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Property—Real Property—Easements

Anthony J. Vaccaro

of voters.[54] In *Matter of Aurelio*,[55] the court took a definite stand on the grounds that a, "strict observance of the letter of the statute would interfere unnecessarily with the intelligent and ready expression of his choice by an independent voter."[56]

In the instant case, the court affirmed, *per curiam*, the order of the Appellate Division which followed the *Aurelio* case and held that a strict construction of the statute would be unconstitutional and denied the application to change the format.

X. Property

A. Real Property

Easements

Easements in public streets may be acquired in the following ways: (1) By condemnation proceedings under a statute. (2) By prescription, or where land is used by the public for twenty years with the knowledge, but without the consent of the owner. (3) By dedication through offer and implied acceptance, or when the owner throws open his land intending to dedicate it for a highway and the public uses it for such a length of time that they would be seriously inconvenienced by an interruption of the enjoyment. (4) By dedication through offer and actual acceptance, where the owner throws open his land and by acts or words invites acceptance of the same for a highway, and the public authorities formally or in terms accept it as a highway.[1]

In *Sauchelli v. Fata*,[2] the owners of property abutting sides of a blind alley sought to enjoin defendants whose property abutted the dead end from using the land for ingress and egress. After finding that the plaintiffs had easements of access in the property the court granted the injunction on the grounds that defendants failed to show acceptance by the town as a public highway and since they had ready access to their land which faced another

54. *Matter of Callaghan v. Voorhis*, 252 N. Y. 14, 168 N. E. 447 (1929). The court said that the statute prejudiced the independent body as they had nominated almost a full row of candidates and a voter would think that no one had been nominated for that office upon seeing the blank.

Matter of Crane v. Voorhis, 257 N. Y. 298, 178 N. E. 169 (1931). Here the statute said in substance that if an independent body, who had not nominated candidates for more than fifty percent of the offices to be filled, nominated a candidate who was also a nominee of one of the other political partys, his name would only appear once with both names and emblems. The court held this unconstitutional.

55. 291 N. Y. 176, 51 N. E. 2d 695 (1943).

56. *Id.* at 180, 51 N. E. 2d at 697.

1. *Nicholas Copper Co. v. Connolly*, 208 App. Div. 667, 203 N. Y. Supp. 839 (2d Dep't 1924), *aff'd*, 240 N. Y. 596 (1925).

2. 306 N. Y. 123, 116 N. E. 2d 75 (1953).

street, there was no easement of necessity. The fact that plaintiffs paid no taxes on the land although it was located on a tax map did not evidence acceptance by public authorities.[3]

In *Loch Sheldrake Associates v. Evans*,[4] the court divided sharply over the interpretation of a reservation of water rights. Through a remote common grantor the plaintiff owned a lake and its shores subject to the reservation while the defendant owned a mill lot and the disputed reservation. The mill is no longer in operation and the plaintiff sought to enjoin defendant from using large quantities of water for her nearby hotel. In substance the reservation contains the right to impound and draw water as well as a right of ingress and egress to construct and maintain a dam and any pipe lines existing or hereafter constructed. The use of the water is limited by the natural high and low level water marks.

The majority felt that the words of the deed were plain and that there was no need to resort to additional circumstances. The contention that defendant had only an easement appurtenant to the mill lot was rejected because no reference was made to the mill lot in the deed. While admitting that the phrase "easement in gross" enjoyed popular usage, the court pointed out the technical impossibility of such a thing. The nature of an easement presupposes two distinct tenements, one dominant and the other servient.[5] The court concluded that the defendant had an absolute interest in the nature of a right to take profits, citing *Huntington v. Asher*[6] and *Saratoga State Waters Corp. v. Pratt*.[7] The majority would have given defendant exclusive right to the water for any purposes limited only by the natural water marks. However, since only the plaintiff had appealed, the court could not broaden the defendant's rights and therefore affirmed the Appellate Division's decision[8] allowing defendant to use the water for any of the purposes for which the grantor had used it, one of which was supplying water for the hotel.

The dissent felt that a reference to pipe lines which were in existence made the deed ambiguous, and, as an ambiguous deed should be interpreted in favor of the grantee,[9] surrounding circumstances being considered,[10] the defendant should have been allowed

3. See *Johnson v. City of Niagara Falls*, 230 N. Y. 77, 192 N. E. 213 (1920).
4. 306 N.Y. 297, 118 N.E. 2d 444 (1954).
5. *Pierce v. Keaton*, 70 N.Y. 419 (1877).
6. 96 N.Y. 604 (1884).
7. 227 N.Y. 429, 125 N.E. 834 (1920).
8. 280 App. Div. 51, 111 N.Y.S. 2d 365 (3d Dep't 1952).
9. *Matter of City of New York*, 209 N.Y. 344, 103 N.E. 484 (1913).
10. *Wilson v. Ford*, 209 N.Y. 186, 102 N.E. 614 (1913).

to prove that an easement appurtenant to the mill lot had in fact been contemplated. In that event the amount of water available to defendant would be controlled by the *quantity* which the grantor had used for the mill, the present use of water being irrelevant.[11]

The dissenters, citing *Flora v. Carbean*[12] and *Matter of Findlay*[13] further maintained that since both parties had agreed in the lower courts that the right in question was an easement appurtenant to the mill lot, the Court of Appeals had no right to abandon that theory which would have produced a different result.

Restrictive Covenants

A restrictive covenant provided that land could not be used for:

> (1) A commercial garage, or automobile parking lot
> (2) A public garage or public automobile filling station.
>
> . . .
>
> (5) Clubs, lodges, and social buildings in which dancing or bowling may be an incidental use; . . .

A development association attempted to enjoin the owners of a refreshment stand from using part of their land as parking area for patrons.[14]

The court felt that the meaning of the restriction was clear from the covenant itself. "Parking lot" considered in conjunction with commercial garage indicated that the land could not be used for the business of storing automobiles for a stipulated price. If a public parking lot were intended to be prohibited, it would have been so stated in the restriction on public garages. The court also rejected the contention that incidental parking was restricted, because the covenant expressed clarity when incidental use of the land was prohibited as in clause number five, *supra.*

The court did not rest solely on what appeared plain to them, but recognized that the spirit of our law favors the free and unobstructed use of property,[15] and applied the rule that if a restrictive covenant is capable of more than one interpretation, it will be construed against the party attempting to extend it.[16]

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11. *Comstock v. Johnson,* 46 N.Y. 615 (1871); 3 FARNHAM, WATERS AND WATER RIGHTS 2286 (1904).
12. 38 N.Y. 111 (1868).
13. 253 N.Y. 1, 170 N.E. 471 (1930).
14. *Premium Point Park Ass'n. v. Polar Bar,* 306 N.Y. 507, 119 N.E. 2d 360 (1954).
15. See *Schoonmaker v. Hecksher,* 171 App. Div. 148, 157 N.Y. Supp. 75 (1st Dep't 1916), *aff'd,* 218 N.Y. 722, 113 N.E. 1066 (1916).
16. *Ibid;* See *Buffalo Academy of the Sacred Heart v. Boehm,* 267 N.Y. 242, 196 N.E. 42 (1935).