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## Easements- with Equitable Remedies

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EASEMENTS- WITH EQUITABLE REMEDIES

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BY

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## EASEMENTS - WITH EQUITABLE REMEDIES .

The principle that " Equity will only interfere where the remedy at law is inadequate, or utterly fails" forms the basis of the following discussion.

I shall endeavor to make a brief outline of the general subject of easements, including in this cursory survey, some of the definitions adopted by modern text-writers , and laid down in the written opinions of different judges, and also to discuss the essential elements of an easement, its divisions into classes, some of its several qualities, the modes of acquisition , and finally with the remedies which equity gives to those whose peaceful enjoyment of such easements are disturbed and the law gives no relief.

Perhaps one of the best definitions is the following:-

" An easement may be defined to be privilege, without profit, which the owner of one neighboring tenement hath of another ( existing in respect to their several tenements ) by which

the servient owner is obliged to suffer or not do something on his own land, for the advantage of the dominant owner." The above definition is taken from Gale on Easements, and is quoted approvingly by many judges.

Broome and Hadley, in their Commentaries say: " When the owner of one tenement called the dominant tenement has the right to compel the owner of another called the servient tenement, to permit to be done or refrain from doing something which as the owner of his tenement he would otherwise have been entitled to restrain or to do respectively , such a right is called an easement."

An easement, then , is one of the forms of interest in real property distinguished from actual ownership.

#### Essential Elements .

There seems to be several essential elements which every such right must have, and nearly all modern text-writers agree on the following requisites:

First. That easements themselves are incorporeal.

Second. That they are imposed on corporeal property, and

not upon the owners thereof personally.

Third. They confer ( as a rule ) no right to a participation in the profits arising from such use.

Fourth. They are imposed for the benefit of corporeal property.

Fifth. There must be two tenements, the dominant, to which the right belongs, and the servient upon which the obligation rests.

It would seem that nearly all modern writers exclude the taking of profits and one eminent writer has said "that rights of accommodation in another's land as distinguished from those that are directly profitable, are properly called easements."

#### Natural Rights and Licenses .

The right of control which we denominate easements, has been by many writers and courts loosely confounded with certain rights which are natural, and others which are mere licenses.

First. Natural rights are those which are conferred on

every land owner by law, and without which the land might be rendered useless by the act of a neighbor, which would otherwise be lawful. Among the natural rights says Goddard, is the " due enjoyment of air, light, and water, which by provision of nature flows over the soil of one land owner to that of another for the common benefit of each".

Easements properly speaking, must be distinguished from mere " licenses" . If it be attempted to pass an easement by parol, it transfers a mere license, as every easement must ( with exceptions hereinafter noted) be transferred by writing. A license passes no vested interest but simply makes an action lawful which without <sup>it</sup> would be unlawful . One tenant in common may grant a license to a third person to enter upon the land and cut timber but he cannot confer an easement because he is not sole owner of the land. A license may be revoked at any time before the expenditure of money is made upon it. 5 Watts, 308.

Having distinguished natural rights and licenses from easements , there is now to be considered some of the classifications and qualities.

Some authors divide the subject into easements appurtenant, and in gross, but Goddard is probably right in saying that technically there is no such thing as an easement in gross, though this term is very commonly used. A right in gross is necessarily separated from the land, while an easement cannot be but must be in respect to the tenement for and to which it is granted.

There must also be a dominant and a servient tenement. These tenements must be held by distinct and separate persons, and the easement granted must be beneficial to the dominant tenement and not reciprocally beneficial. By the best authorities, it seems that it is not necessary that the owner of the servient tenement must do anything for the benefit of the dominant, but that he must suffer something to be done in respect to his lands.

Again easement is best distinguished from custom in that an easement is a right that a single owner hath of another while custom is the usage of a class. Custom ought therefore not to be confounded with easements.

