Obstruction of Passways

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Available at: https://uknowledge.uky.edu/klj/vol17/iss2/3

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OBSTRUCTION OF PASSWAYS

The right of the owner of an estate, servient to another's easement of way, to obstruct the passway by the erection of gates is a question which has been before the Kentucky Court of Appeals many times. That the question is a live one is indicated by the large percentage of the cases that are recent.\(^1\) Since there is at least one Kentucky decision upon nearly every phase of the question, this article has been intentionally localized.

Secondary writers usually devote the same discussion to (1) obstructions by the erection of gates and (2) obstructions by the erection of fences, treating the two types of obstruction together.\(^2\) The grouping is open to objection. The two types of obstruction are very different in their natures. A gate in proper working order is but a partial obstruction of a passway, while a fence, in the nature of things, would ordinarily obstruct the passway completely. It might very well be that under a given set of circumstances the owner of the servient tract would be entitled to maintain a gate across the passway, while the maintenance of a fence, under precisely the same circumstances, would not be countenanced.\(^3\) Finally, as a practical matter, most of the cases have to do with gates, not with fences. This article treats of the erection of gates, and not of fences, across easements of way.

As for the right of the owner of an estate, servient to another's easement of way, to erect gates across the passway, no unqualified answer can be given. Under some circumstances he has that right; under others he has not. The purpose of this article is to analyze and classify the elements favorable and unfavorable to the existence of the right. In no other way can a satisfactory answer to the general question be given.

It will be found that the mode of creation of the passway has an important bearing upon the question of the erection of

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\(^1\) Of the thirty-six Kentucky cases considered in this article, thirty-five were decided since 1897, and twenty-one since 1914.

\(^2\) See, for example, 19 C. J. 981, 986; 9 R. C. L. 800; 23 Am. & Eng. Enc. Law (3d ed.) 34.

\(^3\) See infra at note 44.
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gates across it. For example, a prescriptive passway, created by adverse user for the statutory period, is governed by rules different from those to which a passway created by express grant is subject.4

The nature of the passway, as determined by the mode of its creation, also provides a basic principle of classification. The cases fall into two general groups: (A) those in which the easement is created by grant, reservation or devise; (B) those in which the easement is acquired by prescriptive user.5

It may be remarked, parenthetically, that in grouping easements of way created by grant, reservation or devise, the writer has again departed somewhat from the usual treatment. The customary classification is, (1) easements created by grant or reservation, (2) easements acquired by prescription. No good reason is seen for not classing easements created by devise with those created by grant or reservation. In the case of a grant, the grantor reserves every right, title and interest in the property not inconsistent with the purposes of the easement as granted.6 In the case of a reservation, the grantor retains only his rights in the easement; all others pass to the grantee. These rights of the fee owner, subject only to the easement, pass undiminished to his heirs; his death cannot dignify or increase the interest of the owner of the easement. Similarly, the devisee in fee of land subject to an easement of way in favor of another devisee succeeds to all the rights of his devisor, subject only to the rights of the owner of the easement. In short, his rights are indistinguishable from those of the grantor of an easement of way, or of an heir of such grantor.

4The distinction between the rules applicable to those two types of easements of way is admirably stated in Whitaker v. Yates, 200 Ky. 530, 255 S. W. 102 (1923).

5This classification is not quite exhaustive. McCauley v. Twyman, 33 Ky. L. R. 692, 110 S. W. 892 (1908), and Bard v. Batsell, 184 Ky. 11, 211 S. W. 185 (1919), involve passways created by common agreement, for common use. In Reed v. Flynn, 205 Ky. 783, 266 S. W. 644 (1924), the passway was created by contract. In Maxwell v. McAtee, 9 B. Mon. 20, 48 Am. Dec. 409 (1847); Oak Grove, Etc., Church v. Rice, 162 Ky. 525, 172 S. W. 927 (1915), and Story v. Allen, 221 Ky. 195, 298 S. W. 712 (1927), the easements were originally created by parol grant, and rights thereunder were perfected by adverse user. But most of the cases will be found to come within one of the two classes suggested.

6See infra, note 9.
A. EASEMENT CREATED BY GRANT, RESERVATION OR DEVISE.

It is apparent that there may be either of two situations as to easements created by written instrument. The instrument may contain express provisions as to the right of the owner of the servient estate to erect and maintain gates across the passway. On the other hand, the instrument may be in general terms, with very vague stipulations as to gates, or none at all. Accordingly, for clarity and convenience of treatment we may divide the general class of easements created by grant, reservation or devise into specific groups, (1) those where the instrument creating the easement contains express provision as to gates, and (2) those in which the instrument of creation is in general terms.

