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HENRY M. SCOTT, MARY JANE SCOTT, GREGORY A. LESCALLEET, LESLIE A. LESCALLEET, JAY C. MOORE, WENDY MOORE, EDWARD V. BURKHOLDER, MARLENE J. BURKHOLDER and FRED A. BROWN, Plaintiffs vs. ALBERT L. BARKDOLL and BARBARA E. BARKDOLL, Defendants  
FRANKLIN COUNTY BRANCH CIVIL ACTION - LAW A.D. 1997 - 510

*SCOTT V. BARKDOLL*

*Right-of-way: existence of prescriptive easement, easement by implication, easement by necessity, and irrevocable license*

Facts: plaintiffs are landowners who use gravel lane called "Renner Lane," which runs over the land owned by defendants, to get to the public road. At one point, plaintiffs' and defendants' land had a common owner; when the land was split up in 1957, a right-of-way was given by this common owner to plaintiffs' predecessor in interest but was never recorded. The predecessor also purchased another right-of-way to the public street, which was recorded but never built. In 1985, Antrim Township extinguished plaintiffs' recorded right-of-way to make room for a right-of-way for two other lots to be developed near plaintiffs' land. While that right-of-way also gives access to plaintiffs' lots, they cannot legally use it because it was built only for the other two lots and because it would violate the township ordinance. In 1997, defendants blocked off Renner Lane. Plaintiffs are seeking an injunction.

1. Prescriptive easement exists in this case: use of Renner Lane by plaintiffs and their predecessors was open, continuous, notorious and uninterrupted since 1959.
2. Defendants argue the use of Renner Lane was not adverse because they had given permission to the owner, and all his successors in interest, to use Renner Lane; such permission is revocable license and was extinguished when land was conveyed to subsequent owners in the absence of evidence that defendants told the subsequent owners that they had permission to use Renner Lane.
3. Plaintiffs also have easement by implication: there was a separation in title in the land, Renner Lane was used before the separation of title, and when the land was split up, the use of Renner Lane was necessary for the beneficial use of the land conveyed.
4. Defendants argue that there is no easement by implication because the easement was granted only until the recorded right-of-way was developed and thus the easement was not intended to be permanent; however, at time right-of-way over Renner Lane was granted, Renner Lane was the only way to get to the public road and there was no indication that any other road would be developed. Thus, defendants bought their property subject to easement by implication.
5. Easement by necessity exists as long as there is no other legal access to public road: plaintiffs' property became landlocked when it was severed from common owner; because plaintiffs' recorded right-of-way was extinguished and they have no legal right to use the other right-of-way built in 1985, there still is a strict necessity to use Renner Lane.
6. Plaintiffs have irrevocable license to use Renner Lane: if it must be found that defendants gave permission to plaintiffs' predecessors to use Renner Lane, then this license became irrevocable when plaintiffs and their predecessors expended money and effort by building houses on the land in reliance on the use of Renner Lane for access to the public road; defendants are estopped from revoking their permission.

## Factual and procedural Background

This case involves a right-of-way plaintiffs claim to have over a gravel road called Renner Lane, also known as Prospect Avenue Extended. The facts of this case are complicated. Plaintiffs occupy what have been labeled as lots 1 through 6 on the Marshall survey dated August 30, 1958, and some residue land ("residue") near those lots which are located in Antrim Township, Pennsylvania. See Defendant's Exhibit 1. At one point in time, those lots were owned by Mr. and Mrs. Herbert Swopes ("the Swopes"). The Swopes also owned the land now owned by defendants.

