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REAL PROPERTY—EASEMENTS—EXTINCTION OF EASEMENTS CREATED BY IMPLICATION OR PRESCRIPTION ON SALE OF SERVIENT LAND TO BONA FIDE PURCHASER—Plaintiffs and defendants owned adjoining farms. About thirty years ago their predecessors in title had constructed an underground tile drain from plaintiffs' farm to and across defendants' farm. In 1934 this drain was obstructed. In 1941 the servient farm was sold to defendants, who gave value and had no knowledge of the existence of the drain. Plaintiffs sought an injunction to compel removal of the obstruction. The lower court found that plaintiffs had acquired a prescriptive right to use the drain before it was obstructed, but refused to grant the injunction on the ground that defendants

as bona fide purchasers had taken the servient land free of the easement. On appeal, *held*, reversed. An easement created by prescription or implication¹ is not extinguished by sale of the servient land, even to a bona-fide purchaser. *McKeon v. Brammer*, (Iowa 1947) 29 N.W. (2d) 518.

An easement, whether created by written conveyance, prescription, or implication,² is a legal property interest.³ At common law plaintiffs' easement would not have been affected by a subsequent conveyance of the servient land, because of the familiar rule that priority in right as between competing legal interests is determined by priority in time, notice being immaterial. Inasmuch as easements created by implication and prescription are not based upon written instruments, the usual recording act should have no application to them.⁴ On this basis the decision in the principal case seems unassailable. There is, however, much authority for the contrary view taken by the trial court.⁵ Reasons advanced for such a holding are as follows: (a) Some authorities, mistakenly believing that easements are equities, have misapplied the common law rule that a bona fide purchaser of a legal interest in land takes free of prior competing equities.⁶ (b) Many courts have misapplied the "apparency" test (properly used to determine whether an easement of implication has been created)⁷ to the question whether an existing easement is extinguished on sale of the servient land to a bona fide purchaser.⁸ (c) Many courts in the United States, accustomed to treating the preservation of all interests in land against subsequent purchasers as depending on the existence of actual or constructive notice,⁹ have

¹ Since the supreme court accepted the trial court's conclusion that an easement had been created by prescription (principal case at 521), the discussion of easements created by implication appears obiter.

² For a general explanation of these types of easements, see 5 PROPERTY RESTATEMENT, §§ 467, 457, 474 (1944); BURBY, REAL PROPERTY, § 65 (1943).

³ *Schwann v. Cotton*, [1916] 2 Ch. 459; principal case at 522; 28 C.J.S., Easements, § 22.

⁴ *Aigler*, "The Operation of the Recording Acts," 22 MICH. L. REV. 405 (1924); 1 PROPERTY RESTATEMENT, § 6b (1936).

⁵ 17 AM. JUR., Easements, § 128, and cases cited.

⁶ Among the cases cited in 17 AM. JUR., Easements, § 128 as authority for its declaration of the rule are *Houston v. Zahm*, 44 Ore. 610, 76 P. 641 (1904); and *Willoughby v. Lawrence*, 116 Ill. 11, 4 N.E. 356 (1886), both cases involving equitable interests. See also *Smith v. Lockwood*, 100 Minn. 221, 110 N.W. 980 (1907), involving an easement created by implication and purporting to follow *Swedish-American Bank v. Connecticut Mutual Life Insurance Co.*, 83 Minn. 377, 86 N.W. 420 (1901), a case involving an equity.

⁷ See 5 PROPERTY RESTATEMENT, § 474 (1944); *Van Sandt v. Royster*, 148 Kan. 495, 83 P. (2d) 698 (1938).

⁸ Principal case at 523. See the list of cases cited by appellant's counsel in *Wiesel v. Smira*, 49 R.I. 246, 142 A. 148 (1928), 58 A.L.R. 818 at 819 (1929).

⁹ The over-emphasis of notice would seem to have been fostered by the prevalent explanation of the recording acts in terms of constructive notice. In most cases it would be more accurate to treat the recording acts as merely preserving common law priorities if the requirements of the acts are fulfilled. See *Aigler*, "The Operation of the Recording Acts," 22 MICH. L. REV. 405 (1924).

not realized that at common law notice was generally immaterial.¹⁰ (d) In many cases involving easements of implication there is language indicating that the courts were thinking in terms of the doctrine of estoppel.¹¹ This doctrine presupposes fault, and since there is no common law or statutory duty to give notice it is difficult to find a basis for estoppel.¹² (e) Because unrecorded outstanding interests in land jeopardize certainty of title and detract from the effectiveness of the recording system, there are strong policy reasons in favor of the position taken by the trial court.¹³ However, this deviation from the common law is not a desirable solution to the problem. In the first place, the rule as to what will be considered notice of an easement is variable and uncertain.¹⁴ Such uncertainty is more likely to lead to litigation. Secondly, the owner of an unapparent easement is placed in the unenviable position of having to give notice to all possible purchasers of the servient land without being able to use the recording system for this purpose. The suggestion by the court in the principal case that legislation be enacted to bring within the recording acts easements created by implication and prescription would seem to be the best solution to the problem.

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¹⁰ See *Schwartz v. Atlantic Building Company*, 41 App. D.C. 108 (1913) holding that a bona fide purchaser takes land free of a prescriptive easement. Cf. *Shaughnessey v. Leary*, 162 Mass. 108, 38 N.E. 197 (1894).

¹¹ In *Backhausen v. Mayer*, 204 Wis. 286 at 289, 234 N.W. 904 (1931), quoted and followed in *Schmidt v. Hilty-Forster Lumber Co.*, 239 Wis. 514, 1 N.W. (2d) 154 (1942), the court spoke of a "negligent grantee who fails to exact an express covenant granting to him the right of way necessary. . . ." *Backhausen v. Mayer* is noted in 29 MICH. L. REV. 1083 (1931), and in 7 WIS. L. REV. 42 (1931).

¹² See *Wiesel v. Smira*, 49 R.I. 246, 142 A. 148 (1928) and the principal case (at 524) holding that there is no ground for estoppel.

¹³ See *Hawley v. McCabe*, 117 Conn. 558, 169 A. 192 (1933).

¹⁴ In *Berlin v. Robbins*, 180 Wash. 176, 38 P. (2d) 1047 (1934), the court imputed to defendant knowledge of an easement by implication.