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Property—Implied Easement

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Plains.[71] There is no indication that a route which would not require the narrow strip of hospital lands, here in question, would be less practical, or unreasonably inexpedient from the State's point of view. Again since a "short cut" procedure for exercising the Superintendent's power, through map-filing condemnation, is authorized by the amended highway statute,[72] the Court's construction of the "notwithstanding" language of section 340-b,[73] seems not only grammatically correct, but also in harmony with a logical construction in context. Similarly, such a construction attributes to the legislature the virtue of reasonableness, an attribution often neglected through the use of rigid rules of statutory construction.

IMPLIED EASEMENT

The plaintiff conveyed land to the defendant, describing the westerly boundary as running "along the east boundary" of plaintiff's private road. An injunction to prevent the defendant's use of the road was granted. Affirming the Appellate Division and upholding the injunction, the Court of Appeals,[74] in a unanimous decision, found in *Tarolli v. Westvale Genesee, Inc.*, that as a matter of law no easement was to be implied from the description and other relevant circumstances.

An easement is an interest in land which entitles the owner to a limited use of the land of another. The law favors formality in the conveyance of an easement although express words are not necessary so long as the intention to give an easement is manifest.[75] Where the intention is not manifest by the language of the conveyance it may be possible—although the law does not favor it—to imply an easement where there has been an original unity of ownership in a common grantor of the parcels retained and conveyed,[76] and circumstances justify the inference that there was an intent to grant an easement in the portion retained in connection with a conveyance of a parcel of the whole.[77] To determine intent the court will take into consideration the terms of the conveyance itself and the circumstances attending the transaction.[78] Where the deed describes the land as bounded by a road, the fee of which is vested in the grantor, frequently the grantee by inference of an intent

71. N.Y. HIGHWAY LAW, § 34-a.
72. N.Y. HIGHWAY LAW, § 30.
73. *Supra* note 63.
74. Tarolli v. Westvale Genesee, Inc., 6 A.D.2d 848, 175 N.Y.S.2d 521 (4th Dep't 1958), *affirming* Sup. Ct., Onondaga County, in a 3-2 decision. The dissenting opinion contains a summary of the proof. *Aff'd* 6 N.Y.2d 32, 187 N.Y.S.2d 762 (1959).
75. Rubel Bros. v. Dumont Coal & Ice Co., 111 Misc. 658, 182 N.Y. Supp. 204, (Sup. Ct. 1920), *rev'd on other grounds* 200 App. Div. 135, 192 N.Y.S. 705 (2d Dep't 1922), *dismissal of appeal denied* 233 N.Y. 618, 135 N.E. 942 (1922).
76. Holtz Amusement Co. v. Schorr, 122 Misc. 712, 204 N.Y. Supp. 733 (Sup. Ct. 1924).
77. Miller v. Edmore Homes Corp., 285 App. Div. 837, 137 N.Y.S.2d 324 (2d Dep't 1955), 308 N.Y. 911, 127 N.E.2d 74 (1955).
78. Sabatino v. Vacarelli, 264 App. Div. 742, 35 N.Y.S.2d 725 (2d Dep't 1942); Wilkinson v. Nassau Shores, 1 Misc. 2d 917, 86 N.Y.S.2d 603 (Sup. Ct. 1949), *aff'd* 278 App. Div. 970, 105 N.Y.S.2d 984, *reargued and appeal denied* 279 App. Div. 591, 107 N.Y.S.2d 559 (2d Dep't 1951), *aff'd* 304 N.Y. 614, 107 N.E.2d 93 (1952).

to convey an easement acquires a right of way.[79] But no easement is granted where circumstances indicate that the inference is not justified.[80] For example, if a parcel is bounded by a closed road which the grantee knows is closed, he does not receive an easement unless there is an express covenant in regard to it in the deed. The easement in the grantor's hands must have been continuous, apparent, permanent and necessary.[81] If the easement is the right to use a private road, the road must have been permanently established on one part of the estate for the benefit of another part. If an act of man is essential to the enjoyment of the road, it does not became an easement on severance unless it is a necessary road.[82] It is not a road of necessity if it is one for mere convenience, that is, the claimant has other means of access to the highway.[83]

The Court, choosing between the conflicting inferences raised by the virtually undisputed facts,[84] held that defendant failed to overcome a presumption that no covenant is implied by a conveyance.[85] The deed's description of the boundary was but one circumstance raising an inference of an intent to grant an easement and the intent of the parties must be determined "in the light of all the circumstances."[86] Defendant had argued that plaintiff's deed from plaintiff's grantor was subject to a binding restriction which prevented plaintiff from using the road for any purpose other than a road. The use of the road had not been contiuous. The road was closed and impassible from overgrowth when defendant acquired his abutting parcel from plaintiff. Its use was not necessary when defendant attempted to move a house to the rear of his parcel because he might have moved it over his own land. Plaintiff sought the injunction as soon as defendant began to clear the road. Nor was access to the highway denied where defendant's parcel fronted on the highway. These circumstances were, in the opinion of the trial court, insufficient to war-

79. Collins v. Barker, 286 App. Div. 349, 143 N.Y.S.2d 173 (3d Dep't 1955). Said to apply whether or not an easement in the street is necessary, Ranscht v. Wright, 9 App. Div. 108, 41 N.Y. Supp. 108 (2d Dep't 1896), *aff'd* 162 N.Y. 632, 57 N.E. 1122 (1900).