In 1957, the Swopes conveyed the land on which lots 1 through 6 and the residue are situated to Mr. and Mrs. Charles Reamer ("the Reamers"). In their unrecorded agreement of sale dated October 20, 1956, the Swopes gave the Reamers "the right to ingress and egress of an existing lane" to be used "as to such time as the proposed street is opened and used for that purpose, then this right-of-way is to be canceled and annulled." Defendant's Exhibit 3. The "existing lane" appears to be Renner Lane, which was in existence at that time. See Plaintiffs' Exhibit 6 (deed dated October 23, 1954 in which the boundaries of a lot not in issue in this case are described by making reference to Renner Lane). Renner Lane is situated on defendants' land and runs from the intersection of Clearview Avenue and Prospect Avenue to another gravel road leading to plaintiffs' lots.

At the time of conveyance from the Swopes to the Reamers, lots 1 through 6 and the residue land had no access to the public road other than over Renner Lane, which ran over the other land still owned by the Swopes. Unfortunately, the right to use Renner Lane was never recorded in the deed. The Reamers did, however, purchase a 40-foot right-of-way from Mr. and Mrs. Etter ("the Etters") on property adjacent to the defendants' land. This right-of-way was recorded on the Marshall survey of 1958 (Defendant's Exhibit 1) but it remained a "paper right-of-way" because it was never developed.

In 1960, the Swopes conveyed the land on which Renner Lane is situated to Defendants Mr. and Mrs. Albert Barkdoll, who still live there. Recently, defendants have conveyed a part of their land located on the other side of Renner Lane to their son, Michael Barkdoll. The Reamers have subdivided their land since 1959 and conveyed it to

several other owners. Plaintiffs are all successors in interest to land originally owned by the Reamers.

In 1985, Mr. Schuchman sought a variance from the township ordinance requiring a 50-foot wide private right-of-way to allow him to develop a 40-foot right-of-way to access land he had purchased from the Reamers and which he wished to develop. This land is located south of plaintiffs' lots and adjacent to defendants' land, and is designated as lots A and B on the Englerth survey of 1985. See Plaintiff's Exhibit 2. This 40-foot right-of-way requested by Mr. Schuchman is located west of the existing "paper" right-of-way purchased by the Reamers from the Etters and runs from Walnut Street to lots A and B, where it connects beyond Renner Lane with the gravel road leading to plaintiffs' lots. The Antrim Township Zoning Board granted Mr. Schuchman's request for the 40-foot right-of-way. Plaintiff's Exhibit 3. The township furthermore *extinguished* plaintiffs' existing "paper" right-of-way. Plaintiff's Exhibits 2 and 3. Tom Englerth, the professional surveyor involved in this process, testified that the new 40-foot right-of-way was created specifically to service lots A and B, as well as a lot owned by Tex Myers, located north of plaintiffs' lots. See Plaintiff's Exhibit 5. That right-of-way was built in 1986 or 1987.

The owners of the lots at issue continued to use Renner Lane as they had done since they bought their properties. Occasionally, they also used the 40-foot right-of-way built for lots A and B. In October 1997, defendants erected a barrier on Renner Lane, preventing any of the residents of lots one through six and the residue to use the lane to get to their homes. Defendants claim they did this because of the increased noise and dust of the vehicles of plaintiffs and their guests, and because of the high speed at which the cars were driven over Renner Lane. Because of the barrier, plaintiffs were forced to use the 40-foot right-of-way built for lots A and B. Plaintiffs also had to expend some money to buy stones to make that road accessible to the increased traffic. On October 24, 1997, plaintiffs filed a complaint seeking to enjoin defendants from blocking Renner Lane and seeking reimbursement for the money they had to spend.

## Discussion

Plaintiffs have argued that they are entitled to the relief they are seeking on the basis of four theories. First, plaintiffs argue that they

have a prescriptive easement. Secondly, they claim that they have an easement by implication. Plaintiffs' third theory is based on the doctrine of easement by necessity. Lastly, they sought permission from this court to amend their complaint to add the theory of irrevocable license. Plaintiffs argue that the testimony of defendants' witnesses at trial, that they gave plaintiffs permission to use Renner Lane, gave rise to this theory. This court will grant plaintiffs' motion to amend the complaint and consider all four theories they submitted.

