
840.10 EASEMENT BY PRESCRIPTION.[1]

NOTE WELL: The party claiming the easement bears the burden of proving the elements essential to the acquisition of a prescriptive easement.[2] In most cases, the party claiming the easement will be the plaintiff, but in some cases the easement will be claimed by the defendant. The names of the parties should be modified to fit the situation presented by each case.

The plaintiff may rely upon one of three methods of satisfying the twenty-year time requirement of the prescriptive easement:

1. The Plaintiff's Use: the plaintiff has exercised the adverse use for the requisite twenty years.

2. Tacking: the plaintiff's adverse possession, added to the adverse possession of previous owners in the plaintiff's chain of title, equals the requisite twenty years.[3]

3. Succession: the twenty-year period of adverse possession was established by one or more previous owners in the plaintiff's chain of title before the plaintiff became owner of the dominant tract.[4]

The pattern instruction provides for the alternatives that may be used.

The (*state number*) issue reads:

"Has the plaintiff acquired an easement [on] [over] [across] [under] the land of the defendant by adverse use for a period of twenty years?"

(An easement is a right to make a specific use (or uses) of land owned by another person.[5] A person who has an easement does not own the land but has only the right to use the land for the purpose(s) of the easement.[6]

The owner of the land which is burdened by the easement continues to have all of the rights of a landowner which are not inconsistent with the easement.[7])

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, four things:[8]

First, that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] actually used (*a portion of*) the land of [the defendant] [the defendant and the defendant's predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title] for (*describe the uses of the land claimed as easement*). A mere intention to claim a right to use the land is not sufficient. Moreover, the actual use must be substantially within a definite and specific (*identify type of easement claimed, e.g., roadway, drainageway or other type of easement appropriate to the facts of the case*), although there may be slight deviations over the course of time.[9]

Second, that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was adverse or hostile to [the defendant] [the defendant and the defendant's predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title].[10] Mere use of the land is not sufficient. Every use of land is presumed to be by permission of the owner until it is proved that the user intended to claim the use of the land as a matter of right.[11] To establish that the use is adverse or hostile rather than permissive, it is not necessary to show that there was a heated controversy, or ill will or that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] [was] [were] in any sense the enemy of [the defendant] [the defendant and the defendant's predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title]. An adverse use is a use

of such nature as to put others on notice that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] claim(s) the right to use the land.

(If [the plaintiff] [the plaintiff or one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] originally began using the land with the express permission of [the defendant] [the defendant and the defendant's predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title], the use would not become adverse unless and until [the plaintiff] [the plaintiff or one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] rejects the permission and made [the defendant] [the defendant and the defendant's predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title] aware either by words or conduct that the permission was rejected and the use was claimed as a matter of right.)[12]

Third, that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was open and notorious. This means either that the owner of the land must actually know of the adverse use or that the use must have been so open, visible and well known that a landowner would know of the use if the owner had the same familiarity with the land that an ordinary owner normally would have. The use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] must be of such a nature that anyone in the community, including the owner, knows, or by observing could know,

that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was using the land as if the plaintiff had a right to do so and was not merely a temporary or occasional trespasser.

And Fourth, that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was continuous and uninterrupted for at least twenty years. To be continuous it is not necessary that the use be constant or unceasing. It is sufficient that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] [use] [used] the (*identify type of easement claimed, e.g., roadway, drainageway or other type of easement appropriate to the facts of the case*) consistently and with sufficient regularity under all the circumstances to constitute notice to the owner that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] [was] [were] [has been] [had been] asserting a right. The regularity required is that the use be as frequent as would be consistent with the purpose and the nature of the use claimed by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title]. To be uninterrupted means that [the defendant] [the defendant and the defendant's predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title] [has] [have] not prevented the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain

of title] [physically] [by a lawsuit] [(*state other interruptions shown by the evidence*)].

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] actually used (*a portion of*) the land of [the defendant] [the defendant and the defendant's predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title] for (*describe the uses of the land claimed as easement*), that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was adverse or hostile to [the defendant] [the defendant and the defendant's predecessors in title] [the defendant or any of the previous owners in the defendant's chain of title], that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was open and notorious, and that the use by [the plaintiff] [the plaintiff and one or more previous owners in the plaintiff's chain of title] [one or more previous owners in the plaintiff's chain of title] was continuous and uninterrupted for at least twenty years, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

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1. This instruction is written in general language which is intended to be modified in each case to fit the exact nature of the easement claimed. While the most common claim will

be for a right of ingress and egress, some cases will involve claims for easements for drainage, *see e.g., Lamb v. Lamb*, 177 N.C. 150, 150, 98 S.E. 307, 308 (1919), for the maintenance of a pond, *e.g., Thomas v. Morris*, 190 N.C. 244, 244, 129 S.E. 623, 623-24 (1925) or for other particular uses, *e.g., Ferrell v. Durham Bank & Trust Co.*, 221 N.C. 432, 432, 20 S.E.2d 329, 330 (1942) (use of party wall). The general language of the instruction—particularly the mandate—should be tailored in each case to the nature of the easement claimed.

