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DEEDS—RIGHTS IN STREETS INCORPORATED BY REFERENCE

Recent years have disclosed an increase in sub-developing and large scale conveyancing. This fact necessitates a greater understanding of a sale which incorporates by reference a plat or map. When a deed refers to a plat or map the sale creates certain rights and duties with regard to the streets on the plat. Pennsylvania law in this area is well established, but, nevertheless, quite confusing. This confusion is caused by the use of terminology which at first blush appears to be not only inconsistent, but contradictory. Another factor is the intertwining of public and private rights which result from incorporating a plat. It seems that both history and logic have played their separate parts in creating such a state of confusion.

Where land is sold by reference to a plat the purchaser acquires certain rights in all the streets thereon. A purchaser can reasonably infer under these circumstances that the grantor intended to give certain rights and assume certain duties in regard to these streets. These rights are said to arise as a result of an implied covenant.¹ An incorporation of these streets in the deed not only affects the purchase price, but it is a representation by the grantor that such streets will be available for use by the grantee and the public forever.² The same effect is given to such a representation as would be given to a written statement in the deed.³

The grantor has covenanted not to interfere with the use of the streets by the grantee and the public forever. Although this is only one covenant it has a dual effect. The first is to vest in the grantee a right to use these streets without the grantor's interference.⁴ Courts often refer to this right in the grantee as an appurtenant easement in the streets arising from the implied covenant.⁵ It may seem inconsistent to have an easement arise from a mere covenant, but there is case law to the effect that a grant of an easement may result from the making of a covenant, if the nature of the right given by the covenant is similar to a recognized easement.⁶ However, some Pennsylvania

¹ *E.g.*, Chambersburg Shoe Mfg. Co. v. Cumberland Valley R.R. Co., 240 Pa. 519, 87 Atl. 968 (1913); Cox's Inc. v. Snodgrass, 272 Pa. 148, 92 A.2d 540 (1952); Titusville Amusement Co. v. Titusville Iron Works, 286 Pa. 561, 134 Atl. 481 (1926).

² O'Donnell v. Pittsburgh, 234 Pa. 401, 83 Atl. 314 (1912); Quicksall v. Philadelphia, 177 Pa. 301, 135 Atl. 609 (1896).

³ McCall v. Davis, 56 Pa. 431 (1867).

⁴ Chambersburg Shoe Mfg. Co. v. Cumberland Valley R.R. Co., *supra* note 1; O'Donnell v. Pittsburgh, *supra* note 2.

⁵ *Ibid.*

⁶ Horn v. Miller, 136 Pa. 640, 20 Atl. 706 (1890); Stanislaus Water Co. v. Bachman, 152 Cal. 716, 93 Pac. 858 (1908).

decisions have avoided this problem by holding that a reference creates an implied covenant or an implied grant.⁷

The other effect of such a covenant is that the grantor makes an offer of dedication to the public.⁸ Exactly why a covenant to a grantee results in a dedication to the public is quite difficult to justify. Tiffany, in his work on the law of real property, offers this explanation:

The doctrine had its origin, it may be suspected, in a failure to distinguish between the rights of the individual purchaser and of the public, the courts saying, as they not infrequently do, that a sale of lots with reference to a plat involves a dedication of the lots in favor of the purchasers and ignoring the well-settled principle that land cannot be dedicated for the benefit of particular members of the public. The expression "dedication" having thus been introduced to express the result of such sales in favor of individuals, it was to be expected that as time went on, such sales should come to be regarded as effecting a dedication for all purposes.⁹

It has been stated that the grantor's implied covenant creates an irrevocable tender of dedication. Originally, this offer was said to be irrevocable forever, but the Act of 1899 limited the time period to twenty-one years under certain situations.¹⁰ An interesting question is presented as to whether this tender is, in fact, irrevocable. The court in *Chambersburg Shoe Mfg. Co. v. Cumberland Valley R.R. Co.*¹¹ said:

When streets have been thus dedicated and lots have been sold according to the plan, it is not within the power of the grantor or anyone else to revoke the dedication without the consent of all lot owners who purchased under an implied covenant that the streets shall remain open for the use of the lot owners and of the public as a means of access to their properties.¹²

Hence, it appears that the offer of dedication is revocable when all lot owners in the plat consent to the revocation in writing. This conclusion is reasonable since the offer of dedication results from the grantor's personal covenant to the lot owners.