### 1. Prescriptive Easement

An easement by prescription arises by adverse, open, continuous, notorious, and uninterrupted use of the land for twenty-one years. *Waltmyer v. Smith*, 383 Pa. Super. 291, 556 A.2d 912, 913 (1989). In the underlying case, there is no question that the use of Renner Lane by plaintiffs and their predecessors in title has been open and notorious. Defendants' house is directly adjacent to Renner Lane. Mr. Barkdoll testified that he watched houses being built on lots now owned by plaintiffs, and that he did nothing to stop the traffic to and from those homes. There was even testimony from Plaintiff Henry Scott, whose house is located on lot 1, that Mr. Barkdoll helped him out when he was stuck in the snow on Renner Lane. All plaintiffs testified that they use Renner Lane daily.

It is furthermore clear that the use of Renner Lane has been continuous until Mr. Barkdoll erected a barrier in October 1997. Mrs. Fox testified that Renner Lane was in existence when she bought her lot on the corner of Clearview Avenue where Renner Lane begins, and that when the first houses were built in 1959 on lots 1 through 6, Renner Lane was used by cars and trucks to access them. All plaintiffs furthermore testified that they use Renner Lane daily and that they have done so since they bought their properties.

Next, it must be determined whether the use of Renner Lane has been adverse for twenty-one years by the Reamers and their successors of interest. The period in which the Swopes used Renner Lane cannot count towards the prescriptive period, since they owned the land on which Renner Lane was situated, and therefore could not have been an adverse use. The period in which the Reamers used Renner Lane while the Swopes still owned the land on which Renner Lane is situated also may not be counted towards the prescriptive period, because the Reamers had been given permission by the

Swopes to use it for ingress and egress. This court must thus determine if there has been an adverse use of Renner Lane since the Reamers sold their land and since defendants bought the land on which Renner Lane is situated.

At trial, Defendant Albert Barkdoll testified that within a few days of his purchase of the land on which Renner Lane is situated, Mr. Reamer came to see him and asked defendant permission to use Renner Lane. Defendant testified that he gave Mr. Reamer, and anyone who would buy the property from the Reamers, permission to use Renner Lane until the 40-foot "paper" right-of-way was developed. Thus, defendants argue that there cannot be a prescriptive easement because plaintiffs' use of Renner Lane was by permission, and therefore not adverse.

Generally, a use based upon permission cannot ripen into a prescriptive right unless the owner of the land is given clear notice that the character of the use has changed from a permissive use to an adverse use, and the adverse use then continues for the full prescriptive period. *Waltmyer*, 556 A.2d at 914. However, the fact that a predecessor in interest has used the land with permission does not mean that the successor's use of the land is also by permission. The permission given to use another's land constitutes a revocable personal license. *Id.* "By its very nature such license is not alienable." *Id.* In *Waltmyer*, the situation involved two brothers who owned adjacent lots and constructed one driveway for their mutual use. One of the brothers sold his lot to the plaintiffs, who never asked the other brother permission to use the driveway. The other brother then also sold his lot, and the new owners, defendants, blocked off the driveway. Defendants argued that plaintiffs did not have a prescriptive easement because the use had been permissive, since the original permission given by the brothers had not been revoked. The court found that when the first brother conveyed his land to plaintiffs, the mutual permissive use was terminated. *Id.*, at 915. Thus, the use of the driveway by plaintiffs became adverse, and because it continued for more than twenty-one years, they had obtained a prescriptive easement. *Id.*

Similarly, in the underlying case, defendant testified that he had given permission to the Reamers to use Renner Lane. This permission terminated when the Reamers conveyed their land to

subsequent owners. Defendants argue that the underlying case can be distinguished from *Waltmyer* because defendant gave permission not only to the Reamers, but also to their successors in interest. Defendants rely on *Margoline v. Holefelder*, 420 Pa. 544, 218 A.2d 227 (1966). In that case, the Pennsylvania Supreme Court stated that prior permissive use by a predecessor in title is deemed to continue until the contrary is shown. *Margoline*, 218 A.2d at 229. However, subsequent courts have held that this dicta from *Margoline* did not address the issue of whether permissive use terminates upon succession of interest, and thus does not apply to the facts of a case such as this one. See *Waltmyer*, 556 A.2d at 914; *Sterner v. Freed*, 391 Pa. Super. 254, 260, 570 A.2d 1079 (1990).

