NOLL V. COOK, C.P. Franklin County Branch, No. A.D. 1977-141

Action to Quiet Title - Prescriptive Easement - Unenclosed Woodland Act, Act of April 25, 1850; 68 P.S. 411.

1. Adverse, open and notorious use of a road over the land of another without permission or objection for an uninterrupted period of 21 years raises a rebuttable presumption of an unqualified grant.

2. Evidence of periodic adverse use by claimant's predecessors in title and of such use by numerous others may establish a prescriptive easement.

3. To establish a prescriptive easement, claimant must prove that the location of the right of way was substantially the same from one end to the other during a 21-year period.

4. It was one purpose of the Unenclosed WoodlandAct, Act of April 25, 1850; 68 P.S. 411, to protect the owner of unenclosed woodland from having the use of a portion of his remote wooded land, infrequently visited by him, ripen into a prescriptive easement.

5. Under the Unenclosed Woodland Act, any use of unenclosed woodland during the years when the Act was in effect could not be adverse use.

6. Under the Unenclosed Woodland Act, once unenclosed woodland is cleared, adverse use can occur.

Timothy S. Sponseller, Esq., Counsel for Plaintiff

George E. Wenger, Jr., Esq., Counsel for Defendants

ADJUDICATION

KELLER, J., November 8, 1978:

FINDINGS OF FACT

1. Plaintiff is William Noll, R. D. 1, Fayetteville, Greene Township, Franklin County, Pennsylvania.

2. Defendants are Ronald W. Cook and Evelyn Cook, his wife, R. D. 1, Fayetteville, Greene Township, Franklin County, Pennsylvania; Ray C. Houser and Brenda Houser, his wife, 86 West main Street, Fayetteville, Greene Township, Franklin County Pennsylvania; and Dale Gamby and Anna Gamby, his wife, R. D. 1, Fayetteville, Greene Township, Pennsylvania.

County Pennsylvania; and Dale Gamby and Anna Gamby, his wife, R. D. 1, Fayetteville, Greene Township, Franklin County, Pennsylvania.

3. The plaintiff is the owner of land located in Greene Township, Franklin County, by virtue of a deed dated December 6, 1976, and a deed dated February 16, 1976; said deed being recorded in Franklin County Deed Book Vol. 738, Page 100, and Vol. 722, Page 675.

4. The defendants, Ronald and Evelyn Cook, own real estate that adjoins the southern portion of the plaintiff's property.

5. The defendants, Ray and Brenda Houser, own real estate which adjoins the plaintiff's land on the South and West.

6. Defendants, Dale and Anna Gamby, own land located along Route 506, and said land crosses the alleged right-of way at that point.

7. The parties have stipulated that there are deed references to a private right-of-way from Route 506 north-easterly to the lands of the defendants for the benefit of the defendants. There are no deed references to such a right-of-way to and/or through the lands of the plaintiff by his predecessor in title.

8. Plaintiff purchased his tract of land from Mrs. Florence Oyler. The transaction was concluded in November 1976.

9. The plaintiff was aware of the fact that he had a right-of-way problem at the time he purchased the property, for he was told by Mrs. Oyler's attorney that there was no right-of-way to the plaintiff's land.

10. The plaintiff attemted to purchase a right-of-way from defendants Cook, but the Cooks refused.

11. The plaintiff claims an easement by prescription over a road starting at Township Route 506. The road goes northward from Route 506 with the East side of the road being on the land owned by David and Nancy McClure, the West side being on the land of defendants, Dale and Anna Gamby. The road continues in a northeasterly direction with the East side remaining on the land of the McClures and the West side on the land belonging to defendants, Ray and Brenda Houser. The road then proceeds northward continuing to be bounded on the West by defendants Houser, and on the East by the lands of Edgar J.

Hilton. The right-of-way then enters the land of defendants Cook and continues North to the lands of plaintiff.