(1) Express Provision as to Gates.—Where the parties have had the foresight to embody their understanding as to the erection of gates across the passway in the instrument creating it, their intention, so far as it can be ascertained, is controlling. The question then becomes one of construction, rather than one of the application of rules of law upon the erection of gates across an easement of way. This class of easements is relatively small, and presents no problem save that of interpretation of the language used in the instrument creating the easement.

(2) Grant 'Silent or Vague as to Gates.—The early Kentucky case of Maxwell v. McAtee is the leading case upon easements of this nature. It has been cited literally dozens of times in later cases from many jurisdictions, and has supplied practically every secondary authority with its statement of the rule applicable to such easements.

In that case Marshall, C. J., writing for the court, formulates the rule as follows:

"We are confined to a construction of the language of the parties as inserted by them in their deed." Thomas, J., in Gossett v. Chandler, 204 Ky. 402, 405, 264 S. W. 853, 855 (1924). See also Calvert v. Weddle, 19 Ky. L. R. 1883, 44 S. W. 648 (1898); Evans v. Motley, 25 Ky. L. R. 1825, 78 S. W. 877 (1904); Reed v. Flynn, 205 Ky. 783, 266 S. W. 644 (1924); McCarley v. Owens, 225 Ky. 7, 7 S. W. (2d) 489 (1928); Jones, Easements, sec. 402; note, 3 L. R. A. (N. S.) 461.

It should be noticed that while the easement was originally created by parol grant, which was invalid, rights thereunder were perfected by prescriptive user. The case may therefore be more properly classified under the second general classification.
"The grant of a passway in general terms, over a particular part of the grantor's land, does not imply a negation of his right to erect gates at the termini of the way in entering and leaving his land."

In reaching this conclusion, the court reasons that the bare grant of a right of way passes nothing more than its terms would imply. Every right in the land not inconsistent with its use under the grant remains in the grantor. So long as the grantor's exercise of dominion over the land does not lessen a fair enjoyment of the passway, the grantee of the easement cannot complain.9

The concise statement of the rule in Maxwell v. McAtee has been amplified by subsequent writers.10 The rule as enunciated by the later authorities comes to this: Where the grant is in general terms, the absence of reservation of the right to maintain gates across the passway does not conclude the grantor's right. Extrinsic evidence of the conditions and manner of use of the easement, however, is admissible to interpret the general terms, and may result in a denial of the right. This limitation of the rule, if not carried to extremes,11 is sound in principle, and well-grounded on authority.

* "Conceding that the agreement for the passway was in terms equivalent to a grant, . . . still it is evident that the general grant of a passway, or right of way, over the land of the grantor at a particular place, does not confer either the possession or the right of possession of the land, but the mere right of way, or of passing over it. And nothing passes as an incident to such a grant, but that which is necessary for its reasonable and proper enjoyment [citing authorities]. Notwithstanding such a grant there remains with the grantor the right of full dominion and use of the land, except so far as a limitation of his right is essential to the fair enjoyment of the right of way which he has granted. It is not necessary that the grantor should expressly reserve any right which he may exercise consistently with a fair enjoyment of the grant. Such rights remain with him because they are not granted. And for the same reason, the exercise of any of them cannot be complained of by the grantee, who can claim no other limitation upon the rights of the grantor but such as are expressed in the grant, or necessarily implied in the right of reasonable enjoyment."


10 See infra at note 18
B. EASEMENTS CREATED BY PRESCRIPTIVE USER.

We come now to the second main classification of the cases. Easements of way created by prescriptive user are governed, in the main, by the same rules as those applicable to other prescriptive rights. "Where the right to the easement is acquired by prescription, the owner of the dominant estate, and who becomes entitled to the easement, acquires the right as against the owner of the servient estate to have it maintained in the same condition (in which) it was while it was being acquired by the adverse user." In short, as in the case of any other prescriptive easement, rights in a prescriptive easement of way are measured and determined by the user during the period of prescription. And where a gate is maintained by the servient owner during the period, a prescriptive right to maintain it is acquired.

As has been seen, where the easement is created by grant, reservation or devise in general terms, the circumstances and manner of use of the easement are admissible to show the understanding and intention of the parties with respect to gates. But where the easement is created by prescription, the circumstances and manner of use of the easement are determinative of the question of gates. In other words, if the easement is created by a written instrument, mode of use affects the right to erect gates only indirectly, i.e., by explaining the general terms of the instrument, which is the source of the rights of both parties. But if the easement is created by prescription, mode of use is directly determinative of every right claimed in or against the easement, including the right to erect gates.

