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THE EFFECT OF NON-USER IN PENNSYLVANIA

In the summer of 1949 there was a terrible drought in Podunk, Pa. *AB*, one of the local farmers, was in desperate need of water for his cattle; so, remembering that his grandfather had once mentioned having a right to use a trail which crossed the land of one *RP*, *AB* moved his cattle over said trail and across said land to the Kitchamoo River which lay on the other side. However, *AB*'s supposition of the continuance of that right apparently boomeranged, because *RP* immediately proceeded to bring an action against *AB* in the local court. Now *AB* is in court, pleading in the alternative;

First: That the right was secured to him by deed; or

Second: That the right was acquired by adverse possession for the statutory period.

Assuming that there has been a lapse of 26 years since the right was last exercised, what decision should be forthcoming from the court upon *AB*'s establishing either plea? Or, to be more concise, what is the effect of non-user upon

1. An easement acquired by grant, or
2. An easement acquired by prescription in Pennsylvania?

In the Restatement of Property may be found a general rule, apparently covering the overall picture, to the effect that

"Non-user does not of itself produce an abandonment (of an easement) no matter how long continued."¹

But that rule is definitely general, applying to all easements, no matter how acquired, and we shall soon see that the law in Pennsylvania does not in all respects agree with it.

One of the earliest cases in Pennsylvania was that of *Butz v. Ibric*,² which dealt with the effect of non-user upon a privilege acquired by way of reservation. And, in keeping with our hypo, the period of non-user was longer than necessary for prescription. The court there held that:

"Mere non-user for 32 years of a privilege to swell water on the land of the grantee did not bar or forfeit the privilege reserved."

Then two years later the question again arose in *Nitzell v. Paschall*,³ and again we find a right based upon a deed, but this time the non-user had continued for a period of 38 years. Yet, the court reached the same conclusion. However, it

¹ RESTATEMENT, PROPERTY § 504 comment d (1944).

² 1 Rawle 218 (Pa. 1829).

³ 3 Rawle 76 (Pa. 1831).

is in this case that is found the beginning of a distinction which apparently exists at the present time. Mr. Chief Justice Gibson, a most eminent jurist, delivered the opinion in that case, and the following is quoted from him:

"I think that there cannot be a doubt that a lapse of time may be so great as to afford a natural presumption (of the loss of a right), but where it has been acquired by grant, it will not be lost by non-user, in analogy to the statute of limitations, unless there were a denial of the title or other act on the adverse party to quicken the owner in the assertion of his right."

Had the Chief Justice stopped at this point, perhaps his dictum would have passed unnoticed, but he did not. Continuing, he said:

"It is certainly true that a right of enjoyment may be lost in the same way it has been gained, and when acquired by an adverse possession for 20 years, it may, I should presume, be lost by non-user for the same period."

As a result, we have three classes of cases in Pennsylvania concerning the extinguishing of an easement by non-user:

1. Those in which it is emphatically held that non-user will not effect an extinguishment of an easement acquired by deed or grant;
2. Those in which it is intimated that non-user might effect the extinguishment of easements acquired by deed or prescription;
3. Those in which it is held that non-user will presumably effect the extinguishment of easements acquired through prescription.

First Class

In so far as the first class of cases is concerned, it might be noticed that they all pertain to rights by way of deed, and therefore would be very little authority where an easement by prescription is concerned. But it does not necessarily follow that the rule which they set forth is not deserving of applicability in the prescription cases.

Technically speaking, there is really no sound basis for a distinction between easements created by grant and those created by prescription, if the fiction of the early courts is followed. Under that doctrine, an easement by prescription was presumed to rest upon a lost grant, or as Tiffany words it, "a lost deed."⁴ And if that were so, there really should be no differentiation between them. But the courts were not content to stop there. Rather, they continued along their line of fallacious reasoning and raised another fiction to lose the "lost deed" upon the showing of non-user for 21 years. One of the early Supreme Court decisions of this state attempted to call a spade a spade and exposed the fiction for what it

⁴ TIFFANY, REAL PROPERTY, 544 (Abr. Ed. 1940).

was worth.⁵ But subsequent cases failed to take advantage of the opportunity to strike one more incumbrance from the law and continued to cling hopelessly to a doctrine which avails little more than nothing.⁶

However, on the other hand, the American Law Institute and the Restatement of Property have quite frankly recognized the fiction for what it was worth when they say that "the justification for permitting easements by prescription or the acquisition of any interest in land by adverse occupancy rests upon the protection given by the law to the one who used as against the one who suffered the use."⁷ Yet, even this reasoning does not suffer us to unequivocally say that there should continue to be a distinction.