12. Default judgments have been entered in favor of the plaintiff against Edgar J. Hilton and Marie Hilton, his wife, and David McClure and Nancy McClure, his wife.

13. On or about October 1975, defendants Cook erected a fence over part of the alleged right-of-way which crosses their property.

14. The plaintiff, his predecessor in title, and the general public have not been able to drive any vehicle into the plaintiff's property since the erection of the obstruction by defendants Cook.

15. The right-of-way claimed by the plaintiff appears to be the only practical means of vehicular access to his property.

16. The alleged right-of-way was used continuously and adversely by the plaintiff, his predecessor in title, and the public generally for a period of twenty-one years.

17. Persons who used the right-of-way never asked permission and no one interfered with their use.

18. The real estate now owned by the Cooks was cleared out and the construction of the house erected thereon began in 1955, while the property was owned by Ray C. Houser, Sr.

19. The property now owned by the McClures was formerly owned by Jessie R. Tosh and that property was cleared and the house constructed about 1951.

20. The Houser's summer house located southwest of the Cook's residence was cleared and erected in the early 1950's.

21. The right-of-way between the Tosh house and the Cook property was cleared and bulldozed out in 1956. Prior to that the area was unenclosed woodlands.

22. The portion of the right-of-way which passed through the Cooks' property was unenclosed woodland until it was cleared in 1955.

23. The portion of the right-of-way which passed over the lands of Gamby was not unenclosed woodland.

DISCUSSION

In *Lwekowicz v. Blumish*, 442 Pa. 369, 371, 275 A. 2d 69 (1971), the Pennsylvania Supreme Court held:

> "It is ancient and unquestioned law that to acquire an easement by prescription, the exercise of possession must be adverse, open, notorious, and uninterrupted for a period of at least twenty-one years. Act of March 26, 1785, 2 Sm. L. 299, Sect. 2, 12 P.S. 72. *Fec v. Michail*, 438 Pa. 439, 265 A. 2d 800 (1970). The evidence in proof of such exercise of possession must be clear and positive. *P.&L. E. R. R. Co. v. Stowe Township*, 374 Pa. 54, 59, 96 A. 2d 892 (1953), *Stevenson v. Williams*, 188 Pa. Super. 49, 53, 195 A. 2d 734 (1958)."

The plaintiff purchased his parcel of land in 1976, and at the time he bought it the fence had already been put up by the defendants Cook. The plaintiff knew that he did not have a right-of-way over the road that led onto his property. The plaintiff attempted to establish the prescriptive easement by evidence of his use of the right-of-way prior to his purchase of the land, by his predecessor in title's use of the road, and by the use of the right-of-way by numerous other individuals.

The plaintiff's predecessor it tiltle is Mrs. Florence Oyler. Mrs. Oyler inherited the property from her husband and then sold it to the plaintiff. She testified that she remembered first using the right-of-way about 1947 or 1948, and that she would use the road twice a year to go into the property, usually in the Spring and in December. She and her husband used the right-of-way until 1969, and always used the right-of-way in question whenever they entered their land. Mrs. Oyler testified that she never asked permission and that no one ever interfered with her use of the right-of-way. This is the only evidence of use by the plaintiff's predecessor in title.

The plaintiff testified that he used the road since 1939 mainly for hunting and that he used the road a couple times a year and saw many other people use it. The other testimony on behalf of the plaintiff was the use of the road for logging, hunting, and similar outdoor activities by persons using the road as an open road, and not because of any relationship with the plaintiff or his predecessor in title. Herbert Gsell testified that he and his employees used the right-of-way in his lumbering operation in the 1950's, and remembered many people using the road during the years he was a landowner in the area. Clarence Thomas, a resident of the area, testified that he used the road back in 1928, and regularly from 1946 to the time the fence was erected; never missing a thirty-day period when he

did not drive his truck or jeep over it. Fred Lane testified to use of the road in his truck or car for twenty-seven years, twenty to thirty times a year, for hunting, picking mushrooms and huckleberries, and to get to her reservoir located North of the plaintiff's land.