Finally the law will not recognize new species of ease-

ments, in the absence of express agreement. " A new species of incorporeal hereditaments cannot be created at the will and pleasure of an individual owner of an estate." He must be contented to take the sort of an estate and the right to dispose of it as he finds the law settled by decisions or controlled by acts of parliament or by legislation <sup>NOTE</sup> ~~law~~ ✓

Inconsistent easements cannot co-exist except as one is subordinate to another. There are certain classes of easements which are necessary to the enjoyment of property, and which would not be granted under any other circumstances. If a man buys a piece of property entirely surrounded by land which does not belong to him, it is necessary to the full enjoyment to that which he does own, that he should be at liberty to pass over the ground of the other. The courts differ somewhat as to what degree of necessity shall govern in such cases. Earlier courts held that nothing but absolutely necessary easements shall be allowed in such cases, but later courts hold that such rights ought to be granted as makes the enjoyment of the property most convenient.

It would now be well to refer briefly to the most import-

ant modes of acquisition.

Generally speaking, easements are acquired by act of man, and by grant. Natural rights on the contrary, are those inherent in land. It is true that easements often arise by prescription, but this originated in the presumption of a lost deed or grant. Easements being incorporeal hereditaments, they can only be granted by deed. The grant may be either express or implied.

In order to be able to grant an easement the grantor must be the owner in fee, otherwise he could grant only a license, as if he were tenant for years he could only grant a right for his tenancy. He must be the sole owner of the fee. Ease

Easements may be acquired by express grant, either by particular description or under the general words of a deed of conveyance. If the owner of land is possessed of an easement in another's land he may on conveying his own land convey also the easement by particularly describing it. Again if he conveys a part of his own land he may by a particular description grant an easement in the remaining part.

There has been much dispute and many delicate questions have arisen as to what will pass under a grant by general words. Goddard says, that "All easements, properly so called, to which a land owner has a right in the soil of a third person will pass to the grantee of the land under the general words of conveyance 'together with all the easements and appurtenances' and even if the word 'easements' is omitted the word 'appurtenances' is sufficient to carry those rights." *Whalley v. Thompson*, 1 B. & P., 371; *Morris v. Edgington*, 3 Taunt., 24; *Skull v. Gensler*, 16 C.B., (N.S.) 92;.

Easements of necessity will probably pass to the grantee without any general words of this kind, and they will certainly pass under the general word "appurtenances".

The result of the authorities as to grants by general words is as follows:-

If a man be an owner of two estates, and exercising the quasi-easement over the one for the benefit of the other, the words "with the appurtenances" will not pass the easement to the grantee. However, if the quasi-easement existed as an easement before the union of the two estates, the words "with

the easements used and enjoyed therewith" will pass the easement. In all these cases much will depend on the surrounding circumstances and the words used in the deed of conveyance. It is not necessary to use the word "grant" but any words which express the same meaning will do.

In many cases grants are implied, and easements so granted are worthy of much discussion.

It is a general rule that the law will imply such easements as are necessary to the enjoyment of the estate. The courts differ only upon the point as to what is necessary. As said above, the earlier cases were inclined to restrict to absolute necessity, but later decisions imply nearly everything that is necessary to the convenience of the grantee.

In earlier times the most common of implied grants was the presumption of a lost grant after a use of twenty years, so if a person claiming title could show a user for twenty years, the courts would presume that he had a grant but had lost it. This was a mere fiction of law. After the Prescription Act, this mode of implying a grant fell into disuse.

The subject of implied grant will be treated more fully

under--

### Acquisition by Prescription.

In both England and America easements may be acquired by act of statute and this is often the case in railroads and other corporations.

They also pass by devise, but these last mentioned modes of acquisition are of little importance and will not be discussed farther than to say they exist.

The Acquisition of Easements by Prescription is probably the most ordinary manner of obtaining an easement.

Were it possible, it would be interesting to discuss in detail the history of prescription at common law, and after the Prescription Act was passed in 1832. It will be impossible however to touch upon anything more than the essential elements of prescription .