There are many arguments which might be advanced on either side as to whether the courts should continue to distinguish between easements by grant and easements by prescription. Nor is it pertinent to this topic that the subject should be undertaken completely or extensively. However, it might be well to mention one or two of the more pertinent arguments which might be put forth.

Reasoning from an analogy to the acquisition of land by means of adverse possession, it would seem strange that the one should be lost by non-user while the other could never be lost in that manner. True, there is no essence of possession or seisin in the instance of easements, but they are both of equal formality, and are both founded upon the same principle. Thus, why should there be any difference? Should the acquisition of a corporeal interest in land by adverse possession be protected more fully than the acquisition of an incorporeal interest in land by prescription?

Or again, should an easement by grant which has been spread on the record be accorded a more sacred position in the annals of property than the confirmation of a prescriptive easement by judgment record?

On the other hand, it is very easy to understand that an estate free of an incumbrance is much more desirable than a servient estate. And the courts will generally follow through along that line, strictly construing any such incumbrances so as to limit them as much as possible. But here again we run into a very sound argument against the distinction. If such is the case, that it is desired that incumbrances be avoided if at all possible, why not then steer clear of any distinction and use the rule for both which may work the quickest avoidance?

However, suffice it to say that there is a distinction, and that there is no reason to assume that it shall not continue for quite some time to come.

⁵ *Okeson v. Patterson*, 29 Pa. 22 (1857).

⁶ *Mather-Klock Inc. v. Plymire*, 349 Pa. 194, 36 A.2d 802 (1944); *Lehigh Valley Coal Co. Appeal*, 351 Pa. 108, 40 A.2d 399 (1945); *Mecke v. Heist*, 54 Mont. 275 (Pa.).

⁷ RESTATEMENT, PROPERTY § 477 comment b (1944).

In that field characterized by the existence of a deed, there is a wide and inclusive authority on the subject, in which might be found almost every imaginable situation. But the sum and substance of all of these cases is that non-user is immaterial, of no effect, or other such terminology.⁸

For example, the Pennsylvania Supreme Court held in *Erb v. Brown*⁹ that, "A servitude by grant will not become extinguished by disuse, unless accompanied by denial or other act to quicken its owner to assert his right. Such a servitude can only be extinguished by deed or note in writing or operation of law."

And the Superior Court held in one of its earliest decisions that, "When a right of way is claimed by grant, such right cannot be extinguished by disuse or lost by non-user, unless there be a denial of title or other act on the part of the adverse party to quicken the owner in the assertion of his right, and an abandonment of a servitude created by deed cannot be inferred from non-use by the grantee."¹⁰

Then again the Superior Court held in the *Nickels* case¹¹ that, "A right to the use of an alley, granted by deed, cannot be lost merely by non-user. Nothing less than an absolute denial of the right followed by an enjoyment inconsistent with its existence for the period of 21 years or more can amount to an extinguishment of the right."

And then in the later case of *Bombaugh v. Miller*¹² the situation was very ably summed up by the court in its comment on the charge which the trial judge had made to the jury.

There, an entry had been made upon a lane by *D*, whose title was acquired by deed. He held the same continually for 21 years. *P* also had a right, acquired by deed, to the use of that same lane, and *D* attempted to bar him from that use. The court in its opinion said,

"To prove abandonment of a servitude created by deed, something more must be done than to show that it was rarely exercised by the grantee, and where the *P* had not the exclusive but the concurrent use of a lane, and his reserved right was spread on the record, and appeared in *D*'s chain of title, and the latter had other notice thereof, it was error to instruct the jury that *P* was obliged to continuously use the grant to avoid the presumption of its abandonment."

⁸ *St. Mary's Church v. Miles*, 1 Wharton 229 (Pa. 1835); *Hall v. McCaughey*, 51 Pa. 43 (1865); *Lindeman v. Lindsey*, 69 Pa. 93 (1871); *McKee v. Perchment*, 69 Pa. 342 (1871); *Richmond v. Bennett*, 205 Pa. 470, 55 A. 17 (1903); *Citizen's Electric Company, Applnt., v. Davis*, 44 Pa. Super. 138 (1910); *Haig Corp., Applnt., v. Thomas S. Gassner Co., Inc.*, 163 Pa. Super. 611, 63 A.2d 433 (1949)—Most recent case. A right of way or easement, established by deed, is not lost by non-user.

