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Relocation Of Easements - Millson v. Laughlin

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Relocation Of Easements

Millson v. Laughlin[1]

Plaintiff and defendant owned and occupied two adjacent lots which had, under a previous owner, been unified into one tract. During that unity of ownership, a dwelling house was erected on the portion now owned by defendant. An electric line was strung to the house from a nearby road, over an adjacent property, and across the portion of the tract now owned by plaintiff. A pole, carrying the line to the house, and holding an electrical transformer was set up on that portion of the tract. The original owner sold the northern half of the tract, including the house, to defendant and in the deed granted defendant use of a 30 foot right of way along the western boundary of the tract and use in common of an old winding road located near the same boundary. No mention was made of the electric line or pole although the usual appurtenance clause was included in the deed. Defendant obtained title to the line and pole from the utility company and proceeded to

[1] 217 Md. 576, 142 A. 2d 810 (1958).

repair and maintain them herself. Plaintiff purchased the southern half of the tract, through mesne conveyances, and razed a greenhouse previously existing thereon, planning to build a house on its foundation. He asked defendant's permission to relocate the pole and line, citing his inability to obtain financing because of the dangerous proximity of the pole and line to the proposed site of his house, that the humming of the transformer would keep his wife awake, and that the line passed over the intended location of his garage. Defendant refused to allow plaintiff to move the pole or line and the plaintiff sued for a decree declaratory of his right to relocate the pole and line and for an injunction restraining defendant from interfering with the relocation.

The Circuit Court of Prince Georges County, entered judgment for the plaintiff and defendant appealed. The Court of Appeals, Judge Henderson dissenting, *held* that though defendant had an easement for the pole and line across the plaintiff's property, she did not have a right to insist upon the maintenance of the pole and line in the *exact location* previously established and that plaintiff could relocate the pole and line without cost to defendant, so long as the electric line entered the property of the defendant at the *present location* and *angle*. Judge Horney concurred in the result on the grounds that the defendant did not have an easement but merely a license, which the plaintiff could revoke or modify at will.

In reaching the above conclusion the Court took notice of the general rule that once an easement has been located upon the servient tenement neither the dominant nor the servient owner may change its location without a mutual agreement,[2] but refused to apply this doctrine to the facts of the instant case, distinguishing the cases supporting the doctrine on the grounds that the easements involved in those cases were ones of travel and as such involved problems of grading, drainage, and alignment which were nonexistent in cases such as this under discussion. The Court indicated that any substantial relocation or change in an easement of travel would materially effect its use, but that such was not the case where the easement was of the nature of an acqueduct or power line.

In holding that the pole could be relocated by the servient landowner but that the angle and location of entry of the wires running to the defendant's house could not

[2] *Ibid.*, 814, citing 28 C.J.S. 763, § 84; Greenwalt v. McCardell, 178 Md. 132, 12 A. 2d 522 (1940); Sibbel v. Fitch, 182 Md. 323, 34 A. 2d 773 (1943).

be altered, the Court, in effect, adopted the more liberal view that easements of this type may be expanded or contracted by the servient or dominant landowner along the original line of the easement, so long as the use and enjoyment thereof by the dominant owner is not impaired, and so long as the expenses are absorbed by the person making the change.[3] This view has been followed in allowing the servient landowner to modify a passageway,[4] make minor alterations to an easement of way,[5] make alterations in the grading of a road,[6] repair and alter an acqueduct,[7] and even to make a total relocation of a road.[8] Similarly, the dominant owner has been allowed to expand the size of a gas line and meter,[9] or to relocate a stairway,[10] without extinguishing the easement. In each instance it appears that the modifications were allowed because they were made for purposes which fell within the original scope of the easement.

In *Frank v. Benesch*[11] the court allowed the owner of the servient land to make minor changes in the physical arrangements of a passageway between two houses by relocating a gate, as long as the changes did not materially interfere with the dominant owner's use of the easement. In so holding the court stressed that the dominant owner was only entitled to the reasonable use of the way for the purposes for which it was granted.

Like reasoning was used by the New Hampshire Court in *Olcott v. Thompson*[12] where the servient landowner was allowed to improve the appearance of his own property by replacing the cover to an aqueduct with a more shapely one but of equal utility. As pointed out by the Court in the principal case, the *Olcott* decision was cited by the court in *Tong v. Feldman*[13] as authority for the proposition that the servient owner has a right "to modify an easement across his property without interfering with the rights of