80. King v. City of New York, 102 N.Y. 172, 6 N.E. 395 (1886).

81. Jacobson v. Luzon Lumber Co., 192 Misc. 183, 79 N.Y.S.2d 147 (Sup. Ct. 1948), *aff'd* 276 App. Div. 787, 92 N.Y.S.2d 537 (3d Dep't 1949), *aff'd* 300 N.Y. 697, 91 N.E.2d 724 (1950), *reargument denied* 300 N.Y. 754, 92 N.E.2d 459 (1950).

82. Alleva v. Tornatore, 254 App. Div. 525, 5 N.Y.S.2d 479 (1st Dep't 1938), *aff'd* 279 N.Y. 770, 18 N.E.2d 860 (1939), *reargument denied,* 280 N.Y. 703, 21 N.E.2d 205 (1939). *Contra,* Swezey v. Berry, 143 Misc. 372, 257 N.Y.S. 365 (Sup. Ct. 1932). *Supra* note 81.

83. Garvin v. State, 116 Misc. 408, 190 N.Y. Supp. 143 (Ct. Cl. 1921).

84. Ader v. Pollman, 18 N.Y.S.2d 27, 259 App. Div. 760 (3d Dep't 1940), *appeal dismissed* 296 N.Y. 634, 69 N.E.2d 482, *motion denied* 296 N.Y. 771, 70 N.E.2d 747 (1940) which was an action for an injunction. Judgment supported by evidence in plaintiff's favor must be affirmed on appeal. Duane Jones Co. v. Burke, 306 N.Y. 172, 117 N.E.2d 237 (1954), if conflicting inferences are possible from the evidence, choice as between them must be made by the trier of fact, and no revision thereof is to be made on appeal, unless the choice is clearly wrong. Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928), where the trier was a referee. In Tarolli the facts were heard by the Judge of Special Term.

85. N.Y. REAL PROP. LAW § 251: "A covenant is not implied in a conveyance of real property, whether the conveyance contains any special covenant or not."

86. *Supra* note 74, 6 N.Y.2d 32, 34, 187 N.Y.S.2d 762, 764, In re City of New York, 258 N.Y. 136, 147, 179 N.E. 321, 323 (1932).

rant and establish an easement. While the facts might justify that an easement was created, the affirmance of the Court of Appeals was proper where the trier of fact made a choice which was not clearly wrong, and defendant failed to meet his burden of proving an easement.[87]

TAXATION

UNREALIZED APPRECIATION OF ASSETS EXCLUDED FROM EARNINGS AND PROFITS

Article 16 of the New York Tax law deals with "Taxes Upon And With Respect To Personal Incomes." Within that Article, Section 350(8) defines "dividends" to mean any distribution made by a corporation to its shareholders out of its earnings and profits.[1] Section 359 of the same Article defines "gross income" as including, *inter alia*, gains, profits and income from dividends, and gains, profits and income from any source whatever.[2] In the recent case of *Marks v. Bragalini*,[3] the Court of Appeals clarified the concept of "earnings and profits" for income tax purposes, particularly in its relation to unrealized appreciation of corporate assets.

Taxpayer was a stockholder in a corporation which had purchased an apartment house from the Federal Housing Administration in 1942, to whom it gave a mortgage for $1,682,000. By 1950, the value of the property had increased enough so that the corporation was able to obtain a new mortgage from an insurance company for $2,000,000, paying off the old mortgage and leaving an excess of over $800,000. In 1950, it made a distribution to shareholders of $735,000 ($700 per share) of which taxpayer received approximately $389,000. At the close of the fiscal year, the corporation had accumulated earnings of some $77,000, which was about 10.6 per cent of the distribution.

On his 1950 Federal and New York State personal income returns, taxpayer included $41,000, representing 10.6 per cent of the distribution to him, in "gross income" as a dividend subject to tax as ordinary income. Of the balance of $348,000, he treated $346,000 as "return of capital" (thus reducing his basis in the stock to zero) and the remainder as capital gain. His Federal return was accepted, but the New York authorities disallowed his treatment

87. Zeiger v. Interborough R. T. Co., 254 App. Div. 908, 5 N.Y.S.2d 527 (2d Dep't 1938), *aff'd* 280 N.Y. 516, 19 N.E.2d 922 (1939). One claiming the easement has the burden of proving it.

1. N.Y. TAX LAW § 350(8).
   The word "dividends" means any distribution made by a corporation out of its earnings and profits to its shareholders or members whether in cash or other property or in stock of the corporation, other than stock dividends as herein defined. . . .
2. N.Y. TAX LAW § 359.
   The term "gross income":
   1. includes gains, profits and income from salaries, wages . . . ; also from interest, rent . . . , dividends, securities . . . , or gains and profits and income derived from any source whatever . . . .
3. 6 N.Y.2d 322, 189 N.Y.S.2d 846 (1959).