IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

Filed November 26, 1985

WILLIAM COOPER and LUANN COOPER,)

Plaintiffs-Appellants,)

vs)

JOHN NEUBAUER and BONNIE NEUBAUER,)

Defendants-Appellees.)

5-497
84-1493 53

Appeal from the Iowa District Court for Warren County - Ray Hanrahan, Judge

Plaintiffs appeal from the trial court's refusal to grant a prescriptive easement **REVERSED AND REMANDED.**

Robert M Benton, of Schooler, Stuyvesant & Benton, Carlisle, for plaintiffs-appellants

Stephen A Hall, of Hall, Ewalt & Hall, Indianola, for defendants-appellees.

Considered by Donielson, P.J., and Schlegel, and Sackett, JJ.

SACKETT, J.

The issue before us is whether plaintiffs have a roadway easement over a two-acre tract in Warren County.

On March 15, 1958, Joe Neubauer in exchange for the sum of $400 granted to Hoyett Parker an easement for road purposes over the tract. The easement was written and signed by Parker and Joe Neubauer,[1] and was notarized and recorded. It granted an easement to Parker, his executors, administrators, or assigns for road purposes across the two-acre tract. It recited Joe had been paid $400 for the use of the land and moving the south fence which Joe, his heirs, representatives, and assigns, agreed to maintain.

After Parker purchased the easement, he expended about $1,500 to build a road and bridge over the tract. At the time he granted the easement, Joe Neubauer was in possession of the property but had only a life estate in the two-acre tract. The remainder interest in the real estate was owned by Defendant John Neubauer and his several siblings. These siblings subsequently deeded their interest to John. Joe died April 28, 1970. John now holds fee simple title to the tract.

Hoyett Parker sold property adjacent to the two-acre tract to Plaintiffs William and Luann Cooper on contract on February 26, 1973.[2] On March 26, 1976, the Parker-Cooper contract was amended to add the two acres in question so that the contract conformed with the original agreement of Cooper and Parker.

On August 2, 1983, plaintiffs filed an action claiming plaintiffs and their predecessor in interest have used the easement continuously, openly, notoriously,

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[1] Joe executed the deed as a single person.

[2] The balance of principal and interest on said contract is due March 1, 1998, at which time Parker is required by the contract to execute and deliver a warranty deed.

and hostilely and asking the court to enter an order establishing their right to the easement. After trial, the trial court refused to establish the easement and plaintiffs have appealed.

I.

The parties have raised an issue as to our scope of review. This cause was filed as a petition in equity to establish an easement. At the commencement of the trial, defendants made a motion to have the action moved from equity to law. The trial court did not grant the motion and determined the action would be tried in equity.[3]

Defendants now contend an action to establish a prescriptive easement is an action at law and we should not review de novo. Defendant cites Simonsen v Todd, 261 Iowa 485, 497, 154 N.W.2d 730, 737 (1967) in support of their position. Simonsen was an action for an injunction to assure use of an easement in which the defendant counterclaimed seeking to have a fence line established as a boundary fence.

A careful reading of Simonsen at 497, 154 N.W.2d at 737, shows the court's determination that "this type of action is triable at law . . ." was a statement made in reference to the court's review of the counterclaim. The counterclaim sought to have an existing fence between two farms established as a boundary line pursuant to Iowa Code section 650. Section 650 provides for a special action to establish disputed corners and boundaries. See Iowa Code § 650.4. In a Chapter 650 proceeding, the judgment of the trial court does have the effect of a jury verdict. See Allen v. Melson, 260 Iowa 689, 690, 150 N.W.2d 292, 293 (1967).

This action was not filed as a Chapter 650 action, nor is it a Chapter 650 action. The authorities support the trial court in its determination to try the

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[3] Despite this holding, the trial court determined in its findings the matter was properly triable at law.

cause in equity. See Tamm, Inc. v. Pildis, 249 N.W.2d 823, 828 (Iowa 1976) (in equitable proceedings to establish easement for driveway purposes over partition of defendant's land, court's review is de novo); Anderson v. Yearous, 249 N.W.2d 855, 858 (Iowa 1977) (in equity action seeking by injunction removal of surface water nuisance and obstruction, court's review is de novo). This matter was properly tried in equity.

Our review is de novo. See also Grosnevor v. Olson, 119 N.W.2d 50, 52 (Iowa 1972); Phillips v. Griffin, 250 Iowa 1350, 1351, 98 N.W.2d 822, 823 (1959); Roberts v. Walker, 238 Iowa 1330, 1332, 30 N.W.2d 314, 315 (1947).

II.

Coopers claim the trial court should have determined they had a prescriptive easement.

An easement may be effectuated by: (1) express written grant, (2) prescription, (3) implication. Anderson v. Yearous, 249 N.W.2d 855, 861 (Iowa 1977). A prescriptive easement may be created by adverse possession under claim of right or color of title, openly, notoriously, continuously, and hostilely asserted for ten years or more. Id. Of course, mere usage does not establish adverse possession. Id. Rather, a party claiming an easement by prescription must prove, independent of use, an easement was claimed as a matter of right, and the other party had express notice thereof either actual or from known facts of such nature as to impose a duty to make inquiry which would reveal existence of an easement. Id. There may also be a prescriptive easement where the original use was with a servient owner's consent and usage as of right has continued for more than ten years. Id. Or under some circumstances, there may be an easement by prescription where the original use was with the consent of the servient owner and use of right has continued for more than ten years. See Simonsen v. Todd, 261 Iowa 485, 489, 154 N.W.2d 730, 732-33 (1967).