Prescription, than at common law, was a mode of acquiring real estate when no other title could be shown but that the holder and those under whom he claimed had enjoyed its use uninterruptedly since time immemorial. This in early common law extended to the reign of Richard I.. So as an

easement must be conferred actually by grant , if it could be shown that the claimant and his ancestors had enjoyed the easement since the reign of Richard I., the law would presume a grant.

In England the common law was radically modified by the Prescription Act, passed in 1832, but in America its principles are still largely followed, the statutes being limited to provisions as to the length of time necessary to claim by prescription.

The law of most value and interest, to an American student, is of course, the law of his own country, and in discussing this topic, the characteristics of our own law will be set forth with some attention to the English Prescription Act. ~~See~~

In this country not only is a certain number of years necessary ( twenty years in most of the states ) but the enjoyment must be adverse, continuous, open, and peaceable , and under a claim of right. It must be adverse and not by permission, that is it must be under a claim of right or under such circumstances as to warrant a jury in inferring that it

was made under a claim of right. The doctrine of prescription is most admirably summed up in Mr. Chase's edition of Blackstone. " The statutes of different states differ considerably in detail, but the leading principles upon the subject are as follows: the possession of the person claiming to have acquired title must have been actual, continuous, visible, notorious, distinct and hostile, under an adverse claim of right. There must be a dispossession of the previous owner or an occupation in exclusion of his right of possession."

If the property be suitable for residence purposes, or capable of improvement, actual occupation, or continued cultivation, or inclosure, are usually requisite as necessary to establish a title by limitation. Possession is said to be adverse when it is under a claim of interest or title as against the owner and not in subordination to his title, or by his permission. The usual period of limitation is twenty years as in case of prescription. The Prescription Act in England has modified the common law in many points, the doctrine as above stated is the one that generally exists in

America today. The states differ materially only as to the length of time required.

It has been the object of this paper to give a more outline of the general subject of easements, more in order to form a basis for the following discussion of equitable remedies, than to enter into a detail.

It now proposes to deal with the main question under what circumstances will equity aid the injured party in the enjoyment of his right.

The instrument or tool<sup>with</sup> which equity works, is the injunction. The tendency of the earlier Chancery courts was to leave the injured party to his remedy at law, but of late years the Courts of Chancery have been granted the power to award damages, and the applications to this Court are becoming constantly more numerous.

It is a very general rule that Courts of Equity will interfere by an injunction, only where the right of the party complaining is clearly established, and the injury which he must necessarily sustain if the work be allowed to proceed is of such a nature that no adequate compensation can be

afforded by damages only, and when delay itself would be a wrong. " The leading principle" said Lord Bougham in Blackmore v. Glamorganshire, " in which I proceed in dealing with the application of the principle which I humbly conceive ought ,generally speaking, to be the guide of the court, and to limit it's discretion in granting injunctions, at least where no special circumstances occur, is that such a restraint shall be imposed as may suffice to stop the mischief complained of , and where it is to stay an injury, to keep them as they are for the present."

If the nuisance complained of be in its nature useful and necessary to the public , though productive of inconvenience to individuals, as a small-pox hospital, the court will not interfere by injunction, so to, where the injury is of a temporary nature only.

In England the Judicature Act<sup>k</sup> as merged the common law and equity courts so that it is very general to ask for an injunction wherever an action is brought for the disturbance of an easement.

### Equitable Easements.

Equitable easements are so called because chiefly within the cognizance of courts of equity. These cases are constantly increasing in number, and deserve therefore close and careful attention.

At this point it will be well to consider some of the most prominent of these cases, and one of the most important and commonly cited is that of Parker v. Nightengale, 6 Allen, 341.

In this case the facts were as follows:- The estates in litigation were situated in Boston and upon a cul de sac or a street opened only at one end,. Upon each side of this street, houses had been erected. The land in question originally belonged to several heirs who agreed between themselves that the land should be laid out in a court as above mentioned and that each of the said heirs should put a clause in every deed of conveyance, made out, that the land should be used for dwelling houses only , and the buildings should be of stone or brick, and at least three stories high. Deeds were made out according to the agreement, and this clause, in

question, was repeated in all subsequent conveyances .