This distinction is more than a matter of words. Its importance becomes clearer when we consider one or two actual

23 Oak Grove, etc., Church v. Rice, 182 Ky. 525, 172 S. W. 927 (1915); Suggs v. Carr, 178 Ky. 849, 200 S. W. 27 (1918); Fliner v. Lawrence, 187 Ky. 334, 220 S. W. 1041 (1920); Hunt v. Sutton, 185 Ky. 361, 222 S. W. 84 (1920); Bridwell v. Beerman, 190 Ky. 237, 227 S. W. 165 (1921); Haffner v. Bittell, 198 Ky. 78, 248 S. W. 223 (1923); McCarty v. Blanton, 219 Ky. 506, 293 S. W. 958 (1927); Jones, Easements, section 415; 1 Thompson on Real Property, section 534; 19 C. J. 987, 987; 9 R. C. L. 788; 23 Am. and Eng. Enc. Law (2d ed.) 34, n. 3; note, 48 L. R. A. (N. S.) 91.
24 Maxwell v. McAtee, 9 B. Mon. 20, 48 Am. Dec. 409 (1847); Lurker v. Ross, 121 S. W. 647 (Ky. 1909).
25 Supra at note 10.
26 Cases supra notes 12, 13.
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cases. In Miller v. Pettit, an heir, in the distribution of her father's lands, was given a passway across other lands of the common ancestor to the public road. It does not appear whether the passway was created by grant or devise. The passway ran along a branch, was fenced on both sides, and had a gate at the property line of the dominant owner. This fenced lane was used for thirty or forty years with no other gates across it. The owner of the servient estate stopped up the branch with poles, and erected and wired up a gate across the way. In this way he obstructed the passway completely, and threatened to shoot anyone who removed the obstructions. The court held the obstruction improper, upon the ground that after so long a period of use a prescriptive right was acquired to use the passway free of gates.

The court, although dealing with an easement created by grant or devise, went into the field of prescriptive easements for the rule upon which to rest its decision. The result is sound, but it might have been reached upon other and surer grounds. In the first place, under no circumstances may the servient owner obstruct the passway completely, as he did here. Again, the court might very well have decided that the manner of use of the easement justified the presumption that the servient owner had waived any right to erect gates across the passway. It is submitted that, where the easement is created by grant, reservation or devise, the length of time of its use free from gates, whether or not it was fenced, and all other matters relating to the mode of use are irrelevant save as they go to show one thing—whether or not the servient owner, by implication, has waived his right, if any, to maintain gates across the passway.

In Raisor v. Lyons, the passway was created by grant. It was used for some fifty years with gates only at the points where the passway entered and left the servient owner's land. The servient owner then undertook to erect two intermediate gates, and the owner of the easement sued to enjoin their erect-

172 Ky. 314, 189 S. W. 234 (1916).

See infra, note 44.

Authorities supra, note 10.
tion. An injunction was granted. This case is valuable for contrast, showing the proper application of evidence of the manner of use to an easement created by grant, reservation or devise. Instead of saying that the owner of the easement acquired a prescriptive right to a way free of additional gates, the court held the circumstances to justify a presumption of waiver of the servient owner’s right to erect such gates.22

Too much stress cannot be laid upon the importance of accuracy of analysis and precision of expression, even to the point of meticulous nicety. The case last considered is a model of what is desirable in judicial expression. Miller v. Pettit23 is an example of faulty analysis and inaccurate terminology.

Fences Along Way. Whether or not the passway was fenced during the prescriptive period is usually a circumstance of importance in determining whether a gate can be maintained. The usual rule as to prescriptive easements is that where the way runs through uninclosed woodlands during the period of prescription, no right to use it free of gates is acquired;24 but where the passway is a fenced lane, the servient owner cannot erect gates across it after the expiration of the period.25 The same circumstance may be of importance as to easements of way created by grant, reservation or devise. The existence of a fenced lane may go to show a waiver of the servient owner’s right to erect gates,26 where the absence of fences would not.27

It is interesting to note that where the easement was created by prescription, and the passway was fenced during

22 "We would not gainsay the rule announced in Maxwell v. McAtee, supra, that the grant of a way without any reservation of a right to maintain gates, does not necessarily imply that the owner of the land may not do so, but only hold that the rule does not apply where, as here shown, the consideration for the grant, the object for which it was made, and the manner in which it has been used and occupied as a passway demonstrate that it was not the intention of the parties that the owner of the servient estate might or should erect any gates across it at a place or places other than at its termini.”