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[3] Frank v. Benesch, 74 Md. 58, 21 A. 550 (1891); Olcott v. Thompson, 59 N.H. 154 (1884); Tong v. Feldman, 152 Md. 398, 136 A. 822 (1927).
[4] Frank v. Benesch, *ibid.*
[5] Greenwalt v. McCardell, *supra*, n. 2.
[6] Sandman v. Highland, 312 Ky. 128, 226 S.W. 2d 766 (1950).
[7] Olcott v. Thompson, *supra*, n. 3.
[8] A.S.D. Securities, Inc. v. J. H. Bellows, 48 Ohio App. 101, 192 N.E. 472 (1933).
[9] Tong v. Feldman, *supra*, n. 3.
[10] Sabin v. Rea, 176 Minn. 264, 223 N.W. 151 (1929); Thomas v. Mrkonich, 247 Minn. 481, 78 N.W. 2d 386 (1956).
[11] 74 Md. 58, 21 A. 550 (1891).
[12] 59 N.H. 154 (1884).
[13] 152 Md. 398, 136 A. 822 (1927).

the dominant owner."[14] Applying a corrollary of this principle the court in the *Tong* case permitted the dominant owner to enter upon the servient tenement and to increase the size of a gas pipe and meter which were serving his premises. Although the owner of the dominant tenement made the changes so that he would have increased service for a restaurant he intended to open, it was nonetheless, found that the change did not exceed the purposes of the original grant.

In the principal case, the Court, after recognizing the *Tong* decision, took the view that if an owner of an easement can enter the servient land to modify his easement over the objection of the owner of the fee, it is not unjust to hold that the fee owner can also modify the easement to suit his use of the servient land. The Court, thus, aligned itself with the view of the *Olcott* and *Frank* cases which Tiffany states to be that:

> "The owner of the servient tenement may, it seems, at his own expense, make changes in connection with the appliances placed thereon for the purpose of exercising the easement, in so far as such changes in no way interfere with the exercise of the easement, he being entitled, except insofar as the exercise of the easement is conceived, to have his land in condition satisfactory to himself."[15]

However, it is interesting to note that in an earlier section of his treatise Tiffany states that:

> "After the point or place at which *or line along which* an easement is to be exercised has once been fixed, whether by express terms of the grant, or by agreement and acquiescence, one of the parties cannot change such location without the consent of the other."[16]

Judge Henderson, in dissenting in the principal case, seems to adopt this view in saying ". . . that the location of the pole and electric line cannot be altered except by

[14] Millson v. Laughlin, 217 Md. 576, 586, 142 A. 2d 810, 815 (1958). In addition the Court adopted the proposition set forth in Greenwalt v. McCardell, 178 Md. 132, 136, 12 A. 2d 522 (1940) that:

> "Where a right of way is established by reservation (as the court found to be the situation in the instant case), the land remains the property of the owner of the servient estate, and he is entitled to use it for any purpose that does not interfere with the easement."

[15] 3 TIFFANY, REAL PROPERTY (3rd ed. 1939) 354 § 811.

[16] *Ibid.*, 334 § 806 [emphasis added].

agreement of the parties. I find no distinction in the authorities between an easement of travel and an easement for other purposes, so far as relocation is concerned."[17] This view has been followed by numerous cases in regard to attempted relocations of acqueducts,[18] windows,[19] ways,[20] or affecting easements of light[21] or the right to take water from a stream.[22] Furthermore, in *Guse v. Flohr*[23] it was held that the owner of the servient tenement could not obstruct an easement of way and compel the dominant owner to use another means of ingress and egress even though the alternate way was equally convenient.

It is further noted that Tiffany cites the first proposition in regard to "permissible interferences with easements"; while, the more rigid view, immediately above, is stated to be the law in regards to "change of location."

The view taken by the Court in the instant case is a liberalization of that requiring the consent of both parties before an easement can be relocated. Furthermore, it seems that the liberalization is based upon a standard of reasonableness, as to both the type of easement involved and the nature of the contemplated change. This view seems to apply the rules governing permissible interferences with easements to cases involving the relocation of an easement. It could be argued that the relocation of the electric pole was merely a permissible interference, but the Court chose not to make one distinction along those lines, but instead made its distinction in the form of the easement and reasonableness of the contemplated change.

An easement for a way, located as it is upon the surface of the servient land and affecting the drainage, use and value of the land, often to a marked degree, would seem naturally to bear a different relationship to the servient tenement than lines or pipes providing normal household utilities. How sharply, and in what specific respects, the two types of easements differ, one from the other, remains conjectural although it seems clear that as far as relocation is concerned, rights of way are not susceptible to a unilateral, arbitrary movement, while utility services are.

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[17] *Supra*, n. 14, 595.
[18] Jennison v. Walker, 11 Gray 423 (Mass. 1858).
[19] Kesseler v. Bowditch, 223 Mass. 265, 111 N.E. 887 (1916).
[20] Eureka Land Co. v. Watts, 119 Va. 506, 89 S.E. 968 (1916).
[21] Johnson v. Hahne, 61 N.J. Eq. 438, 49 A. 5 (1901).
[22] Rhoades v Barnes, 54 Wash. 145, 102 P. 884 (1909).
[23] 195 Wis. 139, 217 N.W. 730 (1928).