250 (D.C. Cir. 1937); Simpson v. Adkins, 386 Ill. 64, 53 N.E.2d 979 (1944).

54. National Sign Co. v. Board of Com'rs of Douglas County, 126 Kan. 81, 266 P. 927 (1928).

ditches and excavations under or across highways,[55] fences, gates, and walks.[56]

More specifically, in the case of the public easement in a sidewalk, there is again a primary right in the public for travel.[57] Any obstructions, even temporary or partial, must be in a reasonable manner so as not to interfere with the public rights or safety.[58] However, incidental and partial obstructions of necessity are permitted if not prolonged.[59] The placing of a ladder upon the sidewalk by an abutting owner, to enable him to reach a sign on the front of the building, is not an unlawful or unusual use as decided in *Press v. Penny*.[60] In *Press v. Penny*, the defendant was in the dry goods business and was located on a busy public street. The defendant had a muslin advertisement sign stretched on a wooden frame 12 feet long and 5 feet wide tacked above the first story of the building. The defendant had contracted with a paint company to change and remove the signs as business required. To remove the sign, two ladders were used which were rested against the building so that they stood on the sidewalk about 5 feet from the building. During one such removal, one of the men on the ladder pulled too hard on a nail causing him to lose his balance, fall, and injure the plaintiff who was passing by on the sidewalk below. The "method adopted for removing the sign by the use of the ladder resting upon the sidewalk was a usual one."[61] The issue of this case was whether the use of the sidewalk in such a manner infringed upon the right of the plaintiff as a traveler upon the street. The court recognized two classes of rights being co-existent: that of the traveling public, and that of abutting owners, and each must be exercised with reference to the other. Although the public demands unfettered use for travel, there is "no more useful purpose to

55. Town of Albion v. Ryan, 201 App. Div. 717, 194 N.Y.S. 261 (1922).

56. Rodgers v. Hess, 325 Ill. 603, 156 N.E. 811 (1927); Hansen v. Green, 275 Ill. 221, 113 N.E. 982 (1916); Commonwealth v. Marshall, 137 Pa. 170, 20 A. 580 (1890).

57. People v. Amdur, *supra* note 29; Chicago v. Rhine, *supra* note 29.

58. Massey v. Worth, 39 Del. 211, 197 A. 673 (1938). *Accord*, Miller v. Town of Seaford, 22 Del. Ch. 159, 194 A. 37 (1937) (obstruction of sidewalk is nuisance).

59. Massey v. Worth, *supra* note 58.

60. Press v. Penny, 242 Mo. 98, 145 S.W. 458, Annot., 18 A.L.R. 794 (1912). *Accord*, Brauer v. Baltimore Refrigerating & Heating Co., 99 Md. 367, 58 A. 21 (1904); Smith v. Locke Coal Co., 265 Mass. 524, 164 N.E. 381, Annot., 61 A.L.R. 1052 (1929); Flynn v. Taylor, 127 N.Y. 596, 28 N.E. 418 (1891); Piollet v. Simmers, 106 Pa. 95, 51 Am. R. 496 (1884); North Manheim Twp. v. Arnold, 119 Pa. 380, 13 A. 444 (1884).

61. Press v. Penny, *supra* note 60, at 102, 145 S.W. at 458, 18 A.L.R. at 795.

which a street may be put in behalf of the abutting proprietor than that which contributes to the growth and material development of the communities which it serves."[62] For this reason an abutting owner not only has a right to transfer goods to and from the street, but to hold goods on sidewalks for a reasonable time.[63] The court held that there was nothing in the character of the work, if properly performed, or the character of the place in which it was being done that fixed liability on the defendant. The court said:

> We have seen that in the contracting to have this work done, the Defendants were clearly within their rights, because the use to which the street would be put in the proper performance of the contract was one to which it was lawfully subject, and was not particularly dangerous in its character . . . .[64]
>
> Holding, then, as we do, that the use to which the street was being put in removing the sign in question was a lawful one, founded upon the easement of access incident to the abutting property, it necessary (sic) follows that such use and the general use of the public are mutual and interdependent.[65]

Reasonable commercial needs requiring temporary obstructions would thus include the use of a ladder to change signs in front of a business. This use would be well within the scope of the public easement. In the instant case, *RKO v. Mellon*, the use of a ladder to maintain and change lettering on the marquee by RKO was held to be outside the scope of the public easement and thus an appropriation of Mellon Bank's property for business purposes due to the adverse nature of the use. Once the adverse use was determined, the next logical step was a prescriptive easement in favor of RKO-Theatre. This reasoning goes against years of precedent in deciding what is or is not a reasonable use. RKO-Theatre's use should not have been outside the scope of the public easement nor, as a consequence, an adverse use against Mellon Bank.

