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Real Property - Gates Across Right of Way

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REAL PROPERTY — GATES ACROSS RIGHT OF WAY

The question of the right of a servient land owner to erect gates across a right of way is the primary problem in a recent Illinois case[1]. The plaintiff purchased a plot of land together with a right of way consisting of a 40-foot-wide strip extending over defendant's land to a public road. There were no gates at the time of the grant and no right to erect gates was reserved in the grant. Defendant erected a gate across the right of way and insisted that it be kept closed. Plaintiff removed the gate insisting that he was entitled to the easement free of gates, and brought this action to restrain and enjoin the defendant from further obstructing the right of way.

On appeal the Illinois Supreme Court affirmed the order of the trial court granting plaintiff the requested relief. The appellate decision was based on the prior use of the easement without gates and on the needs of plaintiff for an unrestricted right of way. The appellate court relied on *Rudolph Wurlitzer Company* v. *State Bank of Chicago*[2] and *Kurz* v. *Blume*[3]. Although both cases were only indirectly applicable to the present case, the court's test as to previous usage has considerable merit. It has been used in a West Virginia case holding that a servient owner's right to erect fences and gates, although none had existed at the time of the grant, was dependent on the previous usage and circumstances[4]. By previous usage the court does not mean the previous use of fences and gates but rather the previous use and circumstances of the land. Changes in surrounding circumstances, as well as in uses of the land, may create the necessity of erecting gates. The real test here should

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1 Schaefer v. Burnstine, 13 Ill.2d 464, 150 N.E.2d 113 (1958).

2 290 Ill. 72, 124 N.E. 844 (1919), here the issue was the right to construct pillars on a right of way over an alley.

3 407 Ill. 383, 95 N.E.2d 338, 125 A.L.R.2d 1258 (1950), where the rights in question were those gained by adverse possession.

4 Collins v. Degler, 74 W.Va. 455, 82 S.E. 265 (1914), in which valuable farm land was involved and thus gates held essential.

be whether the parties, at the time of the grant, could reasonably contemplate the possible future need for gates[5].

The cases cited by defendant were properly distinguished by the court. In *Truax* v. *Gregory*[6], the servient owner was allowed to maintain gates where they had been in use at the time of the grant and throughout the existence of the easement. Similarly *Leesch* v. *Krause*[7], held that the servient owner was entitled to gates where a right of way had been gained by prescription and the adverse user had allowed gates throughout the prescriptive period.

The decision, while based in part on the usage at the time of the grant of the easement, also took into consideration the relative inconveniences to the parties. In considering the latter point much weight was placed on the need for convenient and frequent ingress and egress in our modern age.

The decision holding in effect, that in the absence of agreement or circumstances to the contrary, a right of way should remain free and unobstructed, is not in accord with common law. At common law an express grant of a right of way gives

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[5] *Ibid.* at 267. The court held that in the grant of a right of way the words must be given the meaning implied from their use in relation to the character of the land and the customs appertaining thereto. A distinction was drawn between an urban right of way where surrounding circumstances and conditions would not allow gates and a rural right of way where the character of farm land makes gates essential and a custom of the business.

[6] 196 Ill. 83, 63 N.E. 674 (1902).

[7] 393 Ill. 124, 65 N.E.2d 370 (1946). In accord. Bishields v. Campbell, 200 Md. 622, 91 A.2d 922 (1952). However, where gates were not in existence during the prescriptive period there is a conflict of authority whether they may be erected by the servient owner. For cases holding that they may not see: Fankboner v. Corder, 127 Ind. 164, 26 N.E. 766 (1891); Miller v. Pettit, 127 Ky. 419, 105 S.W. 892 (1907). For the majority view, holding that they may be erected (reasoning that the particular manner of the use is not determinative of the nature of the easement), see: Luster v. Garner, 128 Tenn. 160, 159 S.W. 604 (1913); Mitchell v. Bowman, 74 W.Va. 498, 82 S.E. 330 (1914). There are also authorities holding that the servient owner may acquire the right to erect gates by prescriptive use although previously precluded from such rights: Ailes v. Hallam, 69 W.Va. 305, 71 S.E. 273 (1911); Faulkner v. Hook, 300 Mo. 135, 254 S.W. 48 (1923).

the servient owner the right to erect gates at termini. *Jones On Easements* summarizes the common law:

> The rule is general that the landowner may put gates and bars across a way over his land, which another is entitled to enjoy, unless of course, there is something in the instrument creating the way, or in the circumstances under which it has been acquired or used, which shows that the way is to be an open one. The easement of way is for passage only. The land remains the property of the owner of the servient estate and he is entitled to use it for any purpose that does not interfere with the easement[8].

