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Real Property—Deeds—Right of Selection

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trustees . . . and to ratify and confirm the acts of its board of trustees . . ."; and found that the 1952 legislation confirmed these proprietary powers.[24]

Judge Van Voorhis writing for the minority felt that the only issue on appeal was the validity of "Proposition Number One". He reasoned that it was invalid because it combined three propositions — beach, parking and recreation, and dredging — into one which is contrary to the prescriptions of the town law. He also found the proposition to be invalid for its failure to state the amount of obligations which the Town was incurring. As regards the applicability of the 1952 legislation to the proposition and to the powers of the Trustees, the minority contended that its only purpose was to quiet title of the land held by and through the Trustees. In the minority's opinion, the provision stating that the Trustees had the power to acquire real and personal property was limited to those acquisitions incident to the disposition and conservation of property already held by the Trustees. And, though admitting the Trustees had the power to sell the sand and gravel in the harbor, the minority viewed the contract's primary purpose to be the improvement of navigation which is a governmental function[25] to be exercised by the Town Board subject to proper approval.

Doubtless the Court went behind the issue presented by this case in order to put an end to the attacks upon the acts of the Trustees. This writer wonders, however, whether in attempting to settle one controversy the Court has not planted seeds of others when it appears to be the purpose of the Town Law to have these functions initiated by the town board subject to the voters' approval.

REAL PROPERTY

Deeds—Right of Selection

Lipton v. Bruce[1] presented the Court of Appeals with two unusual and interesting problems. Firstly, whether a deed of "one acre of land out of the above described premises, or so much thereof as the party of the second part may require for a cottage lot . . ." was an attempted conveyance, void for uncertainty of description,[2] a conveyance of an undivided interest,[3] or the conferral of a right to

24. The Court also found that this legislation did not violate the requirements of the New York Constitution which provides that no special law shall embrace more than one subject which shall be expressed in the title, N. Y. CONST. Art. 111, §15 (1938); nor did it violate the Constitutional provision which states that an existing law is not to be made applicable by reference, N. Y. CONST. Art. 111, §16 (1938).

25. See *People v. Steeplechase Park Co.*, 218 N. Y. 459, 113 N. E. 521 (1916).

1. 1 N. Y. 2d 631, 136 N. E. 2d 900 (1956).

2. *Tierney v. Brown*, 65 Miss. 563, 5 So. 104 (1888).

3. *Morris v. Baird*, 72 W. Va. 1, 78 S. E. 371 (1913).

select one acre of land at a future time.[4] Secondly, if it be construed as a right of selection, could this right be validly exercised by executing and recording a deed of one specifically-described acre by the original grantee to a third person.

On the first point, there was unanimity in holding that it was not an invalid attempt to convey a specific acre. This was based on the accepted canon of construction that the language of a deed should be read in such a way as to make it valid and meaningful.[5] All agreed further that the instrument created a right of selection.

As to the second question, a divergence of views appeared. The dissent argued that a right of selection could not be exercised unless the selection was consented to by the grantor and followed by occupation, enclosure or cultivation. The majority was of the opinion that such consent was unnecessary. They also felt that a taking of possession was not essential to the valid exercise of the right. The reasoning here was that the purpose of the requisite of possession was notice to the grantor and this had been accomplished by the recording of the deed.

Whether the right of selection is to be dependent upon the consent of the grantor depends on the intent of the parties.[6] Since here the grantor was the grantee's mother and was that same day disposing of her interest in the property, the majority's determination that no consent was intended seems well founded. Further, it is a well settled principle that a man's grant is to be taken most strongly against him.[7]

Difficulties arise when one considers the majority's further holding that recording gave constructive notice to all, including the person who was title holder when the second deed was recorded four years after the right of selection had been given. This statement is in direct opposition to the language of the statute[8] and repeated judicial declarations,[9] limiting the effect of recording to subsequent purchasers and incumbrancers. It is doubtful that the Court intended to make such a ruling. It is rather their expression of the fact that the deed was recorded when the present defendant took title and that the deed under which he took expressly subjected the grant to the right of selection.

The position of the Court, more accurately stated, would be that although

4. *Jackson ex dem. Garnsey v. Livingston,* 7 Wend. 136 (1831).
5. *People ex rel Myers v. Storms,* 97 N. Y. 364 (1884).
6. *Gray v. Producer's Oil Co.,* (Tex. Civ. App.) 227 S. W. 240 (1921).
7. *Jackson d. Troup v. Blodgett,* 16 Johns. 172 (1819).
8. N. Y. REAL PROPERTY LAW §291: ". . . Every such conveyance not so recorded is void as against any person who subsequently purchases or acquires by exchange, or contracts to purchase or acquire by exchange, the same real property or any portion thereof . . . ."
9. *Tarbell v. West,* 86 N. Y. 280 (1881); *Seely v. Seely,* 164 App. Div. 650, 150 N. Y. Supp. 66 (3d Dep't 1914).

the selection was invalid as to the person who was then the title holder, because of want of notice, this invalidity was cured when the title holder, in his grant, recognized the right. The grantee of this later deed was chargeable with notice because the deed was by that time on record in the County Clerk's office.

Easement by Implication

In *Weil v. Atlantic Beach Holding Corp.*,[10] deeds to lots in a beach area referred to cover maps of a subdivision which included proposed streets and a boardwalk. A perpetual right to use the beach for bathing purposes was expressly reserved to the respective owners.

Ten years before this action in equity upon a claim of easement was initiated, the boardwalk fell into disrepair and subsequently closed. The area has since been redeveloped. Before the redevelopment, a party-defendant constructed a fence across one section of the boardwalk although property owners were not interrupted in their free access to the same. In addition, a portion of the walk was removed by said party who constructed an alternative route. Access to this section of the walk was the subject of an appeal by residents of the community.

The Court sustained the easement, and affirmed the holding of the Appellate Division that the defendant must remove the fences barring access to the aforementioned portion of the walk. It further held that property owners in the beach area have implied easements over and upon undeveloped roadways indicated by the cover maps.

An implied easement is an easement resting upon the principle that, where the owner of two or more adjacent lots sells a part thereof, he grants by implication to the grantee all those apparent and visible easements which are necessary for the reasonable use of the property granted.[11] It has been held that purchasers upon a representation that land from the lake shore to water's edge should be used in common, could not be deprived of such right.[12]

Although some state courts have indicated that mere convenience is not enough, and have required the easement to be strictly necessary to the principal thing granted,[13] New York supports a more liberal view, holding that so far as their existence adds to the value of the property sold and

10. 1 N. Y. 2d 20, 133 N. E. 2d 505 (1956).
11. *Farley v. Howard*, 33 Misc. 57, 68 N. Y. Supp. 159 (Sup. Ct. 1900); *Sabatino v. Vasarelli*, 264 App. Div. 742, 35 N. Y. S. 2d 635 (2d Dep't 1942).
12. *Boughton v. Baldwin*, 134 Misc. 34, 235 N. Y. Supp. 98 (Sup. Ct. 1929).
13. *McSweeney v. Commonwealth*, 185 Mass, 371, 70 N. E. 429 (1904).