A public easement in a sidewalk or street will permit a wide range of uses, but these uses must be such as to fall within the general category of a public use. Ordinarily, a use in common with the public will negate a presumption in favor of a private use,[66] and private prescription is not possible if the same right is exercised by the public.[67] When a use is

62. Press v. Penny, *supra* note 60, at 104, 145 S.W. at 459, 18 A.L.R. at 797.

63. Tolman & Co. v. City of Chicago, *supra* note 41.

64. Press v. Penny, *supra* note 60, at 105-06, 145 S.W. at 460, 18 A.L.R. at 798.

65. Press v. Penny, *supra* note 60, at 106, 145 S.W. at 461, 18 A.L.R. at 800.

66. Reid v. Garnett, 101 Va. 47, 43 S.E. 182 (1903). *See* McKenzie v. Elliott, 134 Ill. 156, 24 N.E. 965 (1890).

67. Pirman v. Confer, 273 N.Y. 357, 7 N.E.2d 262 (1937). *See* 2 A.L.R. 1368 (1919); 111 A.L.R. 221 (1937).

outside the scope of the public easement, it is then not common with the public and is exclusive.[68] If a common use does exist, the individual must clearly indicate his personal claim in order to establish a prescriptive right.[69] Some decisive act must convey a claim of right against the owner of the land.[70] The characteristics of the use determine whether an easement has been created. Mere use is not enough,[71] especially where it is connected with a public easement.[72] Any adverse use should be objected to by the owner and prevented. However, the public easement may set up a type of camouflage concealing the adversity of the use.

There are two problems involved in RKO-Theatre's use of Mellon Bank's sidewalk to maintain and change its sign when this was done in common with the many uses available to the public. First, there is the question of notice. Was this use decisive enough (notorious?) so as to put Mellon Bank on notice of a claim against it? Second, assuming Mellon Bank was cognizant of the use, was their inaction acquiescence to RKO-Theatre's claim, in which prescriptive easements will lie,[73] or was their inaction a neighborly indulgence toward RKO-Theatre?

First, as to the question of notice, an adverse use must convey some notice to the owner. In *Gibbs v. Sweet*,[74] a fisherman used a lake to fish for a period in excess of thirty years. There was no testimony respecting any actual notice to the owner of the lake that the use was under a claim of right. The fact that the owner was aware of the man fishing on his lake did not mean that he was bound to assume that the use was under a claim of right. The court said:

> When the evidence which the claimant produces in support of his alleged right to an easement fully explains the manner in which the enjoyment began and is not sufficient to warrant a finding that the owner knew or ought to have known that the use was under a claim of right, the presumption of a grant does not arise.[75]

The use must be such that the owner is aware of the user's intention

68. Reid v. Garnett, *supra* note 66.

69. Pirman v. Confer, *supra* note 67. *Accord*, Gion v. City of Santa Cruz, 2 Cal.3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970).

70. Reid v. Garnett, *supra* note 66. *See* Board of Education v. Nichol, 70 Ohio App. 467, 46 N.E.2d 872 (1942); KRATOVIL, REAL ESTATE LAW (4th ed. 1964).

71. Shaffer v. Baylor's Lake Ass'n, 392 Pa. 493, 141 A.2d 583 (1958); Shinn v. Rosenberger, 347 Pa. 504, 32 A.2d 747 (1943); Savage v. Nielsen, 114 Utah 22, 197 P.2d 117 (1948).

72. Pirman v. Confer, *supra* note 67.

73. Dartnell v. Bidwell, 115 Me. 227, 98 A. 743, Annot., 5 A.L.R. 1320 (1916).

74. 20 Pa. Super. Ct. 275 (1902).

75. *Id.* at 285.

so as to protect his property rights. The prescriptive period begins when a cause of action accrues to the owner.[76] Mellon Bank had failed to exercise its property rights. They supposedly knew, or ought to have known, of the use by RKO-Theatre, and that use was outside the scope of the public easement, and that the use was adverse to them. The court, in *RKO v. Mellon,* did not go into any discussion of this assumed knowledge. The court determined that the use by RKO-Theatre was outside the scope of the easement, and thus adverse to Mellon Bank. The only rationale for this was that "[T]he abutting fee owner retains certain primary rights in the sidewalk, and those rights can be lost by prescription."[77] Mellon Bank was required to know not only if the use was adverse, but if it was outside the scope of the public easement.

