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WATERS AND WATERCOURSES - DIVERSION - PRESCRIPTIVE RIGHTS OF SERVIENT RIPARIAN OWNER

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WATERS AND WATERCOURSES — DIVERSION — PRESCRIPTIVE RIGHTS OF SERVIENT RIPARIAN OWNER — When new waters, formed by seepage and waste from an upper irrigation ditch, began to flow as a stream, they were intercepted by a canal of the defendant irrigation company. At the point of interception a needle gate and spillway were constructed. This gate was kept closed, however, and the waters were diverted along the canal for more than the prescriptive period. The plaintiff sought an injunction restraining the defendant from opening the gate, allowing the intercepted waters to pass through into the plaintiff's drainage district. The theories of the plaintiff were: (a) the defendant's irrigation canal had become the natural course of the water, hence could not be changed to the injury of the plaintiff; (b) since the defendant had acquired a right to the waters by prescription against the plaintiff, the plaintiff had acquired a reciprocal prescriptive right to have the diversion continued; (c) the defendant was estopped from ceasing to divert the water. *Held*, the plaintiff is not entitled to the injunction because: (a) the irrigation canal had not become the natural watercourse, the needle gate making it obvious that there was no intent permanently to divert the water; (b) even if the defendant had a prescriptive right to divert the water formed in this way, there was no reciprocal easement by prescription on the part of the plaintiff, since there was no use

adverse to the defendant; and (c) the plaintiff had not acted in reliance on the continued diversion, hence there was no estoppel. *Mitchell Drainage District v. Farmers' Irrigation District,* (Neb. 1934) 256 N. W. 15.

This case raises the question whether a servient riparian owner can insist on the continued exercise of an easement gained by prescription. The right to have the exercise of an easement continued [1] is difficult to justify on strict theory, since an easement is, primarily, for the benefit of the dominant owner alone. Estoppel is one possible justification,[2] but the mere exercise of his right should not estop the dominant owner from abandoning it.[3] Another justification is that the servient owner has acquired a reciprocal easement by prescription.[4] Since there has been no adverse user by the servient owner giving rise to the implication of a counter grant, the doctrine has been severely criticized,[5] and discarded by many courts.[6] And finally, dedication is used as a justification by some courts.[7] This can be justified only if the artificial state is confined entirely to the dedicator's land; and this point is sometimes lost sight of by the courts.[8] The decisions are not in harmony, either, as to the extent to which they recognize this counter right of a servient owner, or as to the justification for it. In general, courts do not recognize such a right except in special situations. However, four general trends can be distinguished in the cases. (1) Courts will not, in general, impose liability on the dominant owner if the easement is abandoned entirely, provided the dominant owner takes no affirmative action to restore the former state.[9] (2) Equity will, in some states, prohibit an affirmative act of the dominant owner in destroying, or varying the use of, an artificial structure, such as

[1] Mason v. The Shrewsbury & Hereford Ry., L. R. 6 Q. B. 578 (1871).

[2] The right has been justified on estoppel: Shepardson v. Perkins, 58 N. H. 354 (1878); Ford v. Whitlock, 27 Vt. 265 (1855); Pewaukee v. Savoy, 103 Wis. 271, 79 N. W. 436, 50 L. R. A. 836 (1899); Castle v. Madison, 113 Wis. 346, 89 N. W. 156 (1902); Cloyes v. Middlebury Electric Co., 80 Vt. 109, 66 Atl. 1039, 11 L. R. A. (N. S.) 693 (1907); Smith v. Youmans, 96 Wis. 103, 70 N. W. 1115, 37 L. R. A. 285, 65 Am. St. Rep. 30 (1897).

[3] 35 YALE L. J. 385 (1926); 27 R. C. L. 1205 (1920).

[4] Belknap v. Trimble, 3 Paige (N. Y.) 577 (1832); Smith v. Youmans, 96 Wis. 103, 70 N. W. 1115 (1897); Kray v. Muggli, 84 Minn. 90, 86 N. W. 882, 54 L. R. A. 473, 87 Am. St. Rep. 332 (1901); Shepardson v. Perkins, 58 N. H. 354 (1878), in which there was also the element of a grant by the dominant owner in relation to the artificial condition; Delaney v. Boston, 2 Harr. (Del.) 489 (1839); Hammond v. Antwerp Light & Power Co., 132 Misc. 786, 230 N. Y. S. 621 (1928).

[5] 3 FARNHAM, WATERS AND WATER RIGHTS, sec. 819 (1904); 35 YALE L. J. 385 (1926); 77 UNIV. PA. L. REV. 543 (1929).

[6] Goodrich v. McMillan, 217 Mich. 630, 187 N. W. 368, 26 A. L. R. 801 (1922); Lake Drummond Canal & Water Co. v. Burnham, 147 N. C. 41, 60 S. E. 650, 17 L. R. A. (N. S.) 945, 125 Am. St. Rep. 527 (1908); Drainage Dist. No. 2 of Snohomish County v. City of Everett, 171 Wash. 471, 18 Pac. (2d) 53, 88 A. L. R. 123 (1933).

[7] Ford v. Whitlock, 27 Vt. 265 (1855); Pewaukee v. Savoy, 103 Wis. 271, 79 N. W. 436 (1899); Delaney v. Boston, 2 Harr. (Del.) 489 (1839).

[8] Cloyes v. Middlebury Electric Co., 80 Vt. 109, 66 Atl. 1039 (1907).

