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Easements by Implication--When Enforceable

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from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded, even by authority of the United States.[26] For disposing of material elsewhere than permitted there is a fine of five dollars per cubic yard.[27] To tow or move any loaded scow without a permit shall be a misdemeanor, with a fine of not more than one thousand dollars nor less than five hundred dollars and revocation of the license of the master of the scow.[28] Such an injunction would result in making Section 450 of no effect, but it would provide for the execution of the decree in a manner most satisfactory to the plaintiff.

HARRY B. SAMES.

EASEMENTS BY IMPLICATION—WHEN ENFORCEABLE.

It is ancient learning that an easement is a liberty, privilege, or advantage without profit which the owner of one parcel of land may have in the land of another.[1] The land so benefited is called the dominant estate and the land so burdened is termed the servient estate. This interest is created usually by deed or adverse use for the prescriptive period.[2] Since an easement is an incorporeal hereditament it may only be created by grant,[3] prescription,[4] or by express reservation. In the latter case the grantor reserves an easement in the land conveyed for the benefit of land retained by him. The easement comes into being by virtue of the reservation.[5] Where the easement is created by grant the grant must contain all the formal requisites of a grant of land.[6] Under the statute of frauds easements cannot be created by parol.[7] For an easement to arise by prescription there must be an adverse user, open and notorious for twenty years.[8]

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[26] U. S. v. Lee, 106 U. S. 196, 220, 221, 1 Sup. Ct. 240, 256 (1882); Belknap v. Schild, 161 U. S. 10, 18, 16 Sup. Ct. 443, 445 (1895); Philadelphia Co. v. Stimson, *supra* note 6.

[27] *Supra* note 13, §449.

[28] *Ibid.* §443.

[1] Pierce v. Keator, 70 N. Y. 419, 421 (1877).

[2] Scanlon v. Manhattan R. R. Co., 185 N. Y. 359, 363, 78 N. E. 284, 285 (1906).

[3] Canfield v. Ford, 28 Barb. 336 (N. Y. 1858).

[4] WILLIAMS, REAL PROPERTY (17th ed.) 31.

[5] Phoenix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400 (1882). The reservation must be to the grantor. It cannot be created in favor of a stranger to the transaction. Beardslee v. New Berlin L. & P. Co., 207 N. Y. 34, 100 N. E. 434 (1912).

[6] Sweeney v. St. John, 28 Hun 634 (1st Dept. 1883).

[7] Conkhite v. Conkhite, 94 N. Y. 323, 327 (1884).

[8] *Supra* note 2 at 363, 78 N. E. 285. "Easements by grant or reservation, express or implied, and easements arising by prescriptive user, are protected in equity by injunction in practically all cases, the remedy at law being inadequate

The courts have extended the elementary and fundamental rules stated above in certain cases where they felt that justice, common sense and the practical needs of men demanded such extension. In such cases the courts have stated that easements may arise by implication.[9] The courts in declaring this type of easement disregard technicalities such as a writing of the parties and the statute of frauds, and say in effect, "The grantor meant to grant such an easement." O'Brien, *J.*, in *Spencer* v. *Kilmer*,[10] stated, "When the owner of a tract of land conveys a distinct part of it to another, he impliedly grants all those apparent and visible easements which at the time of the grant were in use by the owner for the part so granted, and which are essential to a reasonable use and enjoyment of the estate conveyed." It should be noted, however, that the important feature of the quoted statement is that the easement should be apparent and visible; or at least there must be some apparent sign which would indicate its existence to one reasonably familiar with the subject or by an inspection of the premises.[11]

If an owner of land conveys an inner portion of it, access to which can only be gained by crossing the land of the grantor, an easement is implied across the land of the grantor.[12] This type of easement arises by necessary implication as an implied term of the deed.[13] Strict necessity, however, is required. Mere inconvenience or the saving of expense will not be enough to give rise to this easement.[14]

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as involving a multiplicity of suits, and loss or modification of the easement resulting after twenty years of the wrongful interference if such suits are not brought. Of course damages will be adequate, and equity will not interfere where there is no real threat of further interruption, and therefore no need of an injunction, but such cases are rare. The question usually involved is the character and extent of the easement * * *." WALSH, EQUITY (2d ed. 1930) 184.

[9] Although in early cases the distinction was not made between an implied reservation and an implied grant of such an easement, authorities now generally recognize it. Paine v. Chandler, 134 N. Y. 385, 388, 32 N. E. 18, 19 (1892). Briefly, the distinction is based upon the theory that the common owner's deed of a portion of his land conveys all essential rights which he has, and that whatever is apparent and continuously necessary to the beneficial use and enjoyment of the granted property is intended to be conveyed so far as the grantor could do so. McElroy v. McLeary, 71 Vt. 396, 45 Atl. 898 (1899).