A use generally will not be adverse unless it can reasonably be interpreted as adverse.[78] The use of the sidewalk by RKO-Theatre might raise a presumption of adversity. This presumption is rebuttable where the walk has been used openly, continuously, and exclusively for 20 years; but the origin of such way is not shown.[79] The presumption can therefore be defeated where the circumstances surrounding the use afford an explanation that will defeat the presumption.[80] In *Umhau v. Buzzuro,*[81] there was an isolated alley in a residential block. The alley had no outlets or means of egress from either end of the block. The alley had been dedicated as such but never used due to buildings at both ends. Buzzuro owned the lot that blocked one end of the alley. Many residents, including Umhau, walked over Buzzuro's lot to get to the adjacent street from the alley. When Buzzuro graded his lot to construct and run a business, the neighbors would not only walk across, but would drive vehicles to and from the alley over Buzzuro's lot. No permission was ever asked and none ever expressly granted. The court found that this use was not

76. Cook, *supra* note 14.

77. RKO-Stanley Warner Theatres, Inc. v. Mellon National Bank and Trust Co., *supra* note 1.

78. Bowles v. Chapman, 180 Tenn. 321, 175 S.W.2d 313 (1943). *See* Reid v. Garnett, *supra* note 66, at 49-50, 43 S.E. at 183, where the court said, "Where a landowner keeps open and uses a way, its enjoyment and use by another in common with the public must generally be regarded as permissive or under an implied license, and not adverse, unless there be some decisive act on the part of that other indicating a separate and exclusive use under the claim of right." *See generally* Thomas v. Ford, 63 Md. 346, 52 Am. R. 513 (1884); Polston v. S.S. Kresge Co., 324 Mich. 575, 37 N.W.2d 638 (1949); 2 AMERICAN LAW OF PROPERTY § 8.56 (CASNER ed. 1952).

79. Petersen v. Corrubia, 21 Ill. 2d 525, 173 N.E.2d 499 (1961).

80. Moore v. Day, 199 App. Div. 76, 191 N.Y.S. 731 (1921).

81. Umhau v. Bazzuro, 133 F.2d 356 (D.C. Cir. 1942).

of sufficient character to establish a prescriptive easement as such a use must be accompanied by an assertion of rights adverse to the interests of the owner and indicate a claim of right. This particular use appeared to be more of a friendly accommodation, a mere privilege or license. Relying on other cases, the court felt that this use, being a mere neighborly act, with no intent on the part of the residents to claim adversity, and no intent on the part of the owner to surrender any rights, could not ripen into an easement even though no permission had ever been asked.[82]

RKO-Theatre and Mellon Bank had buildings existing on a common boundary line. They both operated businesses there. The RKO-Theatre needed the sidewalk in front of the Mellon Bank to maintain and change its marquee signs. Mellon Bank could have prevented this use. From a business policy standpoint, to prohibit the use would have been poor business relations. Viewed from a public acceptance standpoint, a prohibition would not have been very neighborly. Mellon Bank was in a precarious position from the start. First, to prohibit RKO-Theatre from using the sidewalk might mean a strained relationship with its neighbors. To allow the use of the sidewalk might result in the loss of property rights. The situation in this case might have begun and continued as a friendly, implicit understanding between neighbors. The ruling in this case has resulted in a prescriptive easement being placed on the land. The facts in the case do not allude to any tacit agreement, nor do they negate the possibility of one. The circumstances, however, certainly point to the possibility that the use was mutually advantageous, and if so, it would have been in the interest of neither party to terminate or restrict the use of the sidewalk.[83]

Secondly, Mellon Bank's inaction to RKO's use could cause one of two results. One would be acquiescence or submission that would give rise to a prescriptive easement, all other elements being present. The second result would be implied permission or license derived from a friendly accommodation. The issue is whether or not a simple awareness of a use coupled with inaction is tantamount to a failure to assert rights against an invasion by an adverse claimant. The origin of the use, the relationship of the parties, and the circumstances generally will control. Acquiescence by the owner which is necessary to the acquisition of a prescriptive easement is defined in *Hopkins v. Hill*[84] to mean "passive assent or submis-

82. *See* Stewart v. Andrews, 239 Ill. 186, 87 N.E. 864 (1909); Rose v. City of Farmington, 196 Ill. 226, 63 N.E. 631 (1902).

