

RENDERED: November 22, 1996; 2:00 p.m.  
NOT TO BE PUBLISHED

NO. 95-CA-1813-MR

HOWARD THOMPSON and AILEEN THOMPSON;  
MARCELLA POTTINGER and PAUL POTTINGER;  
DELORES SALSMAN and DAN SALSMAN;  
CONRAD THOMPSON and ARLENE THOMPSON;  
JANE HAYDEN and BILLY HAYDEN;  
COLMAN THOMPSON and JOYCE THOMPSON;  
DENNIS THOMPSON and BERNADETTE THOMPSON;  
JAMES LARRY HUGHES and MARTHA HUGHES;  
HELEN CHILDERS and HAROLD CHILDERS;  
JENNY CHILDERS and WINFREY CHILDERS;  
FATHER DALE CIESLIK;  
DAVID CIESLIK and KIM CIESLIK;  
KAREN MCGILL; RICHARD THOMPSON and TERRI THOMPSON;  
PATRICIA GRANT; MARY SYNDER; RALPH LAWSON;  
PHYLLIS LAWSON; JOHN LAWSON; THELMA HASH;  
DONALD WRIGHT and ESTELEEN WRIGHT;  
BARBARA GRAHAM and OLYN GRAHAM;  
NANCY GILPIN and PHILIP GILPIN;  
KEITH WRIGHT and REGINA WRIGHT;  
LINDA THOMPSON; BESSIE THOMPSON;  
STANLEY REYNOLDS and BERTIE REYNOLDS;  
LONNIE THOMPSON and THELMA THOMPSON

APPELLANTS

v. APPEAL FROM TAYLOR CIRCUIT COURT  
HONORABLE W.M. HALL, JUDGE  
ACTION NO. 93-CI-219

WALTER SULLIVAN and EFFIE SULLIVAN;  
JEFFREY WRIGHT and DONNA WRIGHT

APPELLEES

OPINION  
REVERSING AND REMANDING

\* \* \* \* \*

BEFORE: WILHOIT, Chief Judge; JOHNSON, and KNOPF, Judges.

KNOPF, JUDGE: This is an appeal from a judgment interpreting a deed as reserving only an easement of access to the grantors. Finding that the trial court improperly applied the rules of construction to an unambiguous instrument, we reverse, and remand for further findings.

On February 4, 1952, the appellant's predecessors, (the Thompsons) conveyed real property to the appellees Walter Sullivan and Effie Sullivan, (the Sullivans), consisting of one hundred (100) acres with a twenty (20) acre exception. The deed also contained the following provision:

There is also reserved and not conveyed by this deed a certain existing graveyard on the southwest side of the said 80 acres and which reservation also includes ten feet around and beyond the present existing fence that is now around said graveyard, together with a certain road leading from the county road to said graveyard, which road follows an old road bed from said county road to said graveyard, and in the event a fence is constructed a (sic; at) the county road then the present holder shall leave an opening and place a hanging gate thereon wide enough to accommodate a truck with a tombstone.

On August 6, 1990, the Sullivans conveyed .83 acres of the property to the appellants Jeffrey Wright and Donna Wright. (the Wrights). That deed also gave them an easement over the road across the Sullivan's property. The easement is partially in the same place as the old road bed, but not entirely. The Wrights constructed a home and made several improvements and

modifications to the old road. Approximately a year later, the current Thompsons, descendants of those buried in the graveyard, brought this action asserting that they retain title to the road and the appellees have no right to use the road.

The trial court ruled that the deed conveyed to the Sullivans all rights and title to the real estate conveyed, including the road in question, except for the specific reservation of the graveyard property and ten (10) feet surrounding it, and with the provision that the roadway would remain subject to an easement for ingress and egress on behalf of the descendants of those buried in the graveyard. The appellants argue that the trial court erred. We agree. Construction of a deed is a matter of law, and the intention of the parties is to be gathered from the four corners of the instrument. Phelps v. Sledd, Ky., 479 S.W.2d 894, 896 (1972). If the intention is manifest, the instrument should be construed without regard to the technical rules of construction. Hall v. Meade, 244 Ky. 718, 51 S.W.2d 974, 976 (1932). In this case, the trial court applied the rules of construction without first determining whether the language used in the deed is ambiguous.

The appellees first point out that the term "reservation" in a deed creates in the grantor a new right issuing out of the same granted, while an "exception" withholds some part of the grant which would have otherwise passed to the grantee. However, these terms are frequently confused and a

technical misnomer does not operate to defeat an attempted reservation or exception. Clark v. Pauley, 291 Ky. 637, 165 S.W.2d 161, 162 (1942). While the deed in this case uses the term "reserved", that word is immediately qualified by the phrase "and not conveyed by this deed". Indeed, all of the parties agree that the graveyard was not part of the estate conveyed.

The deed does not make a distinction between the graveyard and the road. Thus, the sentence at issue reads: "There is also reserved and not conveyed by this deed a certain existing graveyard..., together with a certain road...". The intervening phrases merely describe the graveyard. The clear language of the deed cannot be construed as excepting a fee simple interest to the graveyard, but only reserving an easement over the road.

