Michigan Law Review

Volume 36 | Issue 8

1938

WATERS AND WATERCOURSES - DIVERSION - RECIPROCAL EASEMENTS IMPLIED IN GRANT

Anthony L. Dividio
University of Michigan Law School

WATERS AND WATERCOURSES — DIVERSION — RECIPROCAL EASEMENTS IMPLIED IN GRANT — The village of Canastota, New York, by deed acquired title to land in which originated a stream, with the right "to take, use and divert all said springs, streams and waters . . . or so much thereof as shall be necessary for the use of Canastota Water Works." Prior to this, the village had acquired from the lower riparian owners on the stream "all their title and interest, in and to the waters from the springs . . . the same to be forever, or so long as second party may desire, diverted. . . ." In consideration of the transfer, the village agreed to supply the grantors with water from the waterworks "so long as said waters are diverted as aforesaid." Both instruments were recorded. About fifty years later the village desired to return the stream to its ancient channel, which had completely disappeared and leveled off. *Held*, that there had been a practical location concurred in for forty years as to the lands and rights conveyed and that a city could not turn its drainage upon the lands of another. The dissenting judge said that, since an easement exists solely for the benefit of the dominant estate, it could be abandoned and the water returned to its ancient channel, and further, that the contract of the parties contemplated such abandonment. *Strough v. Conley*, 251 App. Div. 487, 297 N. Y. S. 785, 298 N. Y. S. 516 (1937).

Despite the general rule that an easement exists solely for the benefit of the dominant estate, with no corresponding rights on behalf of the servient owner,[1] the reciprocal easement theory has developed in New York and a few other jurisdictions, at least in connection with prescriptive easements.[2] When confronted with a prescriptive easement, the court decides consequences flowing from the acts of the dominant owner and the acquiescence of the servient owner; it bases these consequences on considerations of policy; it may properly hold that policy dictates reciprocal rights. Of course, the parties may also ex-

[1] Mason v. Shrewsbury & Hereford Ry., L. R. 6 Q. B. 578, 40 L. J. (N. S.) (Q. B.) 293, 25 L. T. (N. S.) 239 (1871); GOULD, WATERS, 3d ed., § 340 (1900).

[2] Begun with the dictum in Belknap v. Trimble, 3 Paige (N. Y.) 577 (1832). Where accepted, the doctrine has taken various shapes and meanings. See Kray v. Muggli, 84 Minn. 90, 86 N. W. 882 (1901); Broadwell Special Drainage District, No. 1 v. Lawrence, 231 Ill. 86, 83 N. E. 104 (1907); Mathewson v. Hoffman, 77 Mich. 420, 43 N. W. 879 (1889); Middleton v. Gregorie, 2 Rich. (S. C.) 631 (1839); Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344 (1845); Burk v. Simonson, 104 Ind. 173, 2 N. E. 309, 3 N. E. 826 (1885); Matheson v. Ward, 24 Wash. 407, 64 P. 520 (1901); Hammond v. Antwerp Light & Power Co., 132 Misc. 786, 230 N. Y. S. 621 (1928).

pressly create reciprocal easements by deed or contract.[3] But whatever may be said for or against the reciprocal easement theory in connection with prescription, it is apparent that fundamental differences exist between prescription and grant which make it doubtful whether or not the theory should extend to the grant cases. When an easement is acquired by grant, there is no room for implications in law, and the sole task of the court is to construe the grant.[4] Furthermore, it has long been an established rule that a grant is construed strictly in favor of the grantee,[5] leaving still less room for implications. Hence, it is submitted that in the complete absence of any expressed intention in the instant case, the village should have the right to abandon its easement and cause the waters to return to their ancient channel. But it is not difficult to go still farther towards establishing their right by a fair interpretation of the grants, and find that the parties expressly contemplated the abandonment or return of the stream. All or so much of the water as was necessary was to be diverted, while the riparian owners were to be supplied with water from the new water works only so long as[6] the stream was diverted. The express terms seem to contemplate total or partial diversion according to the needs of the grantee. Now, was the long established user within or without the scope of this grant? At this point the majority opinion, all too short, becomes confused. It employs the terms concurrence and practical location over a long period of time and apparently interprets the rights of the parties from their acts, ignoring the wide range of user allowable by the grants. There is a doctrine to the effect that long-continued user in a particular manner defines the scope of an easement, but a distinction is found in the cases, although not mentioned by the courts. When stated in prescription cases, user defines scope;[7] but in cases involving grant, user seems to define the location of the easement only[8] unless the grant is ambiguous, in which case the user also defines the scope.[9] Clearly then, if the long continued total diversion be held to imply permanency, these established doctrines are ignored. The user made and the grant itself are quite consistent with a permanent privilege to divert; in fact they seem to point rather to such a privilege than to a permanent duty to divert. A fair construction of the recorded grants would have held that the acts of the village were within its granted privileges, among which was a privilege to abandon its easement.

Anthony L. Dividio

[3] 3 FARNHAM, WATERS AND WATERCOURSES, § 819 [p. 2399], § 827a (1904); Meir v. Kroft, (Iowa 1899) 80 N. W. 521.

[4] Greenspan v. Yaple, 201 App. Div. 575, 194 N. Y. S. 658 (1922).

[5] 2 TIFFANY, REAL PROPERTY, § 437 (1920); Beardslee v. Light Co., 207 N. Y. 34, 100 N. E. 434 (1912); Man v. Vockroth, 94 N. J. Eq. 511, 121 A. 599 (1923); In re Parkway in the City of New York, 209 N. Y. 344, 103 N. E. 508 (1913).

[6] See 5 C. J. 602 (1916) on meanings of "as long as" and 58 C. J. 780 (1932) in relation to "so long as."

[7] Howell v. King, 1 Mod. 190, 86 Eng. Rep. 821 (1674); Parks v. Bishop, 120 Mass. 340, 21 Am. Rep. 519 (1876).

[8] Dudgeon v. Bronson, 159 Ind. 562, 64 N. E. 910 (1902).

[9] Missionary Society of Salesian Congregation v. Evrotas, 256 N. Y. 86, 175 N. E. 523 (1931).