2. *Le Oceanfront, Inc. v. Lands End of Emerald Isle Ass'n*, 238 N.C. App. 405, 416, 768 S.E.2d 15, 21 (2014) (quoting *West v. Slick*, 313 N.C. 33, 49, 326 S.E.2d 601, 610-11 (1985)).

3. *Dickinson v. Pake*, 284 N.C. 576, 585, 201 S.E.2d 897, 903 (1974) ("Tacking is the legal principle whereby successive adverse users in privity with prior adverse users can tack successive adverse possessions of land so as to aggregate the prescriptive period of twenty years."). *BUT NOTE WELL: North Carolina does not follow the majority rule to allow tacking when a grantor adversely possessing property beyond the bounds of a deeded parcel conveys the deeded parcel to a grantee who continues adversely possessing the same additional property.* Cole v. Bonaparte's Retreat Prop. Owner's Ass'n, Inc*., ___ N.C. App. ___, ___, 815 S.E.2d 403, 409 (2018). In North Carolina, a grantee is not permitted to tack a grantor's adverse possession of land that lies outside the boundary of the grantor's conveyance, because "there is no privity of title between him and his predecessors in title as to [that] land."* See Ramsey v. Ramsey*, 229 N.C. 270, 273, 49 S.E.2d 476, 477 (1948).*

4. *Deans v. Mansfield*, 210 N.C. App. 222, 228-29, 707 S.E.2d 658, 664 (2011); *see also* Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 14.09 (Matthew Bender, 6th ed. 2011) (describing the requisite privity as a connection made out where an "initial adverse possessor transfers his possession to a successor adverse possessor by some recognized connection," such as a "deed, will, or even by a parol transfer").

5. *Builders Supplies Co. of Goldsboro, N.C. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972).

6. *Thomas*, 190 N.C. at 244, 129 S.E. at 626; s*ee also Brown v. Weaver-Rogers Assocs.*, 131 N.C. App. 120, 123, 505 S.E.2d 322, 324 (1998).

7. *North Asheboro-Central Falls Sanitary Dist. v. Canoy*, 252 N.C. 749, 753, 114 S.E.2d 577, 581 (1960); *see also Nantahala Power & Light Co. v. Carringer*, 220 N.C. 57, 57, 16 S.E.2d 453, 454 (1941)*; Duke Power Co. v. Rogers*, 271 N.C. 318, 320, 156 S.E.2d 244, 246 (1967).

8. In *West v. Slick,* 313 N.C. 33, 326 S.E.2d 601 (1985), the Supreme Court of North Carolina described six criteria for the establishment of an easement by prescription. The first criterion serves as a reminder that the law places the burden of proof on the party seeking the easement. *Id.* The second criterion restates the presumption in North Carolina law that "the use of a way over another's land is permissive or with the owner's consent unless the contrary appears. A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription." *Dickinson,* 284 N.C. at 580, 201 S.E.2d at 900 (internal quotations omitted).

The remaining four criteria from *West v. Slick* are more traditional "elements" and are presented as such in this endnote and in the body of the instruction. They are: "(1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious

such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period." *Deans*, 210 N.C. App. at 226, 707 S.E.2d at 662 (citing *Potts v. Burnette*, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981)).

Regarding the second element, "[t]he term adverse user or possession implies a user or possession that is not only under a claim of right, but that it is open and of such character that the true owner may have notice of the claim[.]" *Id*. (quoting *Snowden v. Bell*, 159 N.C. 497, 500, 75 S.E. 721, 722 (1912)); *Dickinson*, 284 N.C. at 580-81, 201 S.E.2d at 900-01; *see also West v. Slick*, 313 N.C. 33, 49-50, 326 S.E.2d 601, 610-11 (1985).

Regarding the fourth element on substantial identity, "the user for twenty years must be confined to a definite and specific line. While there may be slight deviations in the line of travel there must be a substantial identity of the thing enjoyed." *Hemphill v. Bd. of Aldermen*, 212 N. C. 185, 193 S.E., 153 (1937). "One who uses one path or track for a portion of the prescriptive period and thereafter abandons all or nearly all of such path or track and uses another cannot tack the period of the use of the new way onto that of the use of the old way in order to acquire a way by prescription." *Speight v. Anderson*, 226 N.C. 492, 498, 39 S.E.2d 371, 375 (1946).

9. *See Dickinson*, 284 N.C. at 581, 201 S.E.2d at 901. *Speight*, 226 N.C. at 496-97, 39 S.E.2d at 374 (1946).

10. If there has been more than one owner during the twenty-year period, where appropriate, the instruction should refer to "the defendant and the defendant's predecessors in title" or "the defendant or any of the previous owners in the defendant's chain of title" as well.

11. *Le Oceanfront, Inc. v. Lands End of Emerald Isle Ass'n*, 238 N.C. App. 405, 416, 768 S.E.2d 15, 21 (2014) (quoting *West v. Slick*, 313 N.C. 33, 49, 326 S.E.2d 601, 610-11 (1985)); *see also Coggins v. Fox*, 34 N.C. App. 138, 140, 237 S.E.2d 332, 333 (1977).

12. This portion of the instruction is intended for use in cases where evidence tends to show that the use was begun with the express permission of the landowner.