All these witnesses testified that they never asked permission to use the right-of-way and nobody ever interfered with their use.

> "Where one uses an easement whenever he sees fit, without asking leave, and without objection, it is adverse, and an uninterrupted adverse enjoyment for twenty-one years is a title which cannot be afterwards disputed. Such enjoyment, without evidence to explain how it began, is presumed to have been in pursuance of a full and unqualified grant. The owner of the land has the burden of proving that the use of the easement was under some license, indulgence, or special contract inconsistent with a claim of right by the other party."

Loudenslager v. Mostella, 453 Pa. 115, 117 (1973). See also *Pierce v. Cloud*, 42 Pa. 102 (1862).

The defendant, Ronald Cook, testified that until the fence was installed, he had no objection to people walking or driving up the right-of-way. There is no other evidence of any permission.

> "The use of a road over land of another without permission or objection for an uninterrupted period of twenty-one years raises the presumption of an unqualified grant, which is not rebutted by equivocal and inconsistent declarations upon the part of the defendant. . . .Appellant's evidence to show permissive use was negligible, while the evidence of plaintiffs as to use was extensive and convincing.' "

(Citations Omitted.) *Wampler v. Shenk*, 404 Pa. 395 (1961).

We feel that there is ample evidence that the use of the plaintiff, Mrs. Oyler, and the other users was open, notorious and adverse for a period of twenty-one years.

On the question whether the use was continuous, the Supreme Court of Pennsylvania in *Keefer v. Jones*, 467 Pa. 544, 548 (1976) held:

> "Furthermore, the evidence need not show a constant use in order to establish continuity, rather continuity is established if the evidence shows a settled course of conduct indicating an

> attitude of mind on part of the users that the use is the exercise of a property right. Restatement of Property, Servitudes, Chapter 38, Sect. 459(b)."

Mrs. Oyler only used the road twice a year but did so from 1947 or 1948 until 1969, a period of twenty-one years. This, coupled with the evidence of the other users, satisfied this Court that the general use was continuous and uninterrupted until the erection of the fence in 1975.

The defendants contend that even if the plaintiff successfully proves the essential elements for a prescriptive easement, nevertheless, he is not as a matter of law entitled to the use of the right-of-way because of the applicability of the Unenclosed Woodlands Act, Act of April 25, 1850, 68 P.S. 411 which provides that "no right-of-way shall be hereafter acquired by user, where such way passes through unenclosed woodland. . . ." This act was repealed in 1974, Dec. 10, P.L. 867 No. 293 Sect. 19. However, the defendant claims that the running of the twenty-one year prescriptive period over unenclosed woodland cannot commence until the date of repeal, December 10, 1974. With this we must agree.

In *Millhimes v. Legg*, 68 D & C. 2d 412, 414 (1975), the repeal of the Unenclosed Woodland Act and its effect on prescriptive rights that would have accrued or been accruing but for the existence of the 1850 Act was discussed as follows:

> "Since our adjudication was filed, there has been a most startling development. The Act of 1850, supra, has been repealed by 'housekeeping amendments' to the Probate, Estates and Fiduciaries Code, which amendments were incorporated in the Act of December 10, 1974 (No. 293). The effect of that legislative action is not crystal clear. The Act of 1850 was in derogation of common law. The Act of November 25, 1970, P. L. 707 (No. 230), as amended, 1 Pa. S., Sect 1978) provides that where a statute created property rights in derogation of common law, the repeal of that statute does not revive the prior inconsistent common-law rule but merely indicates that the general assembly recognizes that such property right has been received into the common law of Pennsylvania. Read literally, section 1978, supra, would seem to say that the repeal of the Act of 1850 would have no effect whatsoever upon the litigation now before us. However, the question remains at what point in time has the common-law right been received into and become a part of the common law of the Commonwealth? The question seems particularly pertinent in the situation wnere Pennsylvania did recognize the common-law property right, then provided an exception to it

by virtue of the enactment of the Act of 1850, and now has repealed the exception. However, on balance, it seems logical to conclude that the effective date of the repealer is the date when the Commonwealth once again 'recognizes' the property right created by common law. We conclude that the repeal of the Act of 1850 does not affect the litigation now before us."

