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Easements--Location When Not Definitely Described

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of the *locus delicti* would not thereby be adversely affected.[4] The protagonists of this liberal view contend that the reason for the common law rule[5] ceases to exist where, as in the instant case[6], a personal representative suing under a wrongful death statute acts not as an ordinary administrator, but rather as a statutory trustee for the beneficiaries, since here the proceeds of recovery could never go to satisfy the creditors of the decedent.[7]

Considering the West Virginia restrictive statute in the light of the liberal majority view, its result is, perhaps, undesirable. The decision, however, is not only sound, but refreshing in that the court recognized its proper sphere of authority by leaving any remedial action in this regard to the proper forum, the legislature.

L. R. M.

EASEMENTS — LOCATION WHEN NOT DEFINITELY DESCRIBED. — The grantor conveyed one-half acre of land, in the midst of his farm, to *P* for burial purposes with a "convenient right of way" and specified its distance between two fixed terminals, but he did not definitely describe or locate its course. Later *D* acquired possession of the grantor's farm. *P* used a convenient course without

[4] In fact, in actual practice, permission to sue has apparently become the rule rather than the exception. Popp v. Cincinnati, H. & D. Ry., 96 Fed. 465 (C. C. S. D. Ohio 1899) (construing Ohio statutes); Provost v. International Giant Safety Coaster Co., 152 App. Div. 83, 136 N. Y. S. 654 (1912); Florida C. & P. Ry. v. Sullivan, 120 Fed. 799 (C. C. A. 5th, 1903) (construing Florida statutes); St. Louis Southwestern Ry. v. Graham, 83 Ark. 61, 102 S. W. 700 (1907).

[5] The common law rule is founded on the policy of the courts of each state to protect resident creditors of the decedent against the withdrawal into another state of assets upon which they may rely for payment. Ghilain v. Couture, 84 N. H. 48, 146 Atl. 395, 65 A. L. R. 553 (1929); Connor v. New York, N. H. & H. Ry., 28 R. I. 560, 68 Atl. 481 (1908).

[6] This was an action brought under the West Virginia wrongful death statute providing for an action by the personal representative of the deceased, and that the proceeds of recovery are to be distributed to the decedent's beneficiaries in the manner and proportion prescribed for the distribution of the personal estate of one dying intestate. W. VA. CODE (Michie, 1937) c. 55, art. 7, §§ 5, 6.

[7] "The reason that the rule in question [that an administrator may only sue in the state of his appointment] cannot possibly apply here is that, by the express terms of the West Virginia wrongful death statute, no creditor of the decedent as such has the slightest interest in or right to the recovery sought by the plaintiff at bar. The foreign administrator here sues to recover a fund which is not to be administered, but is merely to be distributed. When a reason for a rule fails, the rule ceases to apply." Pearson v. Norfolk & W. Ry., 286 Fed. 429 (D. C. Va. 1923) (construing West Virginia statutes); Connor v. New York, N. H. & H. Ry., 28 R. I. 560, 68 Atl. 481 (1908); Boulden v. Pennsylvania R. R., 205 Pa. 264, 54 Atl. 906 (1903); Kansas Pacific Ry. v. Cutter, 16 Kan. 568 (1876).

objection from the grantor or *D*. *D* contested this location, and *P* filed a bill in equity to protect it. *Held,* that the practical use of a particular way and acquiescence by the parties had fixed the location, and that it is within the discretion of the chancellor to fix the width of the way where none had been specified. *Rhodes Cemetery Ass'n v. Miller.*[1]

When the grant or reservation has not precisely located the easement, there are several instances where it is located by acts of the parties.[2] One of the more common is where the servient owner locates the easement with due regard to the grantee's rights and conveniences.[3] Should the grantor fail to exercise this right, the grantee may make his own selection with due respect to the rights and conveniences of the grantor.[4] Further, the location of an easement may be determined by an agreement between the parties, and such agreement need not be in writing[5] but may be inferred from words or conduct.[6] Once the location has been made, it is final and binding and cannot be changed without the mutual assent of the parties.[7]

If the location has not been determined by any of the above methods, it is generally held that a court of equity has jurisdiction to select it.[8] If the right to such easement exists, equity should

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[1] 7 S. E. (2d) 659 (W. Va. 1940).

[2] Rumill v. Robbins, 77 Me. 193 (1885); Winslow v. Vallejo, 148 Cal. 723, 84 Pac. 191 (1906). This problem only arises where there is no mention of the location of the right of way in the reservation or grant of the easement or where a way of necessity arises by operation of law, but it does not arise where there is a way by prescription because in that case the location is fixed wholly by adverse user.