[9] Smith v. Youmans, 96 Wis. 103, 70 N. W. 1115 (1897); Kray v. Muggli, 84 Minn. 90, 86 N. W. 882 (1901); Hammond v. Antwerp Light and Power Co., 132

a dam, to the prejudice of the servient owner.[10] (3) The servient owner can insist on the exercise of the easement where a new, or different, watercourse, or body of water, has become the natural course, or body.[11] (4) The servient owner can insist on the exercise of the easement where the old channel has been made deeper or cleaned out.[12] In both this type of case and the third type the test is usually stated in terms of a question whether an artificial condition has become the natural one, but the cases are not clear or consistent as to when this has occurred. It is submitted that the artificial condition has become the natural one if the intervention of man is not necessary for its continued maintenance.[13]

Misc. 786, 230 N. Y. S. 621 (1928); Pere Marquette Ry. v. Siegle, 260 Mich. 89, 244 N. W. 239 (1932); Goodrich v. McMillan, 217 Mich. 630, 187 N. W. 368 (1922).

[10] Smith v. Youmans, 96 Wis. 103, 70 N. W. 1115 (1897); Kray v. Muggli, 84 Minn. 90, 86 N. W. 882 (1901); Mathewson v. Hoffman, 77 Mich. 420, 43 N. W. 879, 6 L. R. A. 349 (1889); Middleton v. Gregorie, 2 Rich. (S. C. Law) 631 (1839).

[11] Hollett v. Davis, 54 Wash. 326, 103 Pac. 423 (1909); Ford v. Whitlock, 27 Vt. 265 (1855); Kray v. Muggli, 84 Minn. 90, 86 N. W. 882 (1901); Smith v. Youmans, 96 Wis. 103, 70 N. W. 1115 (1897); Matheson v. Ward, 24 Wash. 407, 64 Pac. 520, 85 Am. St. Rep. 955 (1901); Case v. Hoffman, 84 Wis. 438, 100 Wis. 314, 72 N. W. 390 (1897), 74 N. W. 220 (1898), 75 N. W. 945 (1898), 44 L. R. A. 728 (1898).

[12] Lakeside Paper Co. v. State, 15 App. Div. 169, 44 N. Y. S. 281 (1897); Cloyes v. Middlebury Electric Co., 80 Vt. 109, 66 Atl. 1039 (1907); Chapman v. Thames Mfg. Co., 13 Conn. 268, 33 Am. Dec. 401 (1839); Paige v. Rocky Ford Canal & Irrigation Co., 83 Cal. 84, 21 Pac. 1102 (1889), 23 Pac. 875 (1890).

[13] Among the cases holding that it has become the natural condition are Arkwright v. Gell, 5 M. & W. 203, 151 Eng. Rep. 87 (1839), involving a mining sough which required cleaning to prevent decay; Greatrex v. Hayward, 8 Ex. 291, 155 Eng. Rep. 1357 (1853), involving an underground drain often clogged with roots; Gaved v. Martyn, 19 C. B. (N. S.) 732, 144 Eng. Rep. 974 (1865), involving a ditch into which the water was diverted by a movable wooden trough; Wood v. Waud, 3 Ex. 748, 154 Eng. Rep. 1047 (1849), involving a suit against a third party for diverting the flow of water from an underground conduit for draining a mine, the sides being bricked to prevent collapse, and the flow, in part, depending on the pumping of water from a lower level; Hanson v. McCue, 42 Cal. 303, 10 Am. Rep. 299 (1871), involving water carried in a wooden trough. Among the cases holding that it has become the natural condition are those where the channel has been made deeper, or cleaned out. See note 11, supra. *Contra*, Schulenberg v. Zimmerman, 86 Minn. 70, 90 N. W. 156 (1902). According to the test suggested, the following cases involve conditions which have become natural: Ford v. Whitlock, 27 Vt. 265 (1855); Matheson v. Ward, 24 Wash. 407, 64 Pac. 520 (1901), in which banks had been formed so that the original dam was no longer of any consequence; Hollett v. Davis, 54 Wash. 326, 103 Pac. 423 (1909); Mauvaisterre Drainage & Levee District v. Wabash Ry., 299 Ill. 299, 132 N. E. 559 (1921); Pompey Lake Drainage District v. McKinney Lake Drainage District, 136 Miss. 168, 99 So. 387 (1924). *Contra*, King v. C. B. & Q. Ry., 71 Iowa 696, 29 N. W. 406 (1886); Lake Drummond Canal & Water Co. v. Burnham, 147 N. C. 31, 60 S. E. 650 (1908); Mason v. The Shrewsbury & Hereford Ry., L. R. 6 Q. B. 578 (1871); Goodrich v. Burbank, 12 Allen (94 Mass.) 459 (1866), 97 Mass. 22 (1867); Ranney v. St. Louis & San Francisco R. R., 137 Mo. App. 537, 119 S. W. 484 (1909). If it has become the natural course, or body, the same rules apply, in

The finding of the court in the principal case that the condition had not become the natural one seems to be in accord with the test suggested.[14] The flow of water depended on the continued maintenance of the upper irrigation project, and the defendant's needle gate would have decayed in time.

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general, as apply to any natural watercourse. Cloyes v. Middlebury Electric Co., 80 Vt. 109, 66 Atl. 1039 (1907). But see Pompey Lake Drainage District v. McKinney Lake Drainage District, 136 Miss. 168, 99 So. 387 (1924).

[14] However, the recognition by the court of the applicability of the estoppel doctrine in a similar situation might be open to criticism from a strictly theoretical viewpoint.