When the public has accepted the dedication, one of the promises of the covenantor has been fulfilled. However, this acceptance by the public does not

⁷ *Chambersburg Shoe Mfg. Co. v. Cumberland Valley R.R. Co.*, *supra* note 1; *Quicksall v. Philadelphia*, *supra* note 2.

⁸ *Ibid.*

⁹ 4 TIFFANY ON REAL PROPERTY 1103 (1939).

¹⁰ PA. STAT. ANN. tit. 36, § 1961 (1899); where a street is not opened or used by the public for 21 years from time of platting, it may not be opened without the permission of the owner of the land on which it is projected.

¹¹ 240 Pa. 519, 87 Atl. 968 (1913).

¹² *Id.* at 522, 87 Atl. at 969.

extinguish the easement the lot owners previously acquired. The court in the *Chambersburg Shoe Mfg.*¹³ case said:

The public may accept or reject the easement tendered by the owner of the plan of lots, or having accepted may renounce the public right by a vacating ordinance, but no act of the public authorities can operate to divest the property rights of the lot owners resulting as a legal consequence from the implied covenants under which they purchased.¹⁴

When the public does accept the tender of a dedication, however, it is clear that its rights become paramount to the right of the grantee. Further, the grantee has no cause of action against the public authorities or the grantor when reasonable police regulations interfere with his private right.¹⁵

Where a lot is purchased after the public has accepted a street or streets on the plat, Pennsylvania decisions hold that the purchaser acquires no private right to such a street or streets.¹⁶ For example, in *Cohen v. Simpson Real Estate Corp.*¹⁷ the court said: "In such a situation there is negated any implied covenant that the grantee should have private rights in the streets in addition to the rights of the public therein."¹⁸ Therefore, in order to receive any rights in a particular street the grantee must purchase his lot prior to a municipal acceptance of the particular street. This does not seem logical, however, because a reference to a street that is not accepted creates both a tender of a dedication and a private easement. Where a street has been accepted, only the offer of dedication has been accepted, and it would seem that a private easement should still arise from the sale. It would appear that the effects brought about as a result of incorporation by reference are so interconnected that it is impossible to separate the dual aspects of the covenant.

An entirely different situation exists where the grantor makes a reference to an abutting street which is projected on his land by a municipality.¹⁹ The covenant which arises in this instance has but one effect and that is to give the grantee a private easement in the entire bed of the unopened street. If the municipality abandons its right to open the street, the grantee's easement is limited to one of necessity. Whereas if the street is in fact opened, the

¹³ 240 Pa. 519, 87 Atl. 968 (1913).

¹⁴ *Id.* at 522, 87 Atl. at 969.

¹⁵ *Gailey v. Wilkinsburg Real Estate & Trust Co.*, 283 Pa. 381, 129 Atl. 445 (1925).

¹⁶ *Cox's Inc. v. Snodgrass*, *supra* note 1; *Titusville Amusement Co. v. Titusville Iron Works*, *supra* note 1.

¹⁷ 385 Pa. 352, 123 A.2d 715 (1956).

¹⁸ *Id.* at 357, 123 A.2d at 718.

¹⁹ *Hawkes v. Philadelphia*, 264 Pa. 346, 107 Atl. 745 (1919).

grantee acquires a right as a member of the general public to use the street. In describing this unusual situation the court in *Hawkes v. Philadelphia*²⁰ said:

Such act is in no sense a dedication, nor does the owner covenant that the municipality shall in the future open that street. The lot is sold subject to a possible relinquishment, by the municipality, of its right to open; but if it does open the street for public use, there can be no doubt that, whatever covenant springs from the conveyance of a lot bounded by a municipally plotted street, is executed when the street is actually opened as a street.²¹

As a reason for excluding a covenant to dedicate such a street to the public the courts assert the fact that the street was not placed on the plat by the grantor but solely by the act of the city.²² The court in *In re Brooklyn St.*²³ said:

But when a municipal government lays out streets upon the land of a private citizen, it is not the act of the owner in any sense, and hence there is no necessity for an implication of a covenant against the owner to give his land to the public without compensation, . . .²⁴

The private easement, which arises from a reference to a municipal plotting, is limited to the situation where the street is reasonably necessary to the enjoyment of the purchaser's lot.²⁵ In this respect there is a great difference between a reference to a municipally plotted street and a reference to a street plotted by the grantor. In the case of *Pennsylvania Ins. Co. v. Philadelphia*,²⁶ which involved a street plotted by a municipality, the court said:

It cannot be said that the use of Windrim Avenue, then unopened but plotted, was necessary to the Philadelphia & Reading Railway Company. It had the advantage of other opened streets, and the conveyed plot merely enlarged its right-of-way. It is not likely that either party to that grant intended that the grantee should have any easement in or right-of-way over Windrim Avenue.²⁷

However, it should be noted that subsequent circumstances may alter the respective rights of the parties. An example of the effect of subsequent conduct of the parties is the case of *Gailey v. Wilkinsburg*.²⁸ In that case an easement in a street on the plat was created by an implied covenant. Subsequently, the grantee used another street not on the plat for many years, and the grantor erected a building on the first street. The court held that on the basis of estoppel

²⁰ *Ibid.*

²¹ *Id.* at 350, 107 Atl. at 745.

²² *In re Brooklyn St.*, 118 Pa. 640, 12 Atl. 664 (1888).

²³ *Ibid.*

²⁴ *Id.* at 646, 12 Atl. at 666.

²⁵ *Neely v. Philadelphia*, 212 Pa. 551, 61 Atl. 1096 (1905).

²⁶ 318 Pa. 209, 178 Atl. 129 (1935).

²⁷ *Id.* at 216, 178 Atl. at 132.

²⁸ *Supra* note 15.

the grantee lost his easement in the first street and acquired an easement in the second street. In discussing this situation the court said:

The lot owners of course were not bound to accept the change. Nor were they, until their rights were infringed, bound to do anything to signify their disapproval. But after this dedication, the old way was in the actual notorious occupation of others without protest; appellees used the new way, with the general public, for sixteen years; the combined effect of these acts show an acceptance of the new way in lieu of the old: 19 C. J. 973.²⁹

Where an accepted street on the plat is later vacated by a municipality, there may be a need for ingress to and egress from a lot. There is no doubt that the lot holder receives an easement by necessity in that street, regardless of when he purchased the lot or who projected the street.³⁰ In this situation it might seem that the necessity and not the reference to a plat created the easement. However, the cases indicate that a reference to this public street is an implied covenant that the lot owner may use the street to the extent that it is needed for ingress to and egress from his property, provided the street is vacated.³¹ Exactly how this type of easement differs from a pure easement by necessity, other than specifying a definite route seems to be undecided at this time.

Many jurisdictions differ from Pennsylvania as to the effect of incorporating by reference a street plotted by the grantor. Some of these jurisdictions do not give a lot holder a right in all of the streets but only in those streets which are reasonably necessary to the use of his property.³² This would seem to be the true intent of the parties. As previously pointed out, Pennsylvania only reaches this result when reference is made to a municipally plotted street. It seems logical that the same result should be reached with regard to a street plotted by the grantor. Under present law it is exceedingly difficult for a sub-developer to replot the streets should the need arise. It is suggested that this facet of Pennsylvania law be changed, and that streets plotted by a grantor be accorded the same treatment presently given municipal projections. The change not only would remove the present anomaly in the law, but it would also provide much needed encouragement to sub-developing.

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²⁹ 283 Pa. at 390, 129 Atl. at 448-449.

³⁰ Gailey v. Wilkinsburg R.E. Trust Co., *supra* note 15; Hawkes v. Philadelphia *supra* note 19.

³¹ *Ibid.*

³² Mullan v. Hochman, 157 Md. 213, 145 Atl. 554 (1929); Nichols Copper Co. v. Connolly, 208 App. Div. 667, 148 N.E. 720 (1924); *In re* New York (East 177th Street), 239 N.Y. 119, 145 N.E. 903 (1924).