[3] Ingelson v. Olson, 199 Minn. 422, 272 N. W. 270 (1937); Tutwiler Coal, Coke & Iron Co. v. Tuvin, 158 Ala. 657, 48 So. 79 (1908).

[4] Ritchey v. Welsh, 149 Ind. 214, 48 N. E. 1031 (1898); Tutwiler Coal, Coke & Iron Co. v. Tuvin, 158 Ala. 657, 48 So. 79 (1909).

[5] Rumill v. Robbins, 77 Me. 193 (1885).

[6] Cornell-Andrews Smelting Co. v. Boston & P. R. Corp., 202 Mass. 585, 89 N. E. 118 (1909); Eureka Land Co. v. Watts, 119 Va. 506, 89 S. E. 968 (1916); Ritchey v. Welsh, 149 Ind. 214, 48 N. E. 1031 (1898). It is well settled that when there is no express agreement for location, the practical and reasonable location acquiesced in by the grantor sufficiently locates the way, which will be deemed the one intended by the grant. *Accord*: Scott v. Black, 95 W. Va. 48, 120 S. E. 167 (1923). The location of the easement was changed and the grantee went to great expense in doing so; the grantor merely stood by, and the court held that the grantor was estopped to deny the new location.

[7] Douglas v. Jordan, 232 Mich. 283, 205 N. W. 52 (1925). *Contra*: Flener v. Lawrence, 187 Ky. 384, 220 S. W. 1041 (1920), in relation to a prescriptive right of way, "the county court, upon application and proper cause shown, may change the right of way and locate it at another place, if the parties justify it." The great weight of authority is otherwise.

[8] See Fox v. Paul, 158 Md. 379, 390, 148 Atl. 809 (1929); Fox v. Pierce, 50 Mich. 500, 15 N. W. 880 (1883); Higbee Fishing Club v. Atlantic City

establish the route according to the reasonable convenience of both parties.[9] All persons to be affected by the location should be made parties to the action.[10]

Once equity has assumed jurisdiction it is not error for the chancellor to determine the width of the way. It is within his sound discretion to determine that which would be a reasonable width considering the purpose of the deed creating it, the intent of the parties, and the situation of the property.[11]

There is not a case precisely in point in West Virginia where the chancellor has located an easement, but in view of the preceding discussion it seems that a West Virginia court should determine its location if the necessity arises. H. P. S.

LANDLORD AND TENANT — COVENANT TO REBUILD — WHEN RIGHT OF ACTION ACCRUES THEREON. — A lessor brought an action for damages against his lessee, before the expiration of the term, based upon the breach of a covenant to replace buildings destroyed by fire contained in the twenty-year lease. *Held,* two judges dissenting, that the lessor may maintain such an action before the term of the lease has expired. *Campbell v. Kanawha & Hocking Coal & Coke Co.*[1]

The history of this question is both interesting and consistent. At the old common law, a tenant for years was liable for permissive waste, which included liability for buildings destroyed by fire, whether or not through the negligence of the tenant.[2] The Statute of Anne, passed in 1707, provided that a tenant would not be liable for fires which started accidentally.[3] Later English and American cases construed covenants to repair or leave in good condition as including accidental fires.[4] An English court went as far as to de-

Electric Co., 78 N. J. Eq. 434, 79 Atl. 326 (1911). The right to such easement must be clear or equity will not establish the route, inasmuch as this question should be settled at law.

[9] Stevens v. MacRae, 97 Vt. 76, 122 Atl. 892 (1923).

[10] Fox v. Paul, 158 Md. 379, 148 Atl. 809 (1929). The report of the commissioner or chancellor is usually final and binding upon the parties and appeal is usually the only remedy.

[11] Addison County v. Blackmer, 101 Vt. 384, 143 Atl. 700 (1928); Palmer v. Newman, 91 W. Va. 13, 112 S. E. 194 (1922).

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[1] 9 S. E. (2d) 135 (W. Va. 1940).

[2] 4 KENT'S COMMENTARIES (14th ed. 1896) 89.

[3] 6 ANNE c. 31 (1707), 11 STATS. 417, stating ". . . . no action shall be . . . . maintained . . . . against any person in whose house . . . . any fire shall . . . . accidentally begin . . . ."

[4] Church Wardens of St. Savior's Southwark v. Smith, 3 Burr. 1271, 97 Eng. Rep. R. 826 (1762); 1 MINOR, REAL PROPERTY (1908) § 416.