Messrs. Bergen & Bergen for appellants,
On appeal from a decree of the Chancel
reported in Shivers v. Shivers, 7 Stew. Eq.

See front of book
for Bill of complaint

COURT OF ERRORS AND APPEALS.

Between

RICHARD SHIVERS and RICHARD L. SHIVERS,

Appellants,

and

CHARLES SHIVERS,

Respondent.

ON APPEAL FROM DECREE IN CHANCERY.

Brief of Bergen & Bergen, Counsel of Appellants.

I.

There is no dispute in this case as to the existence of a right of way; but there is as to the nature and character of the way in question.

The respondent by his bill, filed in the Court of Chancery, claimed a right of way by *prescription* from his farm across the farm of his brother Richard, occupied by Richard L. Shivers, a son, the appellants, and obtained an injunction from the Court of Chancery, restraining appellants from erecting a gate in said way or lane.

The defendants answer in effect, admitting the existence of an easement, but denying that it arose by prescription, and stating that it arose from necessity on the division of the seizin of adjoining farms, and that from its nature and quality it is subject to reasonable gates; and that it is part of a by-road extending also across respondent's farm.

There is little or no conflict of testimony in the case. The way has existed across both farms to A, on map, since 1808; and of course across Richard's farm, since 1848, the time claimed in respondent's bill. In 1848 the father conveyed the one farm to Richard and the other to Jehu, reserving some back wood land to himself. Nothing was said in the deeds about the way and it is one *ex necessitate.* with such qualities as are necessary only

Blakely vs. Sharp, 1 Stock 9; 2 Stock 206. 3 Rand 419. 420

Fetters vs. Humphreys, 4 C. E. Gr. 476. Wash E & S (1871) 257

Shivers v. Woodruff 1 Zab 15-2

Baker v. Price 45 Maryland 337

Jehu in 1866 conveyed his farm to Charles, the respondent. Charles has only owned it since 1866, and the gate complained of was erected in 1876—ten years—not sufficient to establish a prescriptive right, even though he laid claim to same at the time of his getting title.

Jehu says, while he owned the place, that is, from 1848 till 1866, Richard had the right to erect the gate complained of; that it was the understanding between them that Richard could erect reasonable gates. Richard affirms this, and it is not denied in the case. There can then have been *no prescriptive right accruing*

against the appellants, even on the theory of respondent's case; for proof that the servient owner acquiesced in and conceded the adverse claim, is indispensable in proving title by adverse user. He must have notice of the claim; he must not dispute it; he must concede it; and an understanding or verbal agreement of the parties to the contrary, is sufficient to rebut the presumption of a grant; [redacted]

The burden of proof of prescriptive right, is on respondent.

Lehigh Valley R. R. Co. vs. McFarlan, 3, Stew. 181.
Powell vs. Bragg, 8, Gray, 441.
Bachelder vs. Wakefield, et al., 8, Cush, 249.
Calvin vs. Burnet, 17, Wend. 568.
Sargent vs. Ballard, 9, Pick. 251.

II

What this way was in 1848, at the time of the division of the place, it has ever since continued to be; nor can it be changed from the *qualities* it then had except by the agreement of the parties to it, or on due notice to the servient owner that a particular claim was accruing against him by prescription. Mere user or non-user, is not sufficient to change the *quality* of an established easement. It is always presumed to continue as originally established with its necessary qualities only

Johnson vs. Hyde, 6, Stew. 642 and 649.
Seymour vs. Lewis, 2, Beas. 439.
National Guaranteed Manure Co v Donald 4 H.L.N. 8

That the way was then, (1848) subject to gates, appears not only from the evidence of Richard, that that has always been one of its qualities, and is to-day, and of Jehu, that it was from 1848 to 1866, while he held title, and that Jehu is undenied; but, also, from the fact that no claim to the contrary was ever made till just before this suit was commenced and the gate complained of had then been submitted to without complaint, for two years; and from the fact that bars were some years before in almost the identical place of the gate complained of; and, also, that the gates in the balance of the way, that over Charles's land, have always been erected and changed at will.

III.

Use of way unchanged as to gates for twenty years has not been proved. It is too narrow a view to say that the question is whether a gate has been at the disputed point for twenty years. It is whether the way from Charles's to the road over Richard's land is subject to gates.

The way is claimed from 1848. The gate between Richard and Jehu was first erected in 1859; it was erected over a part of this way *because it swings entirely over Richard's land.* The gate in question was erected in 1876. No prescriptive right could have been gained either in the last *seventeen* years, from 1859 to 1876, or the first *eleven* years, from 1848 to 1859, even if claimed to have been accruing. Of course, since the gate in question was erected no adverse right could be accruing.

Besides, the way thus brought in question by the bill, is but part of an agricultural way extending also over

respondent's farm, the whole of which originated at the same moment and has continued to the present time. Respondent has freely erected gates in his part according to his necessities. The right to erect necessary gates is a quality that attaches as well to appellants' part. The way is all one—one in inception, one in occupancy, one in character and quality.

IV.

The respondent, by his bill, concedes this to be a private way for agricultural purposes. Such a way, by law, is subject to necessary gates.

Bean vs. Coleman, 44, N. H. 539.
Huson vs. Young, 4, Lansing, (N. Y.) 63.
Maxwell vs. McAtee, 9, B, Monroe, (Ky.) 20.
Bakeman vs. Talbot, 31, N. Y. 366, (4 Tiff.)
Houpes v Alderson 22 Iowa 162
Washburn on Eas. 1953

That the gate in question is a necessary gate, appears from the testimony of

Richard L. Shivers, p 20 and 21. 7. 18. 22 36
Jehu Shivers, p 25 and 26.
Samuel G. Stone, p 28.
David Shivers, p 29.
Richard Shivers, p 36.
John C. Shivers N 14. 23

No Evidence contra

- from Charles having 3 inside gates in his part of way.

V.

Is not this a by-road? At least since private or by-roads are by statute subject to gates, how much more are private ways?

Rev. p 1001 § 30 and 31: p 418 § 21 and 22.

Van Blarcorn vs. Frike, 5 Dutch 68 and 516.

XI

Mr. Alfred Hugg for respondent

N. J. COURT OF ERRORS AND APPEALS.

BETWEEN

CHARLES SHIVERS,

Respondent,

and

RICHARD SHIVERS,

and

RICHARD L. SHIVERS,

Appellants.

On Bill for Injunction.

Appeal from Opinion of Chancellor.

POINT OF RESPONDENT.

The respondent, or those under whom he derives his title, have had the exclusive enjoyment of the leasement adversely, since 1848, uninterruptedly without obstruction, and therefore, the legal presumption is, that the right was originally acquired by title.

Twenty years' use of a way is prima facie evidence of a prescriptive right.—Bouvier's Law Dic., and cases there cited.

Washb. on E. and S., p. 66.
Shreve vs. Voorhees. 2 Gr., ch. 25.
Hulme vs. Shreve. 3 Gr., ch. 116.
Shields vs. Arudt. 3 Gr., ch. 234.
The Society, &c., vs. Holsman. 1 Hals. ch, 126.
Stuyvesant vs. Woodruff. 1 Zab., 134.
Del. & Rar. Canal Co. vs. Wright. 1 Zab., 469.
Campbell vs. Smith. 3 Hals., 140.
Thorp vs. Cowan. Spencer, 311.
Earle vs. De Hart. 1 Bees., 280.
Lehigh V. R. R. vs. McFarlan. 3 Stewart, 184.
Palmer vs. Wright. 58 Ind., 486.

ALFRED HUGG,

Counsel of Respondent.