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Real Property - Easements - Implied Easement of Access , Created by Conveyance with Reference to Plat, as Surviving Vacation of Street

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REAL PROPERTY—EASEMENTS—IMPLIED EASEMENT OF ACCESS, CREATED BY CONVEYANCE WITH REFERENCE TO PLAT, AS SURVIVING VACATION OF STREET—Plaintiff sued to recover his deposit and search fee on a contract for the purchase of lands, a valuable part of which lay within the limits of two vacated streets. He contended the title was unmarketable because all owners of lands conveyed with reference to a plat showing these streets had by those conveyances acquired easements of access which survived the subsequent vacation of the streets by municipal authorities. The vacated streets had never been used and there were no physical indicia of them. Evidence showed all the lots on the map had access to the public highway system without using the streets. The trial court held the title was unmarketable as owners of lots abutting the vacated streets retained private rights in them. On appeal, *held,* reversed. The title is marketable. No rights constitutionally compensable in law are now held by the owners of lots abutting on the vacated streets or on cross streets, since all lots have access to the public highway system. *Highway Holding Co. v. Yara Engineering Corp.,* (N.J. 1956) 123 A. (2d) 511.

The existence and extent of private rights in vacated streets has become of increasing importance in recent years as population movements, changes in traffic flow, and other factors[1] necessitate or allow cessation of the public easement in streets and ways. The intervention of thirteen title insurance companies in the principal case emphasizes the importance of private easement rights as actual or potential clouds on the fee title after vacation.[2] The New Jersey court began its inquiry into such rights from the almost universally accepted premise that vacation of the public easement in no degree impairs such private rights as may exist in the street.[3] The issue thus narrowed to a determination whether any private easements which had

[1] See Ogden, "Ownership of Vacated or Abandoned Rights of Way," 26 TITLE NEWS 2 (1947).

[2] See 18 A.L.R. 1008 (1922) and 70 A.L.R. 564 (1931) for annotations on reversion of fee title upon vacation.

[3] See, e.g., Holloway v. Southmayd, 139 N.Y. 390, 34 N.E. 1047 (1893). See generally 150 A.L.R. 644 (1944). However, a statute authorizing vacation of streets may provide that private easements shall also be taken, if compensation is paid for the easement. Barber v. Woolf, 216 N.Y. 7, 109 N.E. 868 (1915).

coexisted with the public easement[4] had been granted to or otherwise acquired by purchasers. Conveyance[5] of land by reference to a filed map or plat upon which lots and streets are laid out is recognized by all courts as giving purchasers an implied easement of access in some or all of the streets shown, assuming the grantor owns the fee in such streets.[6] Although various language has been used to express the legal basis for finding such easements, the principal case properly treats it as a question of probable intent to grant an easement.[7] Regarding the question as *res nova,* the New Jersey court adopted the restrictive view that, at least in the absence of other facts bearing on intent, the showing of a conveyance with reference to a plat would be interpreted as an intent to give the grantee only an easement of *some means of access* to the general street system. Since all purchasers in the principal case still retained such a means of access over non-vacated streets, none had any compensable rights in the vacated streets. By its approval of a distinction suggested in an earlier New Jersey case[8] and well settled in Pennsylvania,[9] the court also seems to indicate that other factors bearing on intent are relevant and may vary the result. For example, that distinction was that where the street or highway in question was opened or had been dedicated and accepted as a public street at the time of the conveyance, no intent to grant a private easement will be found even though there is presently no other means of access. As the grantee had access over the public highway at that time, the grantor probably did not intend to grant him, in addition, a private easement. Additional facts suggested by other courts as bearing on the grantee's intent include: (1) the physical conditions of the lot and its surroundings;[10] (2) statutory abandonment of the street shown on the plat, taking place ten years prior to the conveyance,

[4] A private easement can survive vacation only if it previously coexisted with the public easement, as vacation does not create a private easement. Tuttle v. Sowadzki, 41 Utah 501 at 513, 126 P. 959 (1912).

[5] Courts frequently speak of a *sale* of land by reference to a plat as creating private easements, but clearly this is a short-hand expression for a sale followed by a conveyance with reference to a plat. See 3 TIFFANY, REAL PROPERTY, 3d ed., §800 (1939). That the situation at the time of conveyance and not at the time of sale is decisive in fixing private rights was expressly held in Cohen v. Simpson Real Estate Corp., (Pa. 1956) 123 A. (2d) 715.

[6] For varying views as to the existence and scope of easements so created in cases not involving subsequent dedication and vacation of the public easement, see 7 A.L.R. (2d) 607 (1949).

[7] "The question is one of intention and a right created by an implied grant, the intention being spelled out at the time and by the filing of the map, or its incorporation by reference in the deeds of the subsquent purchasers of the various lots." Principal case at 516.

[8] Dodge v. Pennsylvania R. Co., 43 N.J. Eq. 351, 11 A. 751 (1887). The opinion of Oliphant, J., in expressing the approval of the court (principal case at 520) unintentionally attributes the distinction to another early case, but clearly meant to refer to the Dodge case, as quoted in the principal case at 517.

[9] Cf. Tesson v. H. K. Porter Co., 238 Pa. 504, 86 A. 278 (1913) and Bell v. Pittsburgh Steel Co., 243 Pa. 83, 89 A. 813 (1914) with Chambersburg Shoe Mfg. Co. v. Cumberland Valley R. Co., 240 Pa. 519, 87 A. 968 (1913) and Cox's Incorporated v. Snodgrass, 372 Pa. 148, 92 A. (2d) 540 (1952). See also Cohen v. Simpson Real Estate Corp., note 5 supra.

[10] Bowers v. Machir, (Tex. Civ. App. 1916) 191 S.W. 758.

where the claimant had other access to the public street;[11] (3) the purchase price paid for the lot, as compared with the probable value without a private easement.[12] It would seem that any fact should be admissible if it would shed light on the construction to be given the conveyance. The decision in the principal case is commendable insofar as it shows an unwillingness to presume that grantors intend to burden retained lands with easements not reasonably necessary to the enjoyment of the conveyed lot, and leaves open the possibility of showing actual intent. One may question, however, whether the presence of a public highway at the time of conveyance should be taken as conclusive of the grantor's probable intent not to grant an easement, as the court suggests. It is submitted that while this may be given some weight as one factor, it should not preclude consideration of other factors supporting a contrary result.

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[11] Tuttle v. Sowadzki, note 4 supra.

[12] Van Buren v. Trumbull, 92 Wash. 691, 159 P. 891 (1916). Courts sometimes speak of the assumption that the buyer paid more for the lots with access to the platted streets than he would have paid for the lot alone as underlying the finding that he obtained a private easement, but there is a degree of question-begging in this reasoning. See, e.g., Holloway v. Southmayd, note 3 supra, at 411.