The cause of this suit was the action of one of the tenants who proposed to open a restaurant in one of the houses built under the above arrangement. The owners of the other houses on the cul de sac praying an injunction to restrain him from so doing. None of the present owners of the property being the original heirs , there was obviously no privity of contract or estate between them. The privity was clearly between the original grantors and the present grantees and the question which presented itself for decision ( and a very important principle it was ) was the privity between the original grantors and the present grantees of such a nature as to constitute an obligation on any one of the present grantees to observe the negative easement of the co-grantees not to open a restaurant. It was held that it was, and the opinion of the court was so forcible and clear, that it is best to quote a portion of it. " A covenant though in gross at law, may nevertheless be binding in equity even to the extent of fastening an easement on real property, or of securing to the owner of one parcel of land a privilege or as it

is sometimes called 'a right to an amenity' in the use of an adjoining parcel, by which his own estate may be enhanced in value and rendered more agreeable as a place of residence."

" So long as he " ( the original purchaser ) " retains the title in himself his covenants and agreements respecting the use and enjoyment will be binding upon himself personally and can be enforced in equity." " A purchaser of land with notice of a right or interest, in it existing only by agreement with his vendor, is bound to do that which his grantor had agreed to perform, because it would be unconscientious and inequitable for him to violate or disregard the valid agreement of his vendor in regard to the estate , of which he had notice when he became purchaser. In such cases it is true that the aggrieved party can often have no remedy at law. There may be neither privity of estate nor privity of contract between himself and those who attempt to appropriate property in controvention of the use and mode of enjoyment impressed upon it by the agreement of their grantor, and with notice of which they took the estate from him."

He further argues that by the original agreement which

was embodied in all subsequent conveyances , each subsequent owner had a right or easement in the property of each other owner, and that though this might not be enforceable at law, it would certainly have its remedy in equity and would therefore come under the classification of equitable easements.

In the subsequent case of Hubbell v. Warren, 8 Allen<sup>E</sup>, 173. the court after reaffirming the doctrine laid down in Parker v. Nightengale, enu. ciated a further principle, namely, that to establish an easement over which equity will take cognizance, it must be shown by express terms or by necessary and unavoidable implication that the easement was intended to be permanent, and not simply for the lives of the present owners. In the last case cited, Hubbell v. Warren, 8 Allen, 173, the defendant granted one of the several house lots upon a certain square and stipulated in the deed of conveyance that houses should not be erected within ten feet from the line of the street. The plaintiff brought a bill in equity to restrain the defendant from building within twelve feet from the line of the street declaring that this was a parol agreement and the plaintiff had acted upon it.

The Court held here that though such an agreement in writing as above, might not be binding at law for want of privity of estate between the grantees, of the original parties, still a parol agreement might be enforced in equity to create an easement. The Court laid down the following rule to govern such cases.

It must appear by express stipulation or by necessary and unavoidable implication that the parties intended to impose a permanent restraint on the use or mode of occupation of their respective estates.

This may be done by writing, but where it rests in parol there must be such a stipulation shown as to indicate clearly the intention of the parties. The question then turned on the nature of the agreement as to the two feet difference .

In the case of Brewer v. Marshall, 4 C.E.Green, 543, the facts were similar to those in Parker v. Nightengale, several adjacent land owners, making an agreement that none of the lots should be used for the purpose of selling liquor. They agreed to embody this in all subsequent conveyances, and the equity court held that this was binding upon all who took

with notice. It seems then to be a general rule that where lands are divided into lots, and there are placed in subsequent conveyances clauses that can be shown to be intended to be beneficial to the other lots this will be regarded in equity as an easement. *Tobey v. Moore*, 130 Mass., 448; *Phoenix Ins. Co. v. Continental Ins., Co.*, 87 N.Y., 400; *Trustees v. Lynch.*, 70 N.Y., 440.

