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REAL PROPERTY—VENDOR AND PURCHASER—EFFECT OF NOTORIOUS EASEMENT ON LAND CONTRACT TO CONVEY "FREE OF ENCUMBRANCES"—Vendor contracted to convey land to purchaser by a deed which was to contain a covenant against encumbrances. A public easement of way over the property was outstanding, and on part of this easement a gravel road had been built. Purchaser paid some instalments and took possession but, upon learning of the easement, sued to rescind. The trial court found that the easement would have been discovered by a reasonable investigation, and therefore the contract did not protect purchaser from this easement. On appeal, *held,* affirmed. A contract to convey real estate free of encumbrances does not refer to easements, permanent in character, which are either known or should have been discovered by the purchaser. *Somers v. Leiser,* (Wash. 1953) 259 P. (2d) 843.

The law is extremely confused as to the interpretation to be given a contract calling for title free of encumbrances. However, the provision for conveyance "free from encumbrances" rarely is held to include all easements. One of the determinants for excluding an easement from the aegis of the provision is that the easement is known to the purchaser or would be revealed by a reasonable inspection of the premises.[1] Knowledge or imputed knowledge is interconnected with other factors in almost every jurisdiction, however, so that a general rule is difficult to draw. At least one jurisdiction holds that where the contract specifically provides for a deed with a covenant against encumbrances, knowledge of existing easements is immaterial, but where the contract merely calls for a marketable title, or a good and sufficient deed, knowledge or imputed knowledge bars the purchaser from rescinding the contract.[2] Other courts rule in accordance with the principal case that regardless of the provision for a covenant against encumbrances, an easement which is open and notorious is impliedly excepted from the covenant.[3] The rescission action should be compared with a suit on the covenant itself after the deed has been executed. A similar dichotomy of opinion is found in this situation, but more jurisdictions, including Washington, hold the knowledge of the covenantee inadmissible on the basis that it violates the parol evidence rule.[4] Also to be taken into account is the type of easement. Some courts hold public easements not to be encumbrances at all because they benefit as

[1] See generally 55 AM. JUR. 710 (1946); 57 A.L.R. 1426-1428 (1928).

[2] Strong v. Brinton, 63 Pa. Super. 267 (1916); Patterson v. Freihofer, 215 Pa. 47, 64 A. 326 (1906). A public easement, however, is simply held not to be an encumbrance in Pennsylvania.

[3] McCarty v. Wilson, 184 Cal. 194, 193 P. 578 (1920); Suter v. Mason, 147 Ark. 505, 227 S.W. 782 (1921).

[4] McDonald v. Ward, 99 Wash. 354, 169 P. 851 (1918). Two leading cases in this area are Huyck v. Andrews, 113 N.Y. 81, 20 N.E. 581 (1889) (holding knowledge inadmissible) and Kutz v. McCune, 22 Wis. 628 (1868) (*contra*). Those courts holding knowledge to be immaterial argue that titles would be uncertain if the rule were otherwise. Those courts holding otherwise reason that a spate of litigation would ensue because of the numerous obvious easements which are not included in deeds.

well as burden the land.[5] Other courts exclude public easements because of a presumption of knowledge by the purchaser. Evidently this presumption may be rebutted.[6] Where the easement deprives the purchaser of no substantial rights in the land, the de minimis doctrine has been held to except the easement from a contract to convey, regardless of knowledge.[7]

The importance to be attached to the notoriety of the easement is purportedly determined by construing the land contract.[8] In conformance with this theory, peculiar circumstances have been held to give effect to the covenant as written.[9] Undoubtedly, therefore, the purchaser could with apt words indemnify himself against all easements of whatever character. Even with the contract provision used in the principal case, the only hardship comes when the purchaser is charged with knowledge of the easement but has not actually discovered it. In these cases, the rule of the Washington court seems to place a duty on the purchaser to inspect the premises and perhaps some public records which he probably thinks that he has safely contracted against.

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[5] Jordan v. Eve, 31 Gratt. (Va.) 1 (1878). In a leading case, the Minnesota court excepted only rural public highways on the grounds that custom dictated this result. Sandum v. Johnson, 122 Minn. 368, 142 N.W. 878 (1913).

[6] Although it is rare when a public easement is not or should not be known by the purchaser to exist, one case has held that where no knowledge of the easement existed, the purchaser could recover on the contract. McWhorter v. Forney Bros. & Co., 69 Wash. 414, 125 P. 164 (1912). Compare Bibber v. Weber, 102 N.Y.S. (2d) 945 at 949 (1951): "Where the highway was open and visible, the grantee either knew or was presumed to know of its existence."

[7] Monogram Development Co. v. Natben Construction Co., 253 N.Y. 320, 171 N.E. 390 (1930).

[8] E.g., Eriksen v. Whitescarver, 57 Colo. 409 at 411, 142 P. 413 (1914): "The mere fact that defendant may have known of the existence of the ditch, at the time she signed the contract did not relieve the plaintiff from complying with her covenant respecting the character of the title she agreed to convey. To produce such result there must, in addition to notice, have been at least something in the transaction to show that the parties intended the incumbrance should be excluded from the operation of this covenant." For the opposing view, see Suter v. Mason, 147 Ark. 505 at 510, 227 S.W. 782 (1921): "He [the purchaser] purchased the property in contemplation of its physical condition and with reference thereto. Therefore, . . . [the purchaser] can not rely upon the existence of the road and right-of-way across the land as matters calling for a rescission of the contract."

[9] In Eriksen v. Whitescarver, note 8 supra, a finding that the use to which the purchaser planned to put the property was rendered impossible by the easement helped show that regardless of knowledge of the easement the purchaser could rescind.