

A man owned two adjoining parcels known as Lot 1 and Lot 2. Both parcels fronted a main street and abutted a public alley in the rear. Lot 1 was improved with a commercial building that covered all the main-street frontage of Lot 1. There was a large parking lot on the rear of Lot 1 with access from the alley only.

Fifteen years ago, the man leased Lot 1 to a tenant for 15 years. The tenant has continuously occupied Lot 1 since that time. Thirteen years ago, without the man's permission, the tenant began to use a driveway on Lot 2 as a better access between the main street and the parking lot than the alley.

Eight years ago, the man conveyed Lot 2 to his friend and, five years ago, the man conveyed Lot 1 to the tenant by a deed that recited "together with all the appurtenances."

Until last week, the tenant continuously used the driveway over Lot 2 to reach the parking lot in the rear of Lot 1.

Last week the friend commenced construction of a building on Lot 2 and blocked the driveway over Lot 2 used by the tenant to reach the parking lot in the rear of Lot 1 from the main street. The tenant has commenced an action to enforce an easement by prescription and to restrain the friend from blocking the driveway.

The period of time to acquire rights by prescription in the jurisdiction is 10 years.

If the tenant loses, what will be the most likely reason?

- A. No easement was mentioned in the deed from the man to the friend.
- B. The man owned both Lot 1 and Lot 2 until eight years ago.
- C. The mere use of an easement is not adverse possession.
- D. The tenant has access to the parking lot from the alley.

## Explanation:

An **easement by prescription** is a presumptive nonpossessory right to use another's land for a limited purpose that is acquired through **OCAN**—ie, use that is:

Open and notorious – apparent or visible to a reasonable owner

Continuous – uninterrupted for the statutory period

Actual – use of the land

Nonpermissive – hostile and **adverse to the owner**

**Tenants cannot acquire** a prescriptive easement over (1) the leased premises since they have permission to use them or (2) other lands owned by their landlord because tenants are said to stand in their landlord's place during the lease and therefore lack an adverse interest.

Here, the man leased Lot 1 to the tenant, who began to use the driveway on Lot 2 without the man's permission. Since the man owned both lots, the tenant's use did not become adverse until the man conveyed Lot 2 to his friend *eight* years ago. As a result, the tenant has not satisfied the *10*-year statutory period to acquire a prescriptive easement and will likely lose.

**(Choice A)** Although no easement was mentioned in the friend's deed, an easement transfers automatically with the transfer of the **servient (ie, burdened) estate**. So had the tenant acquired an easement by prescription over Lot 2, the burden of the easement would have automatically transferred from the man to the friend when Lot 2 was conveyed.

**(Choice C)** **Adverse possession** requires that a person *possess* the land, but mere *use* is sufficient to obtain a prescriptive easement so long as the other elements are met (not seen here).

**(Choice D)** The tenant's access to the Lot 1 parking lot from the alley would *not* prevent him from acquiring an easement by prescription over Lot 2. But it would prevent him from acquiring an **easement by necessity** since this type of easement only arises when it is strictly necessary for the use and enjoyment of property. This includes when property (eg, **Lot 1 parking lot**) *cannot* be reached from a public road (eg, public alley).

## Educational objective:

Tenants cannot acquire an easement by prescription (ie, OCAN) over the leased premises or other lands owned by their landlord.

## References

Restatement (Third) of Property: Servitudes §§ 2.16–2.17 (Am. Law Inst. 2000) (easement by prescription).

Copyright © 1995 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.