The courts go even farther in the case of *Gilbert v. Petler*, 38 Barb., 488. In this case one Gilbert owned a certain piece of property, and wished to keep the view from the said property unobstructed. To do this it was necessary to prevent the building on <sup>an</sup> adjoining lot. He bought the estate in question and had the deed made out in the name of a third party without declaring any trust in his own favor. The third party at Gilbert's request then sold the estate to F. and covenanted with Gilbert, his heirs and assigns that they should not erect any building to obstruct the view from Gilbert's house. There were several successive conveyances of this parcel in which this covenant or restriction was noticed, and Gilbert made a qualified release to one of the

owners, of the restriction as to the part of the premises.

The Court held, that there was a negative easement upon this estate and enforceable in equity. " The actions of courts of equity in such cases is not limited by rules of legal liability and does not depend upon legal privity of estate, or require that the party invoking the aid of the court should come in under and after the covenant. A covenant or agreement restricting the use of any lands or tenements in favor of or on account of other lands , creates an easement, and makes one tenement in the language of the civil law, servient, and the other dominant, and this without regard to any privity or connection of title or estate in the two parcels or their owners. All that is necessary is a clear manifestation of the intention of the person who is the source of title to subject one parcel of land to a restriction in its use for the benefit of another, whether that other belongs at the time to himself or to third persons, and sufficient language to make that restriction perpetual."

Badger v, Boardman, 16 Gray., 42; Parker v. Nightengale, 6 Allen, 348.

The English courts holds substantially the same doctrine as the American , and it will be unnecessary to more than cite a few of the more important cases.

Rankin v. Huskisson, 4 Simp. Ch., 13; Mann v. Simpson, 15 Simp., 377; Piggott v. Stratton, 1 DeG.F.&J., 53; Tulk v. Moxhay, 1 H.& F., 165.

The general rule in regard to passing the incidents of an equitable easement , is that the intentions so to do must be shown.

The discussion of the above cases serve to show the growing importance of equitable easements in the United States As population increases the cases in which equitable remedies will be necessary are multiplying. It is now left to consider how equitable remedies may be enforced.

#### When Will Equity Interfere ?

The proposition may be laid down unless it be to prevent irreparable mischief equity will not interfere when the title is in question. This must be first settled by a court of law. An instance of irreparable mischief which may be

prevented by an application to a court of equity is the erection of a building so near to the house of another as to darken the windows against the right of the owner. It was laid down by Lord Romilly in *Heff v. Bucknell* L.R., 8 Eq., 6, that where a man possesses a right to light and air over the property of his neighbor, the obstruction of which will be punishable at law, in the shape of damages, a court of equity will by injunction prevent that obstruction if the injury which would ensue would be of a permanent character.

So in a case where the plaintiffs are entitled to the purity of water and the defendants pollute it, the plaintiff may go into equity and get an injunction restraining him from so polluting the water.

In the case of *Patterson v. Gifford*, L.R. 18 Eq., 262, it was held that in order to obtain an injunction to prevent a violation of a right, it must be shown that such violation would be the inevitable result of the act sought to be prevented, not that it might be .

In America the general rule prevails that injunctions will not be granted unless the right at law has been clearly

established.

In the classes of cases of which Parker v. Nightengale is an example, there being no privity between the dominant and servient tenement equity will very readily interfere even though there be no action at law. So where a suit at law will though successful furnish inadequate remedy equity is always ready to step in.

When a court of equity does take jurisdiction of a case it may take complete jurisdiction and enjoin against future infringements and award damages for the past.

It would be interesting to follow the workings of equity in the many and diverse branches of easements, but enough has been said to show when and how equity will prevent the disturbance of peaceful enjoyment and so the object of this paper, I hope, has in a slight measure been accomplished.

~~John B. Stephens.~~

May, 19, 1894.

*John B. Stephens*