To prove an easement by prescription, plaintiff must show more than use. To comply with Iowa Code section 564.1, there are two other requirements: (1) That he claim his easement as his right, and this must be established by evidence distinct from and independent of its use; (2) That the party against whom claim is made must have express notice before 10-year adverse possession; not alone of the use but of the claim of right to use against objections and protest of owner. Phillips v. Griffin, 250 Iowa 1350, 1354-55, 98 N.W.2d 822, 825 (1959).

The doctrine of adverse possession is to be taken strictly. There are usually no equities in favor of one who claims property of another by adverse possession and his acts are to be strictly construed. Roberts v. Walker, 238 Iowa 1330, 1335, 30 N.W.2d 314, 317 (1947).

When Joe gave Parker the easement, Parker thought Joe had fee simple title. Joe was in possession of the farm and even Joe's children, the remaindermen, thought Joe owned it in fee. If Joe had fee simple title, then the easement given would have been in fee. However, the net effect was that Parker received only what Joe could convey, an easement for Joe's life.

> An easement can be created only by a person who has title to or an estate in the servient tenement. . . . The only person who may grant a permanent easement is the owner of the land in fee simple, or a person with a power of disposal of the fee. A person holding an estate less than fee simple, if he is otherwise legally qualified, may create an easement within, and only within, the terms of his estate. For example, a lessee of land entitled to its exclusive possession may create a right-of-way over the land during the continuance of his term, but the easement will terminate on the termination of the tenancy.

25 Am.Jur.2d Easements and Licenses § 15 (1966).

The easement given by Joe terminated on his death.[4] The evidence shows

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[4] Plaintiffs held under a license prior to Joe's death. They cannot hold by adverse possession until Joe's death.

neither Parker nor the Coopers were aware of the easement's termination and continued to operate as though the easement continued beyond Joe's life.

We must first determine whether the plaintiffs had color of title to the property after Joe's death. Color of title is that which in appearance is title, but in reality is no title. Grosvenor v. Olson, 199 N.W.2d 50, 52 (Iowa 1972). A void deed taken in good faith affords sufficient color of title to sustain the plea and claim of adverse possession by one who, relying thereon has taken and held possession for the required length of time. Id. The deed, although made by one having no authority to convey, is sufficient to support a claim of adverse possession provided such possession was in good faith. Id.; Roth v Munzenmaier, 118 Iowa 326, 330, 91 N.W.2d 1072, 1073 (1902).

> The hostile character of a possession may be sufficiently shown by a deed from one lacking title to the land . . . and possession for the requisite period under claim of title confers title by limitation irrespective of the title of claimant's grantor.
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> A deed may constitute color of title in the grantee although the grantor lacked title.

2 C.J.S. Adverse Possession § 112 (1972).

The easement given by Joe on its face appears to grant an easement in fee. Even though Joe could not give an easement in fee, if taken in good faith the easement affords sufficient color of title to support plaintiffs' claim of adverse possession. The evidence is clear when Parker took the easement, he believed Joe owned the property in fee. We determine the easement was taken in good faith and gave plaintiffs color of title after Joe's death.

We need next determine whether adverse possession is established. Mere usage does not establish adverse possession. Anderson v. Yearous, 249 N.W.2d 855, 861 (Iowa 1977). A party claiming an easement by prescription must prove, independent of use, an easement was claimed as a matter of right, and the other

party had express notice thereof, either actual or from known facts of such nature as to impose a duty to make inquiry which would reveal existence of an easement. Id.

The plaintiffs established a road across defendants' property. A road and bridge were placed on the property by plaintiffs' grantor in 1958. The road has existed since that time. After Joe's death in 1970, the road was used and maintained by plaintiffs and their predecessor in interest. See Anderson at 861.

The servitude was known and obvious to defendants. Defendants knew plaintiffs and their predecessor were using, improving, and maintaining the road at all times. When defendant John bought his siblings' interests in 1973, he was aware of plaintiffs' use of the easement. The plaintiffs and their predecessor in interest paid real estate taxes on the property at least through 1977. Payment of taxes is not essential to acquisition of title but bears on the question of plaintiff's good faith. Grosvenor v. Olson, 199 N.W.2d 50, 52 (Iowa 1972).

The plaintiffs' claim was open, notorious, and known to defendants. The plaintiffs repaired and graveled the road over the 10-year period. Additionally, they removed snow from the road during the winter months. Plaintiffs spent over $8,000 on the road in the 10-year period. Plaintiffs treated the road as their own. Defendants were well aware of the fact plaintiffs were maintaining and improving the roadway. The only time the defendants questioned plaintiffs' use was one time when plaintiffs fenced off the road and plaintiffs were requested to remove the fence.

Plaintiffs effectively established an open, visible, continuous, and unobstructed use for the period required to create a prescriptive easement. The

burden is therefore on the defendants to show existence of a mere license. Anderson at 863.

We do not find from our review of the record that defendants ever gave plaintiffs a license to use the premises or that a license to use the premises was given by anyone to plaintiffs and their predecessor in interest after Joe's death.

We determine plaintiffs have established a prescriptive easement and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.