[10] 151 N. Y. 390, 398, 45 N. E. 865, 867 (1897).

[11] Butterworth v. Crawford, 46 N. Y. 349, 352 (1871).

[12] Palmer v. Palmer, 150 N. Y. 139, 44 N. E. 966 (1896). A way of necessity never exists over the land of a stranger. It arises by implied grant or reservation where the common owner of two parcels conveys or devises one of them, retaining the other. Nichols v. Luce, 24 Pick 102 (Mass. 1839).

[13] But an implied easement cannot exist where there was no unity of ownership of the alleged dominant and servient estate. For example, one cannot have a right of way of necessity over land which the grantor never owned, except as tenant in common. Garvin v. State, 116 Misc. 408, 190 N. Y. Supp. 143 (1921).

[14] Burlew v. Hunter, 41 App. Div. 148, 151, 58 N. Y. Supp. 453, 455 (4th Dept. 1899); see Moore v. Day, 199 App. Div. 76, *aff'd*, 235 N. Y. 554, 139 N. E. 732 (1923), wherein it was held that a purchaser of an island in Lake Champlain did not get a way over the vendor's land to the shore, though such

Since it arises out of the necessity of the case it continues only so long as the necessity continues to exist.[15] It cannot be extinguished by mere non-user,[16] though it may be extinguished by possession adverse to the easement for twenty years.[17] If there is non-user, however, coupled with an intention to abandon, this will operate as an abandonment of the easement.[18] Once the easement is lost by abandonment it cannot thereafter be restored by use.[19]

Recently, in *Goldstein* v. *Hunter*,[20] the Court of Appeals had occasion to reiterate the rule that easements must be open and visible to bind the servient estate, where one claims an easement by implication. In this case the plaintiff brought an action for a permanent injunction restraining defendant from cutting off the connection of plaintiff's dwelling house with a sewer in the street back of his house. The sewer-pipe line led from plaintiff's property through the property of defendant to a municipal sewer in a street upon which defendant's property abutted. Both parties to the action acquired their titles from a common grantor who originally built the pipe line for seven houses on a plot of land he owned. He had the pipe line from each house connected with the municipal sewer in the street. The connection from plaintiff's house with the sewer was under the defendant's house. The original grantor conveyed one of the houses on the property to *A*, the grantor retaining the balance. Later the grantor conveyed a house and lot to defendant, who took without any knowledge of this underground drain connecting the surrounding houses. *A* conveyed his house and lot to the plaintiff. Subsequently defendant learned of this drain and cut off plaintiff's house from the sewer. In the action to enjoin the defendant from this act the court held that the plaintiff was not entitled to an easement in respect to the main sewer connection. Since the defendant was a purchaser of his property in good faith his land would not be burdened with the drain.

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way was used by the vendor, it appearing that approach by launch from a public dock was at least equally feasible.

[15] Bauman v. Wagner, 146 App. Div. 191 (4th Dept.), 130 N. Y. Supp. 1016 (1911).

[16] Columbia Distilling Co. v. State, 183 App. Div. 345, 170 N. Y. Supp. 794 (1918), *aff'd*, 227 N. Y. 636, 126 N. E. 903 (1920).

[17] Smyles v. Hastings, 22 N. Y. 217 (1860). The easement, if created by deed, cannot be extinguished without compensation even if the use to which it is put is unauthorized or excessive. McCullough v. Broad Exchange Co., 101 App. Div. 566, 92 N. Y. Supp. 533 (1905), *aff'd*, 184 N. Y. 592, 77 N. E. 1191 (1906).

[18] Valentine v. Schrieber, 3 App. Div. 235, 38 N. Y. Supp. 417 (1896). Where the easement is lost or abandoned the right to possession of the land reverts to the owner. A. F. Hutchinson Land Co. v. Whitehead Bros. Co., 127 Misc. 558, 217 N. Y. Supp. 413, *aff'd*, 218 App. Div. 682, 219 N. Y. Supp. 413 (3rd Dept. 1926). If the owner of the dominant tenement acquires the servient tenement the easement is extinguished. Lathrop v. Lytle, 84 Misc. 161, 145 N. Y. Supp. 906 (1913).

[19] Atlantic Mills of R. I. v. N. Y. C. R. R. Co., 221 App. Div. 386, 223 N. Y. Supp. 206 (1927), *aff'd*, 248 N. Y. 535, 162 N. E. 514 (1928).

[20] 257 N. Y. 401, 128 N. E. 675 (1931).