The trial court and the appellees also focus on the provision in the paragraph allowing the Sullivans to fence the road. However, this provision specifically contemplates the construction of a fence "at the county road". The deed does not grant the Sullivans a right to build a fence. Rather, the deed presumed that the Sullivans could build a fence on their own property. The only limitation is that the Sullivans were required to leave an opening at the point where the graveyard road meets the county road, and place a hanging gate so that the Thompsons could have access to the road. This solution allowed the Sullivans to enclose their property without the expense of

separately fencing the entire length of the seldom-used graveyard road. We do not find that this provision purports to limit the scope of the interest retained by the Thompsons.

The Sullivans and the Wrights also refer to a Kentucky "rule" that "a graveyard reservation generally is a reservation of an easement and not a fee simple exception". Yet, the cases from which they glean this "rule" are distinguishable. In Johnson v. Kentucky-Virginia Stone Co, 286 Ky. 1, 149 S.W.2d 496 (1941), the parents of a child brought an action against a road contractor for desecration of their daughter's grave. The former Court of Appeals held that the parents had standing to bring the action even though they did not own the fee in the land where their daughter was buried. "Such right is sometimes referred to as a mere easement or license or privilege. It is a right which entitles the next of kin of the dead person to maintain an action against the owner of the fee or strangers who, without right, knowingly and wantonly disturb the grave." This right may not be extinguished by the owner of the fee, but it may be abandoned through disuse. Id. at 498.

Goins v. Beech Bottom Baptist Church, 313 Ky. 287, 231 S.W.2d 23 (1950), involved a dispute regarding the boundaries of a graveyard. The former Court of Appeals held that any dispute as to the boundary lines must be resolved against the grantor's heirs in their suit to recover the excepted land. In Gabbard v. Campbell, 296 Ky. 216, 176 S.W.2d 411 (1943), the deed

specifically excepted a family graveyard from the conveyance, and reserved a right of way over a road leading to the graveyard. The former Court of Appeals held that where no agreed upon route has been fixed by the parties and where to travel, the easement is only prescriptive in nature. In such a case, the owner of the servient estate may locate the road in such a way as least inconvenient to him, provided that the location does not diminish the rights of the dominant estate owner. Id. at 413. Lastly, in Carr v. Baldwin, 301 Ky. 43, 190 S.W.2d 692 (1945), the description of the boundaries of the excepted graveyard were ambiguous. The former Court of Appeals held that "where a deed is valid and only the exception is void for uncertainty or vagueness, the title to the whole tract passes; the exception alone being void". Id. at 693.

In this case, the Thompsons undisputedly retain fee simple title to the graveyard. There is no argument in this case concerning the sufficiency of the description of either the graveyard or the location of the road. The only issue in this case is whether the parties to the deed intended that the Thompsons would retain fee simple ownership to the road, or merely have an easement across the road for access to the graveyard. We find that the deed unambiguously excepts both the graveyard and the road from the conveyance.

However, we also note the trial court's additional

finding:

6. The parties, at their deposition testified and the Court finds that for nearly forty years there was never any protest by any of the Plaintiffs to Mr. Sullivan or those working for him or others having need to enter into his farm from using the roadway. No protest was made or registered ...at any time during this period.

7. Further, the testimony was and the Court finds that at such time as the "present road" was constructed, when the Wrights built their home, no protest was made to the Wrights by the Plaintiffs until such time as they had completed their home and had been living there approximately one year.  
Opinion and Judgment, p. 3.

The trial court's findings do not support an interpretation of the deed that the Thompsons only retained an easement over the road. However, these findings partially support a conclusion that the Sullivans and the Wrights acquired an easement by prescription to the use of the road. An easement by prescription may arise from continuous use of a passageway for such length of time as to presume the existence of a grant. Clark v. Cuning, 302 Ky. 779, 196 S.W.2d 609, 610, (1946). In order to establish title to an easement by prescription, the adverse possession must be actual, open, notorious, forcible, exclusive and hostile, and must continue in full force for at least fifteen (15) years. Jackey v. Burkhead, Ky., 341 S.W.2d 64, 65 (1960).

The trial court found that the Sullivans have used the road without protest from the Thompsons for the past forty (40) years. However, the trial court never addressed the question of

whether that use was permissive or adverse. There is a presumption of a grant of a right of way by prescription following an uninterrupted, unexplained, adverse use of such right of way. The burden is upon the landowner to show that the use was merely permissive. Further, such uninterrupted, unexplained use of a passway on another's land creates the presumption that the use was adverse. Haynes v. Dennis, 308 Ky. 483, 486, 214 S.W.2d 1005, 1006-07 (1948). Consequently, we remand this action for further findings concerning whether the Sullivans and the Wrights have a prescriptive easement to use the graveyard road. Following a factual finding on this question, the trial court shall enter an appropriate judgment.

Accordingly, the judgment of the Taylor Circuit Court is reversed and this matter is remanded for further proceedings and judgment in accord with this opinion.

ALL CONCUR.



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