The same issue was raised in *Klopp v. Seiler*, 68 Berks 216, 217 (1975), and the Court held:

"...Although said Act was repealed on December 10, 1974, the repealer does not provide that any benefit or disadvantage accrued under it should be rendered null and void. One of such benefits was the right of owners of unenclosed woodland to freedom to subjection to an adverse use of ways across their lands. We cannot construe the repeal to suddenly give effect to past years of adverse use and to give an advantage to an adverse user to the detriment of a landowner, neither of which would have been of any moment while the statute was in force."

We conclude that any use during the years when the Act was in effect cannot now be held retroactively adverse to the owner of unenclosed woodland. An owner relying on the statute was not required to challenge others when they used the right of way because the Act provided that no easement could be acquired. Therefore, the twenty-one year prescriptive period cannot begin to run until the date of repeal, December 10, 1974.

Having concluded the Unenclosed Woodland Act remained in effect until the date of repeal, we must now determine whether the lands or some of them through which the easement claimed by the plaintiff runs were, in fact, unenclosed woodlands. The rationale for the Act must in part have been to protect a landowner from having a use of a portion of his land located in a remote, wooded area infrequently visited by the owner ripen into an easement by prescription. *J. Nelson Fox, et ux v. Oberholzer*, Equity Docket, Vol. 6, Page 176, Franklin County. Such owner could not reasonably have been expected to know that a right-of-way was being used by others; thus the use was not considered adverse. However, once the land was cleared, it no longer was protected by the Act, for the Act also provides: "...but on clearing such woodland, the owner or owners thereof shall be at liberty to enclose the same, as if no such way had been used through the same *before such clearing or enclosure.*" (Emphasis ours.) Consequently, once the land is cleared, it may then become subject to an easement by prescription through user for the twenty-one year period,

because such use would be open and adverse and the land would no longer be woodland. *Hartman v. Webster*, 33 Dauph. 199 (1931).

In the case at bar, the defendants contend that the alleged right-of-way passed through unenclosed woodlands from the point where it left the lands of Jessie R. Tosh and proceeded in a northerly direction through lands of Houser, Hilton and Cook to the property of the plaintiff. The uncontradicted evidence presented established that the real estate now owned by the defendants Cook was cleared and construction on the house started, at the earliest possible date, in 1955. Until that year the defendants testified that the property was nothing but woodland.

The plaintiff has produced no evidence that would lead us to believe otherwise. The fence was erected in October or November of 1975. From 1955, the time of clearing, to 1975 is not twenty-one years. Though very close, the plaintiff has failed to prove that the Cooks land, through which the easement would run, was not unenclosed woodland for twenty-one years. In addition, we are persuaded by the evidence that that portion of the right-of-way from the Tosh property to the Cook property, bounded on the West by the property of the defendant Houser, was also unenclosed woodland.

With the Tosh to Cook portion of the right-of-way another problem arises. To establish a prescriptive easement the claimant must prove that the right-of-way was substantially the same from one end to the other during the twenty-one year period. *Becker v. Rittenhouse*, 247 Pa. 317 (1920). An additional reason for the Unenclosed Woodlands Act prohibition against prescriptive easements by adverse use was that a right-of-way through such woodland could be shifted from time to time so the way would not be capable of exact delineation and the easement could not be shown to be substantially the same over the required period. *Nicolet Industries v. Maval Corporation*, 93 Montg. L.R. 239 (1970). There is conflicting testimony in this case whether the road used went directly from the Tosh property through the Cook property, or whether it proceeded in a northeasterly direction along the Tosh property line through lands now of Hilton and then circled back before veering northerly through Cook to the plaintiff's land.