⁹ 69 Pa. 216 (1871).

¹⁰ *Twibill v. L. and S. S. Pass. Ry. Co. and Elec. Traction Co., Applnts.*, 3 Pa. Super. 487 (1897).

¹¹ *Nickels v. Hand in Hand Cornet Band, Applnt.*, 52 Pa. Super. 138 (1910).

¹² 82 Pa. 203 (1876).

But any further citation of cases along this line is unnecessary, inasmuch as they all follow the general rule.

Second Class

Under the second class of cases, which are few in number, we find in particular, the *Nitzell* case¹³ and *Dyer v. Depui*,¹⁴ which followed Chief Justice Gibson's dictum by eight years. Perhaps the rule evolved in this case was influenced by that dictum. It would seem so, since the language employed is almost identical. Parts of the trial judge's charge are quoted.

"It is said in the first place that this right of the plaintiff under the deed has been lost by neglecting to exercise it. A right may be lost in this way, but it certainly cannot be so lost in a shorter period than a right of this nature could be acquired by a reverse occupancy—viz., 21 years."

And further on he continues,

"The rule in Pennsylvania is that non-user of an incorporeal hereditament for 21 years creates a presumption to defeat the right. Non-user for 20 years is not sufficient."

It could be contended, without stretching the rule there cited, that this goes beyond the Chief Justice's dictum, since it is inferred that the right involved, though acquired by deed, could be affected by non-user. However, on appeal these points were not considered by the court, the only reference being to the statute of limitations under the Act of 1785,¹⁵ plaintiff contending that 20 years was sufficient to raise the presumption.

Thus we are left in doubt as to the position the court might have taken at that early date had error been assigned as to those parts of the charge. As a result, we must fall back on the general rule as pertaining to easements acquired by deed.

Third Class

In the third class the authority is apparently limited to one case, that of *Commonwealth v. Zimmerman*.¹⁶ And even it is not clearly in point with the desired situation.

The facts were that one Abraham Z. was given the right to "fich wathar" from a certain spring, the privilege being one in gross created by deed. The right was exercised by the grantee, the water having been carried in buckets along a path which led from A's place to the spring. Later, by virtue of a deed, Hiram Z. came into possession of the land of A and while the land was in his possession, about 23 years before this action, H laid a pipe from the spring to the said land. But its use was abandoned about a year later, and the pipe became choked up.

¹³ *Supra*.

¹⁴ 5 Wharton 584 (Pa. 1839).

¹⁵ Act of March 26, 1785, 2 Sm. L. 299, 12 P. S. 72.

¹⁶ 56 Pa. Super. 311 (1914).

Shortly prior to this action, *H* entered upon the alleged servient land, which was posted, for the purpose of replacing that pipe with one of larger dimensions, and the owner brought this action of trespass. However, the difficulty lies in the fact that the circumstances surrounding the laying of the original pipe were not known. It was not shown that the piping had been done with the acquiescence of the then owner or adversely to his rights therein. Thus the fact that a prescriptive right had been created was dubious, to say the least, and as a result, the court was in a quandary as to the proper disposition of the case.

The final conclusion finds the court hesitating between easements in gross, the right to replace the old pipe with a larger one, and the loss of easements acquired by prescription through non-user, not knowing with certainty upon which ground to sustain their decision of *H's* liability, but rather citing all three in an attempt to hit upon the correct reasoning.

The opinion does, though, reaffirm, by dictum, the earlier dictum attributable to Chief Justice Gibson that,

"A non-user of a prescriptive right for more than 21 years, under the circumstances of this case, raises, we think, a presumption of abandonment."

But that leaves us with less than nothing. Such assistance is as water to a drowning man.

Thus we find that there are two situations:

1. That of an easement acquired by grant, upon which non-user has no effect whatsoever as to the extinguishing of the right; and
2. That of an easement acquired by prescription, upon which non-user for the period of 21 years will evidently, by virtue of the dictum rule, cause a forfeiture;

with a number of cases in between, where the inference is unauthoritative, to say the least.

