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EASEMENTS - RIGHT TO LAY ADDITIONAL PIPES

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EASEMENTS — RIGHT TO LAY ADDITIONAL PIPES — Defendants had granted to the city of Lynchburg an easement to "lay, construct, operate, inspect, repair and perpetually maintain water or conduit lines with all the necessary fixtures and appurtenances. . . ." Pursuant to this grant, the city had laid down

a conduit of redwood staves which has now decayed. In this action, the city seeks to enjoin the defendants from interference with the laying down of a new cast-iron conduit which would require the utilization of an additional six feet of land. *Held*, that the parties had defined their rights under an indefinite grant, and the laying of the additional pipe by the city would therefore go beyond its servitude to the prejudice of the defendants. *City of Lynchburg v. Smith*, 166 Va. 364, 186 S. E. 51 (1936).

It is a settled principle of law that a grant of an easement conveys to the grantee all the rights and powers within the terms of the grant.[1] Mere non-user, or lapse of time, will not destroy the rights expressly granted.[2] It is equally well settled that where the terms of the grant are indefinite, a practical definition of rights by the acts of one of the parties, acquiesced in by both parties, fixes the rights under the grant.[3] After the rights of the parties have thus become fixed, alteration of these rights will not be allowed without mutual consent, even though the alteration would be beneficial to both parties.[4] The court in the principal case relied strongly on the case of *Winslow v. City of Vallejo* [5] where the terms of the grant and the facts were similar to those in the above case. However, in that case, as in the present, two question were possible under the grant: (1) the location of the pipes over the land of the grantor, (2) the number and size of the pipes within the terms of the grant. In both cases, the acts of the parties were held to bind them on the construction of the

[1] Hammond v. Hammond, 258 Pa. 51, 101 A. 855 (1917); C. F. Lott Land Co. v. Hegan, 177 Cal. 169, 169 P. 1035 (1917); Haldiman v. Overton, 95 Vt. 478, 115 A. 699 (1921); Buckles, Irvine Coal Co. v. Kennedy Coal Corp., 134 Va. 1, 114 S. E. 233 (1922); Cantu v. Central Power & Light Co., (Tex. Civ. App. 1931) 38 S. W. (2d) 876.

[2] Wheeler v. Wilder, 61 N. H. 2 (1881); Pratt v. Sweetser, 68 Me. 344 (1878); Lathrop v. Elsner, 93 Mich. 599, 53 N. W. 791 (1892).

[3] Onthank v. Lake Shore & M. S. R. R., 71 N. Y. 194 (1877); Chandler v. Jamaica Pond Aqueduct Corp., 125 Mass. 544 (1878); Winslow v. City of Vallejo, 148 Cal. 723, 84 P. 191, 5 L. R. A. (N. S.) 851 (1906) (location of water conduits); Evangelical Lutheran Orphan Home v. Buffalo Hydraulic Assn., 64 N. Y. 561 (1876) (location of a dam); Garraty v. Duffy, 7 R. I. 476 (1863); Bannon v. Angier, 2 Allen (84 Mass.) 128 (1861); Roberts v. Stephens, 40 Ill. App. 138 (1891); O'Brien v. Goodrich, 177 Mass. 32, 58 N. E. 151 (1900); Dudgeon v. Bronson, 159 Ind. 562, 64 N. E. 910, 65 N. E. 752, 95 Am. St. Rep. 315 at 318 (1902); Gaston v. Gainesville & D. Electric Ry., 120 Ga. 516, 148 S. E. 188 (1904) (location of a right of way).

[4] Gregory v. Nelson, 41 Cal. 278 (1871); Jaqui v. Johnson, 27 N. J. Eq. 526 (1875); Allen v. San Jose Land & Water Co., 92 Cal. 138, 28 P. 215, 15 L. R. A. 93 (1891). The reason given for the above rule is that the rights when defined set the issue at rest immediately, so that alienation and improvement are not discouraged, and an innocent purchaser is not deceived. Tennessee Public Service Co. v. Price, 16 Tenn. App. 58, 65 S. W. (2d) 879 (1932). But this reason should not be enlarged so as to defeat rights expressly granted.

[5] 148 Cal. 723, 84 P. 191, 5 L. R. A. (N. S.) 851 (1906). In that case, the city wished to lay a new 14-inch pipe within three feet of a 10-inch pipe laid down prior, under a grant which conveyed an easement in a strip of land for "any water mains which may be laid by the city."

grant as to both question presented.[6] It might reasonably be argued, however, that the acts of the parties defined the place where such pipes should be laid, but left undefined the size and number of such pipes.[7] The right to lay additional pipes would then depend on a construction of the terms of the grant and and an opposite result might be reached.[8] The court might conclude that the intention of the parties was not undefined but was rather to allow the laying later of additional pipes as needed.[9] In reaching such a result the court would be aided by the settled principles that a grant is to be construed so as to arrive at the intention of the parties in view of their status and in the light of surrounding circumstances, and that all ambiguous terms are to be construed favorably to the grantee.[10] The court apparently did not perceive the possibility of construing the grant as one which was intended to allow additional pipes. It assumed without question that the grant itself was undefined and that the doctrine of practical construction applied. On the facts probably the conclusion is sound. But in another case it should be open to reach an opposite conclusion as a matter of construing the grant.

[6] It was urged in both cases, that as the grant specified "pipes" in the plural, this should govern the construction, but in both cases, the argument was rejected. See also Onthank v. Lake Shore & M. S. R. R., 71 N. Y. 194 (1877).

[7] As to this construction, see C. F. Lott Land Co. v. Hegan, 177 Cal. 169 at 173, 169 P. 1035 (1917), where the course of a ditch was held to be fixed by the acts of the parties in its construction, but that the language of the grant was sufficient to allow an increase in the capacity of the ditch.

[8] This result was reached in the case of Standard Oil Co. v. Buchi, 72 N. J. Eq. 492, 66 A. 427 (1907). In that case a grant "to lay pipes for the transportation of petroleum" was held sufficiently broad to allow the laying of subsequent pipes. The place where the pipes could be laid was held defined, but the laying of two pipes did not limit the right under the words of the grant to prevent the laying of additional pipes. This case, however, was not mentioned in the decision of the principal case.

[9] A precedent for this view is Standard Oil Co. v. Buchi, 72 N. J. Eq. 492, 66 A. 427 (1907). But see also Sked v. Pennington Spring Water Co., 72 N. J. Eq. 599, 65 A. 713 (1907).

[10] Salisbury v. Andrews, 19 Pick. (36 Mass.) 250 (1837); Cleaves v. Braman, 103 Me. 154, 68 A. 857 (1907); Addison County v. Blackmer, 101 Vt. 384, 143 A. 700 (1928); Missionary Society of Salesian Congregation v. Evrotas, 256 N. Y. 86, 175 N. E. 523 (1931); Cantu v. Central Power & Light Co., (Tex. Civ. App. 1931) 38 S. W. (2d) 876. There is also a line of railroad cases in which indefinite grants are construed in favor of the grantees. Where a statutory limit was provided, the statutory limit prescribed the bounds of the railroad right of way, not merely that actually used. See Prather v. Western Union Telegraph Co., 89 Ind. 501 (1883); Campbell v. Indianapolis & Vincennes R. R., 110 Ind. 490, 11 N. E. 482 (1886); but with these compare Fort Wayne, C. & L. R. R. v. Sherry, 126 Ind. 334, 25 N. E. 898 (1890), where the grant was held limited to the actual use. In general as to the extent of the right of way granted to a railroad, see Ann. Cas. 1918D 1040 at 1047.