23 Supra, note 17.


27 Ford v. Rice, 195 Ky. 185, 241 S. W. 835 (1922); Whitaker v. Yates, 200 Ky. 530, 255 S. W. 102 (1923).
the prescriptive period, the easement extends to the fence lines upon either side, and is not limited to the actual wagon tracks or beaten way.28

GENERAL OBSERVATIONS.

Having observed the outstanding differences in the two great classes of easements of way determined by their mode of creation, we may pass to certain considerations common to all easements of way, regardless of the mode of their creation.

TERMINI RULE.

Beginning with the great leading case of Maxwell v. McAtee,29 a long line of Kentucky cases has announced the rule that where the servient owner has the right to erect gates across a passway, he must erect them at the termini of the way; i.e., where it enters and leaves his land.30 This limitation of location is to some extent a reiteration of the rule in Maxwell v. McAtee, in which the gate in question actually was at a terminus. There has been a tendency to place less emphasis upon the limitation of the right to erect gates to the termini.31 Where a rigid insistence upon the limitation would work hardship, it has been expressly renounced.32 But as a general rule, a gate erected at

30 Bland v. Smith, 23 Ky. L. R. 1802, 66 S. W. 181 (1902); Smith v. Pennington, 123 Ky. 355, 28 Ky. L. R. 1282, 91 S. W. 730, 8 L. R. A. (N. S.) 149 (1906); Evans v. Cook, 33 Ky. L. R. 788, 111 S. W. 326 (1908); Oak Grove, etc., Church v. Rice, 162 Ky. 525, 172 S. W. 927 (1915); Raisor v. Lyons, 172 Ky. 314, 189 S. W. 234 (1916); Miller v. Miller, 182 Ky. 797, 207 S. W. 450 (1919); Hunt v. Sutton, 188 Ky. 361, 222 S. W. 84 (1920); Ford v. Rice, 195 Ky. 185, 241 S. W. 835 (1922); Reed v. Flynn, 205 Ky. 753, 266 S. W. 644 (1924); Justice v. Justice, 216 Ky. 657, 288 S. W. 293 (1926); compare McCawley v. Owens, 225 Ky. 7, 207 S. W. 450 (1925).
31 Compare Flener v. Lawrence, 187 Ky. 384, 220 S. W. 1041 (1920), in which the “termini” limitation is omitted altogether; Bridwell v. Beerman, 190 Ky. 227, 227 S. W. 165 (1921); Whitaker v. Yates, 200 Ky. 530, 255 S. W. 102 (1923), holding that servient owner could put gates across way “especially at its termini”; Evans v. Motley, 23 Ky. L. R. 1325, 78 S. W. 877 (1904), in which the court ordered that the servient owner be allowed to maintain gates “at convenient places;” Justice v. Justice, 216 Ky. 657, 288 S. W. 293 (1926), where the court approved a gate erected a short distance from one of the termini.
32 As, for example, where the actual terminus, or property line, is so located that one would be forced to wade in a stream to open a gate erected at that point. Miller v. Miller, 182 Ky. 797, 207 S. W. 450 (1919); Gosssett v. Chandler, 204 Ky. 402, 264 S. W. 853 (1924). Compare Justice v. Justice, supra note 31.
one of the termini of the passway, especially at its junction with a public road, would seem to have a better chance of judicial approval.

A closer examination of the cases reiterating the "termini rule" is instructive. It will be found that four of the cases are only negative authority for the rule since they hold that gates may, under certain circumstances, be erected at the termini of the passway, but do not hold that gates may not be erected elsewhere. While Oak Grove, etc., Church v. Rice, Hunt v. Sutton, and Bridwell v. Beerman each holds the gate in question improperly maintained, and seems to rest the decision in part upon the rule under consideration, there were other facts in each case which would have justified the court's conclusion without mention of the "termini rule." Raisor v. Lyons, while it holds adversely to the maintenance of intermediate gates, reaches its conclusion by an interpretation of the grant involved, in the light of the conditions of use of the passway.

The one case which may be said to be bottomed upon the "termini rule" is Evans v. Cook. There, in an action instituted under section 4354 (now section 3739a-12), Kentucky Statutes, for the recovery of a fine imposed for the obstruction of a roadway, it was held that the burden of proof was on the defense to show that the gates were at the termini. Failing so to show, the defendant was adjudged liable to the fine, and the court refused to enjoin its collection.