This court finds that in the underlying case, the permission given by defendants to the Reamers was extinguished when the Reamers conveyed their land to their successors in interest. All plaintiffs testified that they had never asked for nor been given permission by anyone to use Renner Lane. The fact that defendant told Mr. Reamer that he had given permission to the Reamers and their successors in interest did not extend the permission to them in the absence of any showing that defendant told any of the successors in interest that they had permission to use Renner Lane. A person cannot sit idly by and watch people use a right-of-way for thirty-seven years without doing anything about it, and then claim that there cannot be a prescriptive easement because he had given the original owner, and all successors in interest, permission to use the right-of-way. The successors in interest must, at a minimum, have notice that such permission existed. See *Orth v. Werkheiser*, 305 Pa. Super. 576, 580, 451 A.2d 1026 (1982) ("Having not been communicated to any user, Defendant's 'obvious permission' was no permission at all). In the absence of such notice, the permission is deemed to have been extinguished at the time of conveyance by the owner who was given permissive use. This, the prescriptive period commenced when the Reamers conveyed parts of their land to their successors in interest.

The Reamers started selling their land in 1959 to the Schuchmans, and Olive Schuchman testified that Renner Lane was in existence when they bought their property and that they have used it for ingress and egress since they lived there. Thus, it is clear that Renner Lane has been used by the owners of what are now lots 1 through 6 and the residue at least since 1959. The use of the land by subsequent

owners may be tacked to reach the full twenty-one year period. 7 Summ. Pa. Jur. 2d § 13:44 (1992). Thus, there clearly is a prescriptive period of more than twenty-one years.

This court finds that plaintiffs had adverse, open, continuous, and uninterrupted use of Renner Lane for more than twenty-one years, and thus they have acquired a prescriptive easement in Renner Lane. While the finding that a prescriptive easement exists would be sufficient to resolve the problem in the underlying case, this court will nevertheless address the other theories in the interest of expediency and completeness in a possible appeal.

## 2. Easement by Implication

Plaintiffs' second theory for relief is based on the doctrine of easement by implication. An easement by implication exists when the following requirements are met: (1) a separation of title; (2) such continuous and obvious use before the separation as to show an intention to make the alleged easement permanent; (3) the easement is used for enjoyment of the land granted or retained; and (4) the servitude is continuous. 7 Summ. Pa. Jur. 2d § 18:49. Applying these elements to the underlying case, it appears that an implied easement exists.

The land now owned by plaintiffs and defendants previously had a common owner, the Swopes. A separation of title occurred when they sold part of their land to the Reamers. It is clear that Renner Lane existed when the Swopes owned the land and that its use was necessary to get to the public street. Furthermore, when the Swopes conveyed part of their land to the Reamers, the use of Renner Lane was necessary for the beneficial use of the Reamers' property. It is also clear that the use of Renner Lane has been continuous and obvious.

