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Real Property--Extent of Easement Acquired by Prescription

William Mellor
University of Kentucky

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such voters is once begun, it should be extended to all that fall within that class. If only some voters that are not under the control of the county school unit are prohibited, the votes of the qualified electors do not have their proportionate share of weight in the election. When the Court of Appeals uses the expression "unreasonable regulation of the franchise," as they have done in this case and many others, they undoubtedly mean unreasonable in the sense that it violates either the rule of "free elections" or the rule of "equal elections". Under this analysis of the case it is believed that the first reason given by the Court of Appeals is more far-reaching than the second. With the inferences in mind that can be logically drawn from this case, it is hard to see how any law which provides for the election of the county superintendent by the popular vote of the people can be made valid unless it allows all qualified voters in each county or prohibits all who do not reside in those portions of the counties that are controlled by the county school unit to vote.

HENRY C. SMITH.

REAL PROPERTY—EXTENT OF EASEMENT ACQUIRED BY PRESCRIPTION.

"The right of the owner of the dominant estate is governed by the character and the extent of the use of the easement during the prescriptive period." Ferguson v. Standley, 89 Mont. 489, 300 Pac. 245 (1931). Numerous other cases make similar broad, general statements. "It (the easement) must be limited to the use for which it is shown by the evidence to have been originally designed." Atwater v. Bodfish, 11 Gray (Mass.) 150 (1850). "The right derived from user can never outrun or exceed the user in which it has its origin". Amer.-Bank Note Co. v. N. Y. Elec. R. Co., 129 N. Y. 252, 29 N. E. 302 (1891).

Our problem is to determine the application of the above general statements. This can best be done by first resorting to a review of the decisions of the courts.

Situations in which it was held that the owner of the prescriptive easement did not exceed his rights therein.

Where the defendant has acquired a right of way by adverse user in the matter of carrying materials for, and doing other things incident to, a blacksmith shop, a paint shop, and a carriage shop, and where, when the buildings in which these shops were housed, burned, the defendant erected a storehouse and a manufactory, the court held that, as there was no substantial alteration in the condition or in the character of the dominant estate, and as there was no change, except in degree, in the exercise of the easement, the defendant had not exceeded his rights in the use of the passway. The court went on to say that, if the condition and the character of the dominant estate had been substantially altered, the right of way could not be used for new purposes, thereby imposing a greater burden on the servient estate. Parks v. Bishop, 120 Mass. 340 (1878).
The Illinois Supreme Court, in the case of *Sell v. Finke*, 295 Ill. 470, 129 N. E. 90 (1920), held that a defendant who had acquired a right of way by adverse user had the right to make repairs on the road over which the easement extended, because the owner of a right of way may do whatever is reasonably necessary for the reasonable use of the right of way for the purpose for which it is acquired.

Where an easement consisting of a right of way over a footpath has been acquired by prescription by the adverse travel of members of one family residing on the dominant estate, and its use by occupants of houses thereafter erected on the dominant estate is shown not to materially increase the burden on the servient estate, the occupants of such later erections may use the path; the change in the use being in degree but not in kind. *Baldwin v. Boston and M. R.*, 181 Mass. 166, 63 N. E. 428 (1902).

Situations in which it was held that the owner of the prescriptive easement exceeded his rights therein.

In *Atwater v. Bodfish*, supra, a prescriptive right of way acquired for taking away wood from uncultivated land was held not to entitle the owner of such right of way to the use of the way for all purposes incidental to cultivated land, with dwellings thereon, the court saying that where the nature of the user is altered by the one having the right of way, thereby imposing an added burden on the servient estate, such use of the land goes beyond the use to which the owner of the way has a right.

A prescriptive right of way for the benefit of two tracts of land does not permit the use of such way for the benefit of tracts of land other than the dominant estate, even though such other tracts belong to the owner of the dominant estate, the reason being that an added burden will be placed upon the servient estate. *Clark v. Reynolds*, 125 Va. 626; 100 S. E. 468 (1919). *Dictum of Cleve v. Nairin*, 204 Ky. 342., 264 S. W. 721 (1924), accord.

In *The District of Columbia v. Robinson*, 14 App. Cas. (D. C.) 512 (1899), the court held that a right of way acquired by prescription does not extend beyond the land actually used in the exercise of the right of way during the prescriptive period. But where the passway is fenced, the user of the passway is considered to extend to the fences, whether or not all of such land was actually gone over in the use of the easement. *Haffner v. Bittell*, 198 Ky. 78, 248 S. W. 22 (1923).

From the above cases, we adduce that: the right of way acquired by prescription is limited to the land actually used during the prescriptive period; that persons who come onto the dominant estate after the acquisition of the right of way may use way, as long as a materially greater burden is not put upon the servient estate; that reasonable repairs may be made upon it by the owner thereof; that an easement attached to the dominant estate does not extended to its use for the benefit of other lands, even though such other lands are owned by the owner of the dominant estate; and that, in general
terms, the extent of an easement acquired by prescription is governed by the character and the extent of the user during the prescriptive period plus reasonable deviations in degree but not in character, from the original user, so long as such deviations do not impose a materially greater burden upon the servient estate.

In the determination of whether or not the dominant owner has exceeded his rightful use of a prescriptive easement, we are not aided by the distinctions between character, or nature, and degree, of the use. This is due largely to the fact that we are unable to reach any satisfactory working definitions of these terms. Apparently the courts merely say that an excessive use is a deviation in character or a deviation in degree. As an example of the arbitrariness of the courts in this matter, let us compare Atwater v. Bodfish, supra, and Parks v. Bishop, supra. In the former, carrying products from cultivated land was held to be a deviation in character from the original use of carrying wood from the same land when it was in an uncultivated state. In the latter, using the dominant estate for a storehouse and for a manufactory, where formerly it was used as a paint shop, a carriage shop, and a blacksmith shop, was held to be, not a deviation in character, but a change in the degree of the use. The writer is of the opinion that the real distinction between these two cases is that in the former a materially greater burden was imposed on the servient estate, whereas in the later case the added burden to the servient estate was not materially greater.

Thus it is submitted that the proper method of handling the problem of the extent of a prescriptive easement—a method which will reach the same results as have the courts—is to hold that the user acquired is governed by the prescriptive user, plus reasonable deviations therefrom, as long as such deviations do not impose a materially greater burden upon the servient estate.

WILLIAM MELLOR.

EVIDENCE—COMPETENCY OF HUSBAND AND WIFE.

The recent case of Funk v. U. S., 54 Sup. Ct. 212 (1933), considers the problem of the common law disqualification of husband and wife to testify for or against the other in criminal cases. In that case the petitioner had twice been tried and convicted in a Federal District Court upon an indictment for conspiracy to violate the National Prohibition Act. The case reached the Supreme Court by the grant of a writ of certiorari which was limited to the question as to what law was applicable to the determination of the competency of the wife of the petitioner as a witness in his behalf. The court, in reversing the conviction meted out by the District Court and ruling that the wife was a competent witness in her husband's behalf, said: "a refusal to permit the wife, upon the ground of interest, to testify in behalf of her husband, while permitting him, who has the greater interest, to