In this state of the authorities, it may well be doubted whether an insistence upon the ancient rule serves any useful

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34 Maxwell v. McAtee, 9 B. Mon. 20, 48 Am. Dec. 409 1847; Bland v. Smith, 23 Ky. L. R. 1802, 66 S. W. 181 (1902); Ford v. Rice, 195 Ky. 185, 241 S. W. 835 (1922); Reed v. Flynn, 205 Ky. 783, 266 S. W. 644 (1924). In the last case, an intermediate gate was actually upheld.
35 162 Ky. 526, 172 S. W. 927 (1915).
36 188 Ky. 361, 222 S. W. 34 (1920).
37 190 Ky. 227, 227 S. W. 165 (1921).
38 172 Ky. 314, 189 S. W. 234 (1916).
39 See supra, note 38.
40 33 Ky. L. R. 788, 111 S. W. 326 (1908). In Raisor v. Lyons, supra note 38, the court refers to the issue of fact in this case as to whether or not the gates were located at the termini, which "makes it, as previously stated, the only case in this jurisdiction expressly declaring that the owner of the land over which the passway runs has no right to erect gates elsewhere than at its termini."

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purpose. Other things being equal, a gate erected midway of the passage is no greater obstruction than the same gate erected at one of its termini. The question of the reasonableness of the obstruction is always the prime consideration. Other jurisdictions have not been so insistent upon the location of a gate at the point where the passway enters or leaves the servient estate. While the location of the gate is one of the circumstances to be considered, it should not of itself be of sufficient importance to support a decision.

Reasonableness of Obstruction.

It may be stated generally that the gate, where it may be maintained at all, must not obstruct the passway unreasonably. What is an unreasonable obstruction is largely to be determined by the facts of the given case. In general, it may be said that the gate or gates must not obstruct the passway unnecessarily, or completely, and must be needed, to some extent, for the inclosure and protection of the servient owner's land.

Dominant Owner Must Close Gate.

Where the servient owner has a right to maintain gates across an easement of way, it is the duty of the dominant owner

- See infra at note 43.
- Compare Ames v. Shaw, 19 Atl. 855 (Me. 1890); Green v. Goff, 39 N. E. 976 (Ill. 1894); Hartman v. Pick, 31 Atl. 342 (Pa. 1895); especially Dyer v. Walker, 75 N. W. 79 (Wis. 1898).
- Rice v. Ford, 120 S. W. 283 (Ky. 1909); Oak Grove, etc., Church v. Rice, 162 Ky. 525, 172 S. W. 927 (1915); Ford v. Rice, 195 Ky. 185, 241 S. W. 835 (1922); Whitaker v. Yates, 200 Ky. 530, 255 S. W. 102 (1923); Justice v. Justice, 216 Ky. 657, 288 S. W. 293 (1926); McCauley v. Owens, 225 Ky. 7, 7 S. W. (2d) 489 (1928).
to close such gates after passing through. His duty to keep the gates closed may be enforced by injunction.

**Statutory Provision.**

By Section 3779a-12, Kentucky Statutes, a civil fine of ten dollars may be imposed upon anyone obstructing a passway. This statute, or rather its identically worded forerunner, is declared to extend to all passways, whether created by law or by acts of parties. Where the servient owner wrongfully maintains a gate, he is liable to fine under this statute.

**Devolution of Right.**

Where the servient owner has a right to maintain gates and the right is not such as to be lost by the passage of time, it passes to his heirs or grantees as an incident of the servient estate. In the case cited, the heirs of a common ancestor created a common passway by agreement. From the beginning one or more gates were maintained. It was held that the right to maintain gates passed to the grantee of several of the heirs.

If the passway is prescriptive, but the servient owner has preserved his right by maintaining a gate, his heir or grantee may do so. Where the servient owner has a contract right to maintain a gate, such right is not lost by a temporary removal of the gate, and a purchaser who bought in the meantime is entitled to restore it.

**Dominant Owner Without Right.**

While this article has to do with the right of the owner of the servient estate to erect gates across a passway, a brief word

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49 Evans v. Cook, 33 Ky. L. R. 733, 111 S. W. 326 (1908).
50 Bard v. Batsell, 184 Ky. 11, 211 S. W. 185 (1919).
52 Reed v. Flynn, 205 Ky. 783, 266 S. W. 644 (1924).
as to the dominant owner may be permissible. He has no right, either to fence the passway or to erect gates across it, without the consent of the servient owner.\textsuperscript{53}

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