Defendants dispute that an easement by implication has arisen, because the easement was not intended to be permanent. The 1956 sales agreement between the Swopes and the Reamers from 1956 indicates that a right-of-way was granted only until "the proposed street was opened." Defendant's Exhibit 3. However, this sales agreement between the Swopes and the Reamers was never recorded, and the language granting the Reamers the right to ingress and egress only until a proposed street was opened was never made part of the

deed. There furthermore is no evidence that there were any plans which provided for another road to be opened. Only the Marshall survey of 1958 (which was prepared two years after the sales agreement) provided for a right-of-way on paper. However, that right-of-way was never built and was actually extinguished in 1985. Thus, it appears that any restriction on the grant of an easement until the time another road was opened was so vague that it can be viewed as non-existent. When defendants bought their property from the Swopes, Renner Lane was the only way to gain access to the public road and there were no indications that any other road would be developed. The intent to create a permanent easement may be gathered from the parties' acts and circumstances. 7 Summ. Pa. Jur. 2d § 18:51. This court finds that when defendants bought their property, it was obvious that there was a right-of-way in existence over their land which was continuously used and which was necessary to the Reamers' enjoyment of their land. There were no signs that another right-of-way would actually be developed. Thus, defendants purchased their property subject to the easement by implication. Plaintiffs, as the Reamers' successors in interest, have purchased their properties with the benefit of the implied easement over Renner Lane.

### 3. Easement by Necessity

Thirdly, plaintiffs argue that they have an easement by necessity. When property is conveyed in a manner that there is no access to a public road except by passing over the remaining land of the grantor, then an easement by necessity is created over the land of the grantor in favor of the grantee. 7 Summ. Pa. Jur. 2d § 18:53; *Price v. Musselman*, 343 Pa. Super. 90, 95, 493 A.2d 1389 (1985). The necessity must have existed at the time of the severance of title and there must be a strict necessity for the easement, it may not be merely a matter of convenience. *Possessky v. Diem*, 440 Pa. Super. 387, 399, 655 A.2d. 1004 (1995). Furthermore, an easement by necessity is extinguished when the necessity from which it resulted ceases to exist. *Id.*

It has already been established that there was previous common ownership of plaintiffs' and defendants' land by the Swopes. When they severed their title by conveying a part of their land to the Reamers, the property bought by the Reamers was landlocked since

there was no way to get to the public road other than over the land retained by the Swopes. Thus, an easement by necessity was created over Renner Lane at the time the Swopes conveyed their land to the Reamers. At the time of the severance of title, the access over Renner Lane was a strict necessity, not a matter of mere convenience. Defendants argue that such strict necessity does not exist, because there was a recorded 40-foot right-of-way described in the deeds of the parties. Furthermore, defendants argue that since the extinguishment of the recorded right-of-way in 1985, plaintiffs have had access via the 40-foot right-of-way built for lots A and B. This court finds this reasoning to be flawed in two respects. First, the recorded "paper" 40-foot right-of-way as described in the Marshall survey of 1958 was never actually developed. This court finds that it is hard to maintain that plaintiffs had other access to their lots because they had a "paper" right-of-way which was never actually built. Thus, even though plaintiffs had another means of access on paper, in reality the strict necessity to use Renner Lane existed. Furthermore, plaintiffs' "paper" right-of-way was actually extinguished by the township in 1985. This was done with the agreement of defendants themselves, as evidenced by the agreement signed by them. See Plaintiff's Exhibit 5 (stating that the existing paper right-of-way would be extinguished and that a new 40-foot right-of-way would be established over defendants' land for the purpose of land development by Mr. Schuchman for lots A and B). Secondly, plaintiffs do not have a legal right to use the 40-foot right-of-way currently in existence. As evidenced by the agreement, this right-of-way was granted to the Schuchmans solely for the development of lots A and B (and some land owned by Tex Myers). Plaintiff's Exhibit 5. It furthermore appears that the township has an ordinance which prevents more than three users from using a private right-of-way. Plaintiff's Exhibit 1. Defendants cannot argue that plaintiffs' use of Renner Lane is not strictly necessary because they can illegally use the existing 40-foot right-of-way. Clearly, the use of Renner Lane is still a strict necessity to plaintiffs. Therefore this court finds that plaintiffs have an easement by necessity over Renner Lane. Only if and when Antrim Township corrects the problem to which it contributed by providing access to plaintiffs' lots via a public street rather than a private right-of-way, or provide legal access in some other manner, then an easement by necessity will no longer exist over Renner Lane.