Non-User as Evidence of Intention

But this does not wind up the problem. The question now arises as to whether there is any benefit to be derived from showing non-user. The Restatement has said that non-user "but evidences the necessary intention" of abandonment.¹⁷ Is this true?

As we have seen from the *Zimmerman* case,¹⁸ in the instance of easements by prescription, a consideration of this is immaterial, assuming that the dictum will be controlling in future cases. But what is the situation where the privilege

¹⁷ See note 1, *supra*.

¹⁸ *Supra*.

was acquired by grant? The Pennsylvania cases, for the most part, have not concerned themselves too much with this problem, since there has generally been no necessity to do so. Yet there is one such case in this state which directly attempts to discover a solution. In *Weaver v. Gleitz*¹⁹ the Superior Court affirms an opinion which undertook to determine the weight to be given non-user as evidence of abandonment. The court held that,

"The fact that another right of way than that acquired by deed was used is no evidence of abandonment of the right of way acquired by deed, in the absence of any proof that the owner of the land obstructed such right of way."

However, this does not in truth offer a solution, unless it might be inferred that the court had reference not only to abandonment, but also to the intention to abandon. Something more is needed to throw light on the court's interpretation of its own rule, and that it is believed, may be found in one of the cases cited therein with the high approval of the court. That case, *Welsh v. Taylor*,²⁰ presents the proposition that,

"A person who acquires title by deed to an easement appurtenant to land has the same right of property therein as he has in the land, and it is no more necessary that he should make use of it to maintain the title than it is that he should actually occupy or cultivate the land; hence his title is not affected by non-user, and, unless there is shown against him some adverse possession or loss of title in some of the ways recognized by law, he may rely on the existence of his property with full assurance that, when the occasion arises for its use and enjoyment, he will find his rights therein absolute and unimpaired. . . . Abandonment necessarily implies non-user, but non-user does not create abandonment, no matter how long it continues. There must be found in the facts and circumstances connected with non-user an intention on the part of the owner of the easement to give it up, but intention existing coupled with non-user will uphold a finding of abandonment."

It would be very strange indeed could one show abandonment and not be able to show non-user, but it does not follow that non-user will be accorded weight sufficient to show an intention to abandon. As is seen from the above citation, something in addition is needed to uphold any finding of abandonment. And conversely, can it be said that non-user is not necessary in order to prove abandonment? It would seem that the affirmative answer to this question would be the logical one.

Therefore, as a necessary conclusion to the above, we can safely say that non-user as evidence of the intention to abandon is slight, if not closely approximating the degree of insignificance. Nevertheless, even the ant can move moun-

¹⁹ 16 Pa. Super. 418 (1901).

²⁰ 134 N. Y. Rep. 450, 31 N. E. 896, 18 L. R. A. 535 (1893)—The later citation contains a fine collection of cases in re the effect of non-user upon easements.

tains, so a showing of non-user in many instances may mean the difference between a favorable and an unfavorable consequence.

In conclusion, as a sidenote to the foregoing, there is also another situation of which mention might be made, namely, that of easements acquired by eminent domain and the effect of non-user thereon.

For the most part, the rules governing these privileges and non-user are not unlike those governing the acquisition of such rights by grant and non-user.

"An abandonment of land appropriated by a municipality for public use cannot be established by proof merely of a failure for the time to use it."²¹

However, in two situations statutes are applicable which change the rule to some extent.

1. By the Act of 1893,²² which refers to easements created for the benefit of mining concerns, there is a loss by non-user upon 21 years adverse possession by the owner of the land, and
2. Likewise, by the Act of 1893,²³ which refers to easements which have been acquired by corporations under the right of eminent domain, the vacation, cessation of occupation, and non-user of that right and privilege for a period of 15 years will terminate it.

But these instances are mere exceptions, and will be rarely encountered, leaving only the situation where the right is acquired by prescription as unsettled and possibly conflicting with the general rule that "*mere non-user will not effect an extinguishment or abandonment of an easement.*"

Roy Miller

²¹ Corr, Applnt., v. Philadelphia, 212 Pa. 123, 61 A. 808 (1905).

²² Act of May 26, 1893, P. L. 143, 68 P. S. 421-22.

²³ Act of June 10, 1893, P. L. 415, 68 P. S. 423.