83. Shinn v. Rosenberger, 347 Pa. 504, 32 A.2d 747 (1943); Bennett v. Biddle, 140 Pa. 396, 21 A. 363 (1891).

84. 160 Neb. 29, 68 N.W.2d 678 (1955).

sion, quiescence, consent by silence."[85] In *Hopkins*, the plaintiff owned land over which a road crossed that connected one part of the adjoining tenant's land to another part. The road was 15 feet wide and the defendant used a distance of 600 feet to move farm equipment and crops between his two parcels of land. There was no other convenient route between the two parcels. The owner knew of the defendant's use and defendant had never asked for permission. The court decided that a prescriptive easement arises when the use is "adverse, under a claim of right, continuous and uninterrupted, open and notorious, exclusive, and with the knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period."[86] An owner, to avoid a prescriptive easement, must show the use was by permission when the use is shown to be open, continuous, visible, and unmolested since such use will be presumed to be under a claim of right. The owner was charged with the knowledge of the use and his acquiescence was implied from the facts of the case. Inaction in *Hopkins* had resulted in acquiescence leading to a prescriptive easement.[87] There is, however, another interpretation for inaction. Where a use begins as a permissive use, it cannot ripen into an adverse use.[88] Mere neighborly accommodation is not a basis for any subsequent claim of an adverse use[89] until a positive notice of adverse or hostile claim is conveyed to the owner, and the holding continues thereafter for the statutory period.[90] A use which does not show a clear claim of right that is adverse to the owner is at most a permissive use or a license.[91] In neither neighborly accommodation nor unclear claim of right will the doctrine of prescription apply.[92] The owner of land should be allowed to extend to his neighbor friendly access to his land. The owner should not have to fear an eventual lawsuit for a prescriptive right. Otherwise, "an act of neighborly kindness may lead to the acquisition of an enforceable legal right to the detriment of the kindly land-

85. *Id.* at 41, 68 N.W.2d at 685.

86. *Id.* at 40, 68 N.W.2d at 684.

87. *Contra,* Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646, Annot., 112 A.L.R. 536 (1937) (permissive use presumed in unenclosed land). *See* THOMPSON, REAL PROPERTY § 512, at 621 (Prem. ed. 1924).

88. Williams v. Fears, 248 Ark. 486, 452 S.W.2d 642 (1970); Rita Sales Corp. v. Bartlett, 129 Ill. App. 2d 45, 263 N.E.2d 356 (1970).

89. Savage v. Nielsen, 114 Utah 22, 197 P.2d 117 (1948). *See also* Johnson v. Whelan, 171 Okla. 243, 42 P.2d 882, Annot., 98 A.L.R. 1096 (1935).

90. Williams v. Fears, *supra* note 88.

91. Cincinnati N.O. & T. Ry. v. Sharp, 141 Tenn. 146, 207 S.W. 728 (1918).

92. Condry v. Laurie, 184 Md. 317, 41 A.2d 66 (1945). *See* Joseph v. Evans, 338 Ill. 11, 170 N.E. 10 (1929); Sgarlot v. Diggory, 68 Pa. Super. Ct. 53 (1917).

owner's financial interest."[93] Mellon Bank's inaction could easily be attributed to courtesy or neighborly accommodation. To hold otherwise puts landowners in a very tenuous position. The mere erection of a ladder to change a sign on a marquee may be analogous to the erection of a ladder to change storm windows. The use of a neighbor's yard to put up storm windows or clean them periodically should not amount to the acquisition of a prescriptive easement. The decision in the instant case is support for the proposition that it should.

In *Stevenson v. Williams*,[94] the owner of a driveway let his neighbor use it to get into his backyard. The testimony showed that they were good friends, but there was no evidence of permission. The court was hesitant to encumber the land with an easement without a clear showing of adversity and hostility on the part of the user. Prescriptive rights could not be established through indulgence, permission, or mutual accommodation. As the use of the driveway began and continued as a result of friendly and accommodating permission, the claim for a prescriptive right was rejected.[95] In a case with similar facts, *Bazell v. Cain*,[96] the driveway, after years of mutual use, was fenced down the middle by the owner of one side. The court, when faced with the circumstances of neighbors, mutual use, no permission, and inaction came to a conclusion different than that in *Hopkins*. The court explained:

> An acquiescence for long term of years of a way that may be partly on one side of a boundary line and partly on the other side, and used mutually by both lot owners, does not create a title in and to the land of another for the reason that such use is not hostile or adverse. No easement can be acquired when a use is by express or implied permission.[97]

In both the *Stevenson* and the *Bazell* cases, the use was for the mutual accommodation of the adjoining property owners and no prescriptive easements were acquired.