This rule has been applied in many cases allowing the servient owner to erect gates[9].

The court failed to elaborate on one point which would have given greater strength to their decision. In the instant case the gate was erected across the right of way at an intermediate point rather than at the termini. This distinction has been employed in several cases[10]. In a Kentucky case the common law rule as to gates was specifically negated in connection with gates at intermediate points:

> . . . the rule does not apply where the consideration for the grant, the object for which it was made, the situation and condition at the time of the land, and the manner in which it had been used and occupied as a passway, demonstrates that it was not the intention of the parties that the owner of the servient estate might or should

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[8] JONES ON EASEMENTS, § 407.

[9] Willing v. Booker, 160 Va. 461, 168 S.E. 417 (1933); Davis v. Wilkinson, 140 Va. 672, 125 S.E. 700 (1924); Fortner v. Eldorado Springs Resort Co., 76 Colo. 106, 230 Pac. 386 (1924); Palmer v. Newman, 91 W.Va. 13, 112 S.E. 194 (1922).

[10] Evans v. Cook, 33 Ky. 788, 111 S.W. 326 (1908); Bridwell v. Beerman, 190 Ky. 227, 227 S.W. 165 (1921).

erect any gates across it at a place or places other than at its termini[11].

The reason for this rule is that the dominant owner could, at the time of the grant, reasonably contemplate the erection of gates at the termini but gates at intermediate points would not be within the contemplation of the parties. Therefore, to allow gates at intermediate points would be to impose an inconvenience on the dominant owner while giving the servient owner a right he had not intended to reserve.

However, in Virginia, a different result would have prevailed despite the distinctions between gates at termini and intermediate points; distinctions concerning past usage with or without gates; and distinctions of greater or lesser inconvenience. The erection of gates across easements used for the purpose of travel is expressly allowed by statute[12]. A recent Virginia case[13], decided under the Virginia Code, clearly states that gates are to be allowed and further states that the same result would be reached at common law as is now reached under Virginia statute. The only conditions imposed by the statute are that fences must exist on both sides of the right of way, there must be good faith, and there must be no expressed intent not to have gates[14].

The Virginia statute, in accord with common law, precludes Virginia from following the Schaefer case. But, while the case does not follow the common law rule, it does follow the reasoning behind the rule. The rule allowed the servient owner to erect gates because it was believed more necessary to

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11 Raisor v. Lyons, 172 Ky. 315, 189 S.W. 234 (1916); it should be noted that, in addition to cases decided on the point, other decisions on gates specify only that they are to be allowed at the termini without ruling on intermediate points.

12 Va. Code, § 33-119 (1950).

13 Hartsock v. Powell, 199 Va. 320, 99 S.E.2d 581 (1957). In accord: Good v. Petticrew, 165 Va. 256, 183 S.E. 217 (1936); Terry v. Tinsley, 140 Va. 240, 124 S.E. 290 (1924); Meadows v. Meadows, 143 Va. 98, 129 S.E. 354 (1925).

14 A 1952 amendment to the statute adds the proviso that the landowner must own land on each side of the right of way.

allow land to be enclosed than to allow the dominant owner unrestricted travel over the right of way[15]. The court in the instant case has found this comparison of need to be in favor of the dominant owner. Although this may have resulted in justice in the *Schaefer* case, such reasoning, if followed, would add confusion and uncertainty to the law. The Virginia statute conveniently does away with the necessity for the reasoning involved in the *Schaefer* case by providing a clear if arbitrary standard which in effect codifies the common law. It is submitted that other jurisdictions may avoid uncertainty and clarify right of way law by enacting similar statutes.

N.W.S.

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[15] Fortner v. Eldorado Springs Resort Co., *supra* at 391. See also 3 Tiffany, REAL PROPERTY, 812, 3rd Ed. (1939). And see RESTATEMENT OF PROPERTY, § 48, in which emphasis is placed on the reason for the rule and which would tend to corroborate the reasoning of the court in the instant case.