The plaintiff and his witnesses testified that the right-of-way proceeded in a direct northerly direction from Tosh to his land and that the road used was essentially the same for the entire period of its use. The defendants and their

witnesses testified that the road from Tosh to Cook was not cleared and bulldozed until 1956, and before that time there was only a footpath from Tosh to Cook, possibly usable by jeep, and that all observed vehicle traffic circled out around the Tosh property. Thus, for twenty-one years, the defendants argue that the easement claimed was not substantially the same. The serious factual question whether the road went straight from Tosh to Cook buttresses the conclusion that the land was unenclosed woodland up until 1956. We do not find any persuasive evidence to the contrary.

We are persuaded by the evidence that the easement claimed by the plaintiff passed through unenclosed woodlands, and those lands were not cleared, and thus removed from the effect of the Unenclosed Woodlands Act until 1956. Therefore, the prescriptive rights claimed by the plaintiff did not begin to accrue before 1956, and were terminated in 1975, less than the required twenty-one year period. It is with no little regret that we conclude that the plaintiff's claim to a means of access to his real estate across the lands of defendants Houser and Cook must be denied as a matter of law by reason of the operation of an 1850 statute recently repealed.

The plaintiff's uncontradicted evidence estalished an adverse, open, notorious and continuous use of the right-of-way across the lands of Dale and Anna Gamby, his wife, for twenty-one years and more. There was no evidence that the right-of-way over the Gamby lands was at any time, here relevant, unenclosed woodland.

CONCLUSIONS OF LAW

1. By virtue of the Unenclosed Woodland Act, supra, the plaintiff, William Noll, did not acquire an easement by prescription over the lands of Ronald W. Cook and Evelyn Cook, his wife, and Ray C. Houser and Brenda Houser, his wife.

2. The plaintiff, William Noll, did acquire an easement by prescription over the lands of Dale Gamby and Anna Gamby, his wife. The said easement is one held in common with other users of the existing right-of-way.

ADJUDICATION

NOW, this 8th day of November, 1978:

In the suit of William Noll v. Ronald W. Cook and Evelyn Cook, his wife, and Ray C. Houser and Brenda Houser, his wife, the Court finds for the defendants.

In the suit of William Noll v. Dale Gamby and Anna Gamby, his wife, the Court finds for the plaintiff.

Costs to be paid by plaintiff.

Exceptions are granted the plaintiff and defendants.

MILLER, ET AL. v. MILLER, C.P. Franklin County Branch, No. A.D. 1978-409

Child Custody - Past Moral Lapses

1. Past moral lapses are not enough to deprive a parent of custody; the issue is the parent's present fitness and not past misconduct.

Edwin R. Frownfelter, Esq., Counsel for Petitioner

David C. Cleaver, Esq., Counsel for Respondent

OPINION AND ORDER

KELLER, J., December 13, 1978:

This habeas corpus proceeding was commenced by Carol A. Miller by the presentation of a petition for a writ of habeas corpus on July 31, 1978. An order was signed on the same date directing the respondent, William R. Miller, to bring John R. Miller and Christine D. Miller, children of the petitioner and respondent, before the Court. The hearing was set for August 8, 1978, at 1:30 o'clock P.M. The August 8, 1978 hearing was continued until August 24, 1978 at 2:00 P.M., because the Sheriff has been unable to make service of the petition and order upon the respondent. Service of the petition and order was made upon the respondent by Deputy Sheriff Barnhart on August 10, 1978 at 3:45 o'clock P.M. By stipulation of counsel dated September 15, 1978, it was established that the petitioner at that time had custody of John R. Miller, and the respondent custody of Christine D. Miller, and the Court was requested to enter an order providing for visitation by the children with their respective parents on alternating weekends. This order was entered September 20, 1978. By stipulation of counsel the Court will determine the custody of both children and will consider the proceeding as one where each parent seeks custody of both children. Hearing on the matter was held on November 6 and 7, 1978.