An easement by prescription will only be acquired if there is clear and positive proof of its existence.[98] In *Clarke v. Clarke*,[99] the plaintiff

93. Cretney, *Wider Still and Wider*, 119 NEW L.J. 192 (1969). In Boyden v. Achenbach, 86 N.C. 383 (1882) the court said, "It would be unreasonable to deduce from the owner's quiet acquiescence, a simple act of neighborhood courtesy . . . consequences so seriously detracting from the value of the land . . . and compel him needlessly to interpose and prevent the enjoyment of the privilege. . . ." *Id.* at 398-99.

94. Stevenson v. Williams, 188 Pa. Super. 49, 145 A.2d 734 (1958).

95. *Id.*

96. 285 Ala. 661, 235 So. 2d 805 (1970). *See also* Kirkland v. Kirkland, 281 Ala. 42, 198 So. 2d 771 (1967).

97. Bazzell v. Cain, *supra* note 96, at 665, 235 So. 2d at 808.

98. Pittsburgh & Lake Erie R.R. v. Township of Stowe, 374 Pa. 54, 96 A.2d 892

owned a vacant lot on Railroad Street with a forty foot frontage. The defendant walked and drove vehicles across the lot to and from his business. The plaintiff at no time gave the defendant permission to use the lot, but he had full knowledge of the use. The issue before the court was whether or not the use was under a claim of right, or a mere matter of neighborly accommodation, and the court held that a claim of right that exists only in the mind of the claimant is not sufficient; it must be communicated or conveyed to the owner. The owner's knowledge of the use does not raise a presumption of hostility or that the use was under a claim of right. The defendant was not allowed to gain title by prescription when allowed to pass over the land by "silent permission"[100] because to hold a prescriptive easement in this case "would be a blot upon the law."[101] The court agreed with the argument that when an owner negligently fails to assert his rights when his property is subjected to a hostile or adverse claim, he then loses. The court goes on to say:

> But it by no means follows that the owner is negligent because he does acts of kindness. Because he allows others to use and to travel over a vacant lot without objection, the law does not presume that he intended to give it to them.[102]

The relationship between Mellon Bank and RKO-Theatre is most indicative of an attitude of courtesy by the former and acceptance by the latter. This relation would seem to be the most reasonable inference drawn from the circumstances of the parties. To infer anything besides neighborly accommodation would be to impute adversity and hostility into a relationship that had none. Imposing the doctrine of an easement by prescription on the set of facts in *RKO-Theatre v. Mellon Bank* might eliminate a good deal of mutual kindness between neighbors.

> [F]or if it were once understood that a land-owner, by allowing his neighbors or the public to pass through his lands without objection over a passway which he himself used, would thereby, after the lapse of twenty years, confer on such neighbors, or any of them, the right to compel the way to be kept open for his or their

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(1953); Bennett v. Biddle, 140 Pa. 396, 21 A. 363 (1891) where the court said the jury must determine "whether this user has been a friendly exchange of advantages, or whether each has entered and exercised a right of passage adversely to the other. In the latter case only would the lapse of time give title." *Id.* at 404, 21 A. at 364.

99. 133 Cal. 667, 66 P. 10 (1901).

100. *Id.* at 670, 66 P. at 11. *See* Hopkins v. Hill, *supra* note 85.

101. Clarke v. Clarke, *supra* note 99, at 670, 66 P. at 11.

102. Clarke v. Clarke, *supra* note 99, at 671, 66 P. at 12. *Accord,* England v. Ally Ong Hing, 105 Ariz. 65, 459 P.2d 498 (1969) (mere use is insufficient notice); Eddy v. Demichelis, 100 Cal. App. 517, 280 P. 389 (1929) (no prescriptive easement if license or neighborly accommodation); Grimmesey v. Kirtlan, 93 Cal. App. 658, 270 P. 243 (1928).

benefit and enjoyment, a prohibition against all such travel would immediately ensue.[103]

Had the public easement been absent in this case, the decision may have gone the other way in favor of Mellon Bank. Such a decision would have been in keeping with good public policy. The public easement clouded the issue of a prescriptive easement. The court discussed the scope of a public easement rather than the basic standards required to establish the elements of a prescriptive easement. The result is a detrimental effect on neighborhood relations.

William Groebe

103. Reid v. Garnett, *supra* note 66, at 50, 43 S.E. at 183.