As the facts in the case disclosed no physical construction on the property which would give notice to a reasonably prudent purchaser of the existence of a drain the court properly held that an easement did not exist. Aside from the rule at common law the real property law safeguards such a purchaser as defendant.[21] Here the defendant was a purchaser in good faith and for a valuable consideration. As the court pointed out,[22] "If in recording their deed they (defendants) would hold their property as against any prior unrecorded deed held by plaintiff, surely they would hold free from anything less than a deed such as an agreement, express or implied, creating an easement."

As between the original grantor and plaintiff there was an easement by implication as against the grantor for the maintenance of the sewer connection from plaintiff's property through to the main sewer.[23]

Where the owner of a unified plot, through which a sewer runs, conveys one plot, he impliedly grants to his grantee the right to use the sewer connection. Although not expressed in the deed this implied easement arises because the grantor knew of the sewer pipe connecting all the houses and because the apparent intent of the parties was that the grantee should have this privilege of user. But when the grantor of such dominant estate grants the property to an innocent purchaser the easement in favor of the first grantee is lost, as it was not in writing or was not apparent. If the defendant had notice of the easement, either actual or constructive,[24] his fee would be subject to such easement. In *Butterworth* v. *Crawford* [25] the principle to be applied is stated, "The rule of law which creates an easement on the severance of two tenements or heritages, by the sale

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[21] REAL PROPERTY LAW (CONSOL. LAWS, c. 50) §242: "An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any matter relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing." Section 291: "A conveyance of real property, within the state * * * may be recorded in the office of the clerk of the county where such real property is situated. * * * Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded." It is to be noted, however, that easements capable of physical examination are embraced within the statute and are subject to the same law of notice as a conveyance of a fee. Ward v. Metropolitan El. R. Co., 82 Hun 545, 31 N. Y. Supp. 527 (1st Dept. 1894), *aff'd*, 152 N. Y. 39, 46 N. E. 319 (1897).

[22] *Supra* note 20.

[23] 2 WASHBURN, REAL PROPERTY (6th ed. 1902) 289.

[24] In Wilson v. Ford, 209 N. Y. 186, 102 N. E. 614 (1913) the court held that one who bought property burdened with a passageway agreement affecting it which was recorded was presumed to have made the inquiry necessary to ascertain prior rights, or to have been guilty of a degree of negligence fatal to a plea of ignorance.

[25] *Supra* note 10 at 392.

of one of them, is confined to cases where an apparent sign of servitude exists on the part of one of them in favor of the other; * * * or, where the marks of the burden are open and visible."

From a review of the cases, wherein the courts have held that an easement arose by implication, it would seem that the unexpressed intent of the parties is given effect. Without benefit of a writing or a parol agreement the courts bring into being a new and distinct legal interest in land, an easement. The easement is implied in order that justice might be done, and is based on a principle dear to equity, *i.e.*, the enforcement of a parol agreement in cases of partial performance. But even here, where the court seeks to right an injustice, there are certain technical rules which are enforced. The easement must be open and visible, it must be strictly necessary, the necessity must be a continuing one, and the purchaser and seller must have intended that the easement pass with the title. The question is, "Did the parties as reasonable men intend the easement to continue after the conveyance of one parcel and the retention of the other." If they did, the easement continues in favor of the grantor. But where, as in the principal case,[26] the easement was not open and visible and was not expressed in writing, no easement accrues to a subsequent grantee, even though his grantor may have had one.

RAYMOND C. WILLIAMS.

TRUST FUNDS—CONVERSION—INFORMATION SUFFICIENT TO PUT BANK ON INQUIRY.

The courts have ever been zealous to protect the corpus of a trust estate for the *cestui que* trust or the beneficiary. They have held the trustee liable for his negligent acts, which though not wilful, have caused depreciation or loss of the funds entrusted to his care and have demanded of him ordinary care and prudence in administering the trust.[1]

The first well-known principle of equity in this respect is that trust funds are to be kept separate from the private funds of the trustee and must be deposited in an account showing the fiduciary character.[2] For failure to comply with this mandate of the law, the trustee himself is held liable, and good faith is no defense to an action

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[26] *Supra* note 19.

[1] Ewing v. Wm. L. Foley, Inc., 115 Tex. 222, 224, 280 S. W. 499, 500 (1926). "As a general rule, one accepting the duties and responsibilities of a trustee, is charged with the use of ordinary care and prudence in administering the trust." *In re* Kline, 280 Pa. St. 41, 124 Atl. 280 (1924).

[2] *In re* Stafford, 11 Barb. 353 (N. Y. 1851); Otto v. Van Riper, 164 N. Y. 536, 58 N. E. 643 (1900).