#### 4. Irrevocable License

Lastly, plaintiffs argue that if defendants' contention that they gave permission to the Reamers and their successors to use Renner Lane is accepted by this court, they must prevail on the theory of irrevocable license. A license is a personal privilege to use the land of another and is considered to be a mere personal privilege which is revocable at will. *Kovach v. General Tel. Co.*, 340 Pa. Super. 144, 148, 489 A.2d 883 (1985). However, such a revocable license may become irrevocable once the license holder has expended money and treated their own property in a manner they would not otherwise have treated it. *Zivari v. Willis*, 416 Pa. Super. 432, 437, 611 A.2d 293 (1992). When this occurs, the person who gave permission is estopped from denying access over his land. *Id.* Plaintiffs argue that if this court accepts that defendants gave permission to the Reamers to use Renner Lane, and that this permission extends to plaintiffs, then this revocable license became irrevocable when the Reamers and their successors in interest expended money and effort by improving Renner Lane and by building additional houses on the lots now owned by plaintiffs.

As stated above, this court finds that any permission given to the Reamers by defendants cannot bind the Reamers' successors in interest in the absence of any notice to those successive landowners. However, if the permission must be deemed to apply to plaintiffs, then they will prevail on the theory of the irrevocability of the license. This court agrees with plaintiffs' argument that plaintiffs and their predecessors changed their position in reliance on their ability to use Renner Lane. There was some evidence that plaintiffs and their predecessors have improved Renner Lane with slate and stones. However, Defendant Albert Barkdoll testified that most of the work done by plaintiffs was done on the section of the road beyond Renner Lane and that defendant himself has done most of the improvements. Without having to resolve the factual dispute of who performed what work on Renner Lane, this court finds that the mere fact that the Reamers developed the land now owned by plaintiffs and that houses were built on those lots in reliance on being able to use Renner Lane to get to the public street is sufficient to establish estoppel. Defendants cannot sit idly by and watch several houses being built which were accessible only via Renner Lane, and then revoke their license to use the lane. Instead, this court finds that defendants are

estopped from revoking that license, and that plaintiffs have the right to use it for ingress and egress until another legal way to provide access is created.

#### Conclusion

This court finds that plaintiffs prevail under all four theories submitted by them, and this court will therefore grant their request for an injunction and order defendants to remove the barriers from Renner Lane and to refrain from putting up barriers in the future. This court points out that the underlying case would not have been before this court if it had not been for the haphazard conduct of Antrim Township. The township engaged in completely irresponsible "planning" by allowing a recorded right-of-way to be extinguished without providing for another legal right-of-way for plaintiffs' lots. The township permitted land to be sold and developed for the benefit of two lots at the expense of plaintiffs without even considering the predicament it would cause plaintiffs. This court cannot understand how a government entity can engage in such irresponsible activity and finds it to be inexcusable. Without the township's actions, the plaintiffs would not have had to expend all this money and effort in an attempt to gain legal access to the public street. The township should take responsibility for its irresponsible actions and use its authority to create a (nicely paved) public street providing access to plaintiffs' lots. This will remedy both plaintiffs' predicament as well as defendants' objections to the dust and noise generated by the increased traffic on Renner Lane. This is the least the township can do after all the problems it created.

#### ORDER OF COURT

October 5, 1998, after consideration of the evidence presented at trial and the briefs submitted by counsel, this court hereby enters the following order:

1. Defendants are ordered to remove the barriers they have erected on Renner Lane within ten (10) days of the date of this order.
2. Defendants are ordered to refrain from erecting barriers on Renner Lane in the future unless and until another legal method of access to plaintiffs' lots is created.

3. This court finds that plaintiffs' right to use Renner Lane was not clear and obvious at the time defendants erected the barrier on Renner Lane, and therefore plaintiffs' request for damages is denied.

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