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# Property—Destructibility of Easements Implied Grant

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Not outside the scope of reasonable inference is the possibility that the Court may have intentionally disregarded the question of privity of estate between covenantor and covenantee. Thus, it may have simply indicated by omission, that the test in future cases will be as stated as a continuous succession of conveyances between the original covenantor and the party now sought to be burdened. If this is so, then it would appear that the type of privity required has been changed. Rather than requiring privity between the originally covenanting parties, the New York courts will require that privity of estate which normally flows from the conveyance of land by grantor to grantee.

This apparent change of the privity requirement seems desirable and is in accord with the view of a leading modern authority in this area.[14] Clark states that the requirement of privity is designed to furnish a connecting link between the parties.[15] Since that is present because of the promise between the covenantor and covenantee, the only remaining need is to justify the transfer of the right or duty created by the promise. This is accomplished by requiring a continuous succession of conveyances between the original covenantor and the party now sought to be burdened. Previously, by requiring privity of estate between the covenantor and covenantee, there arose the need for a conveyance between the two parties. Professor Clark argues that a conveyance from the covenantor to the covenantee, and then back, would fulfill the formality of this privity requirement.[16] Although the New York courts are concerned with undue restrictions on the alienation of land, the privity requirement as previously formulated has no real effect, either to hinder or facilitate alienability. This is so because, as previously indicated, a barren formality will suffice to create privity of estate between covenantor and covenantee.

This decision seemingly eliminates the last vestiges of the requirement of privity of estate between covenantor and covenantee still apparent in the *Neponsit* case. If so, this case may herald future decisions in which the New York courts will be concerned with the "intent and substantive effect of the covenant, rather than its form."[17] In determining when a covenant may run with the land, the courts will be free to ignore at least one formalistic and technical question, i.e., is there privity of estate between the covenantor and covenantee. They may instead regard the actual burden the covenant places on the land, in terms of the financial burden it may seek to impose, and its duration in time.[18]

DESTRUCTIBILITY OF EASEMENTS IMPLIED IN GRANT

"An easement . . . is an interest in land existing independent of the fee

14. Clark, Covenants and Interests Running With the Land 117 (2d ed. 1947).
15. Ibid.
16. Ibid.
17. Supra note 3 at 259, 15 N.E.2d 797 (1938).
18. Supra note 2.

of the land over which it is exercised, and is an estate in land possessed in fee, by the owner of the dominant estate."[19] The Court in the *Nellis* case held that an express easement in grant is capable of being a fee, or freehold estate within the meaning of Section 243 of the New York Real Property Law, requiring acknowledgment of fees or freehold estates. It follows, therefore, that easements, ". . . whether arising through express or *implied* grant, are as indestructible, in their nature, . . . as is the estate which is the subject of the grant."[20] (emphasis supplied).

When an easement by grant, express or implied, is compared with an easement by necessity, the most striking difference is that the latter is not a perpetual right, but is subject to termination at such time as the necessity no longer exists.[21]

In the principal case of *Gerbig v. Zumpano*,[22] the parties were owners of adjacent lots separated by a lane, hereinafter called lot 166. The lots were formerly portions of an entire tract which had been divided into numbered lots and lanes on a map filed with the appropriate authority. The defendant acquired his property by a deed making reference to this map. Originally lot 166 formed part of a lane which was the only means of access to the defendant's lot. In 1912, however, an avenue was opened which bordered the defendant's property thus making unnecessary the use of lot 166 as a means of access.

Upon acquiring title to lot 166, plaintiff instituted this action to extinguish defendant's claimed easement and for the removal of incumbrances erected by the defendant. The trial court held in favor of plaintiff,[23] and the defendant appealed. The Appellate Division unanimously affirmed,[24] and on appeal the Court of Appeals unanimously reversed and a new trial was ordered on the issue of abandonment which was raised for the first time.

The Court of Appeals held that this was an easement implied in grant and could only be extinguished by abandonment, conveyance, condemnation, or adverse possession. The Court relied on *Holloway v. Southmayd*,[25] a case involving an action in ejectment by the original grantor to establish his rights in a roadbed which had been discontinued as a public highway. The deed to the grantee made reference to a highway in describing the location of the property (as the deed in the principal case made reference to the map) and on the basis of that reference it was held that the grantor retained the fee subject to the grantee's easement which was perpetual. The *Holloway* case in turn relied on *White's Bank v. Nickols*, which stated the general rule that "When land is granted bounded on a street or highway there is an implied

19. Nellis v. Munson, 108 N.Y. 453, 460, 15 N.E. 739, 741 (1888).
20. Johnson and Co. v. Cox, 196 N.Y. 110, 122, 89 N.E. 454, 458 (1909).
21. Kux v. Chandler, — Misc. —, 112 N.Y.S.2d 141 (Sup. Ct. 1952).
22. 7 N.Y.2d 327, 197 N.Y.S.2d 161 (1960).
23. 13 Misc. 2d 357, 177 N.Y.S.2d 969 (Sup. Ct. 1958).
24. 7 A.D.2d 904, 182 N.Y.S.2d 1016 (1st Dep't 1959).
25. 139 N.Y. 390, 34 N.E. 1047 (1893).

