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Easement of Necessity--Increasing the Servitude

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The injustice of the rule in *Cariens v. Cariens, supra,* will terminate in West Virginia probably without the necessity of the court reversing itself. Under the code of West Virginia[13], which takes effect January 1, 1931, the state has fallen in line with a great number of the states, and has by statute given the court power to revise the decree for alimony, whether for divorce from bed and board or absolute divorce, "as the altered circumstances or needs of the parties may render necessary to meet the ends of justice".

—JOHN HAMPTON HOGE.

EASEMENTS OF NECESSITY—INCREASING THE SERVITUDE.—It appeared in a recent decision that one of the defendants had an easement of necessity from his 95-acre tract across the plaintiff's land to a nearby road and became owner of an adjoining tract of 31 acres. He sold the timber on the 31-acre tract to the other defendants. The trial court denied the plaintiff an injunction to restrain the transportation of this timber across his land. On appeal, reversed. *Held,* that an owner having an easement of necessity as to one tract of land, cannot as a matter of right extend such easement to other lands he may subsequently acquire. *Dorsey v. Dorsey.*[1]

The Court followed the old English case, *Howell v. King,*[2] holding that one having a right of way to Blackacre over the land of another has no right to drive his cattle to land beyond Blackacre. The doctrine that a way to a tract of land cannot be used as a way to additional land adjoining is settled in West Virginia.[3]

The Ohio case of *Remington v. Fireproof Warehouse Company,*[4] suggests a variation. The right of way was extended to the use of a subsequently-purchased 10-foot strip of ground and the court held that a driveway could be used to the benefit of newly ac-

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[13] Ch. 48, art. 2, § 15.

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[1] 153 S. E. 146 (W. Va. 1930). See generally JONES ON EASEMENTS (1898) § 360.

[2] 1 Mod. 190 (1674).

[3] Shaver v. Edgell, 48 W. Va. 502, 37 S. E. 664 (1900); McNeil v. Kennedy, 88 W. Va. 524, 107 S. E. 203 (1920); Bennett v. Booth, 70 W. Va. 264, 73 S. E. 909, (1912); see Springer v. McIntyre, 9 W. Va. 196 (1876); Powell v. Simms, 5 W. Va. 1 (1871); Standiford v. Goudy, 6 W. Va. 364 (1873).

[4] 17 Ohio Cir. Ct. (N. S.) 301, 87 Ohio St. 523 (aff'd).

quired land if the additional burden on the servient tenement was slight.

Suppose the timber on the above-mentioned 31-acre tract had first been piled on the 95-acre tract for the purpose of drying. Could it then be hauled over the right of way? In the case of *Williams v. James*,[5] hay from land adjoining was stacked on the dominant land, and later was carted across the servient tenement. The English court said that the defendant could make an ordinary and reasonable use of the dominant field, but could not use it as a pretext to increase the scope of the easement. The jury found that the defendant was making a *bona fide* use of his land in stacking hay on it. It followed that his use of the way was proper. A similar situation would arise here if the timber was piled on the dominant land to dry and then hauled across the way. If this were done *bona fide,* and not as a pretext to secure the use of the way, it would seem to be a reasonable use of the dominant land. If so, the defendant could then transport the timber over the way, although it would indirectly benefit land adjoining the dominant tenement. The West Virginia Court has held that a way of necessity is granted for any and all purposes for which land is reasonably adapted.[6] It would seem to follow that timber or other products from adjoining land might be brought on the dominant tenement for any reasonable purpose and later hauled therefrom across the way.

—A. WILLIAM PETROPLUS.

EQUITY—SHOWING A DEED ABSOLUTE ON ITS FACE TO BE A MORTGAGE—EFFECT OF ILLEGALITY IN TRANSACTION.—Miller applied to McNabb for a loan of $100,000, who instead of taking a lien on his property as security had him to convey the same to him in fee, giving Miller a lease on same for five years with the option to repurchase for the amount of the loan. This was done to avoid usury and taxation. After McNabb died, Ben Lomond Company, assignee of Miller, sought to repurchase the property. Trial court decreed that the $100,000 be paid to Florence McNabb, the widow. The heirs appealed and the Supreme Court reversed the decree and refused to give effect to the parol

[5] 2 C. P. 577 (1867).

[6] Crotty v. New River Coal Co., 72 W. Va. 68, 78 S. E. 233 (1913); Uhl v. Railroad Co., 47 W. Va. 59, 34 S. E. 934 (1899).