covenant that there is such a way, that so far as the grantee is concerned it shall be continued, and that the grantee, his heirs and assigns shall have the benefit of it."[26]

In *Johnson and Co. v. Cox*,[27] also relied on in the present case, the plaintiff took by deed making reference to an existing road, the fee of which was in the grantor. The defendant was an adjacent owner and was attempting to fence in the roadbed which had been abandoned as a public highway. There was a proposed new road which would border the plaintiff's property but it had not been actually opened. Additional facts indicated the abandoned road was the only means of an easterly access to his land and absolutely necessary to the continuance of his business. Expressly disregarding the apparent necessity, the Court, basing its decision on the fact that the deed made reference to the road, said, "It would seem to go without saying that an easement by grant is not to be distinguished from a deed conveying the fee, and can only be acquired by condemnation or conveyance."[28] Thus, an easement, implied in grant on the basis that the deed made reference to a roadbed, the fee of which was in the grantor, is afforded the same perpetual life as an express easement by grant.

The trial court, relying mainly on a Cardozo opinion,[29] in essence held that when the necessity giving rise to the implication is gone the easement ceases. However, Cardozo expressly excluded subdivision cases, which are a ramification of the cases discussed above, i.e., easements implied in grant because the deed made reference to an existing or proposed road or lane as in the existing case.[30]

Although the principal case neither adds nor subtracts from the existing law in this area, it does suggest that perhaps the best way to deal with easements implied in grant is to base them on necessity. Applying the rule of easements by necessity to the facts in the *Johnson* case, the result would be that the plaintiff would be assured the use of the roadbed while necessary and that the owner would be assured the beneficial use of his land in the future when the necessity ceases, as opposed to the result obtained, namely, that the owner was permanently enjoined from obstructing the roadbed even if the road is never used. Likewise, in the principal case the plaintiff would have the unobstructed use of his land free from an easement which was no longer necessary to the defendant's full enjoyment of his estate. Although the result of the trial court is legally in error, practically, it is not difficult to defend.

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26. 64 N.Y. 65, 73 (1876).
27. Supra note 20.
28. Id. at 121, 89 N.E. 458.
29. Matter of City of New York (Northern Blvd.), 258 N.Y. 136, 179 N.E. 321 (1932).
30. See Lord v. Alkins, 138 N.Y. 184, 33 N.E. 1035 (1893); Fiebelkorn v. Rogacki, 280 App. Div. 20, 111 N.Y.S.2d 898 (4th Dep't 1952), aff'd 305 N.Y. 725, 112 N.E.2d 13 (1953).

REPLEVIN ACTION: MEASURE OF DAMAGES

The law affords two possible measures of damages in a replevin action. The measure of damages applied in a particular case depends on the purpose for which the plaintiff held the chattel. The first measure of damages applies to merchandise held for sale or consumption and gives the plaintiff interest on the value from the time of taking, plus the difference in value at the time of taking and the value at the time of the action if the value of the chattel has depreciated. The second measure of damages applies to chattels held for use and indemnifies the owner for the value of the lost use.[31]

In the case of *Michalowski v. Ey*,[32] plaintiffs automobile was impounded by the defendant, Property Custodian of Nassau County, on the suspicion that it was stolen property. Previously, the Court of Appeals had held that the plaintiff was entitled to recover possession of his car plus damages for its wrongful detention.[33] Plaintiff instituted the present action to recover these damages. The trial court found that the car was held by plaintiff for his use and not for sale. Normally, the measure of damages applicable would be the value of the lost use. However, since the parties stipulated only as to the loss of value, introducing no evidence whatever as to the value of the lost use, the Court deemed them to have abandoned the measure of damages for chattels held for use and to have agreed that the measure of damages applicable to chattels held for sale should be applied.

Although the background of this particular case appears to justify the manner in which it was settled,[34] it is unusual for a court to allow litigants to apply a technically incorrect rule of damages. Perhaps the Court reasoned that the burden of demanding and proving the maximum amount of damages fell on the plaintiff and accepted the stipulations of the parties as to the value involved, in the absence of other evidence.[35]

The provision of Section 479 of the Civil Practice Act that any relief consistent with the issues may be granted after an answer is interposed has not been construed to allow a money judgement in excess of the amount demanded in the complaint.[36] Therefore, the Court of Appeals affirmed the Appellate Division's modification of the judgment to conform to the amount demanded in the complaint.[37]

31. Allen v. Fox, 51 N.Y. 562 (1873).
32. 7 N.Y.2d 71, 195 N.Y.S.2d 633 (1959).
33. Michalowski v. Ey, 4 N.Y.2d 277, 174 N.Y.S.2d 6 (1958).
34. Plaintiff was in jail during a considerable portion of the time car was held. Case was previously before the Court of Appeals.
35. Hunt Aylmer Corp. v. Landy, 241 App. Div. 682, 269 N.Y. Supp. 465 (2d Dep't 1934).
36. Corning v. Corning, 6 N.Y. 97 (1849); Barbato v. Vollmer, 273 App. Div. 169, 76 N.Y.S.2d 528 (3d Dep't 1948).
37. 8 A.D.2d 854, 190 N.Y.S.2d 535 (2d Dep't 1959).