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Real Property -- Easements -- Implication from Description in Deed

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jurisdiction, the entire action shall be removed to the superior court of the same county upon the filing by the counterclaiming defendant of such bond as would be required for appeal to the superior court if there were a verdict adverse to him for the full amount of the claim by the plaintiff. The removal is mandatory upon the filing of the bond and the superior court is to have complete power to render any adequate verdict and judgment, regardless of amount.[47]

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Real Property—Easements—Implication from Description in Deed

The owner of a tract of land fronting on a city street conveyed out of the tract two lots bordering on the street. One deed called for a 10-foot alley as the eastern boundary of the lot conveyed; the other called for the alley as the western boundary. The owner later conveyed a third lot in the rear, the deed to which described it as fronting on a 10-foot alley running from the street and between the two lots previously conveyed. The plaintiffs, owners of the western front lot and rear lot, brought an action to determine whether they have an easement in the alley, since quitclaimed to defendants by heirs of the original grantor. The North Carolina Supreme Court *held* that bare references to the alley for descriptive purposes, being the only evidence of an intent of the grantor to establish the easement, were insufficient standing alone to create an easement by implication or otherwise.[1]

[47] The proposed statute treats the plaintiff as if he had obtained a favorable judgment in the justice's court, and does not deprive him of any rights he has under the present law. The only change is that a counterclaiming defendant is now entitled to plead his claim in full provided he follows a defined procedure.

Neither does the statute deprive the justice's courts of jurisdiction in any case. The effect of "exclusive original jurisdiction" in contract actions, where the amount of the plaintiff's demand is less than $200.00, N. C. GEN. STAT. § 7-22 (1953), is unchanged: no superior court can acquire jurisdiction, except on appeal or removal from a justice. See also N. C. GEN. STAT. § 7-21 (1953) (concurrent jurisdiction with the superior court in other actions where amount claimed is less than $50). See N. C. CONST. Art. IV, § 27 (as changed 1875): "The several Justices of the Peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions, founded on contract, wherein the sum demanded shall not exceed two hundred dollars (The Constitutional Convention of 1875 changed "exclusive original jurisdiction" to "jurisdiction.") . . . And the General Assembly may give to the Justice of the Peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed fifty dollars . . . The party against whom the judgment is given may appeal to the superior court from the same."

[1] Green v. Barbee, 238 N. C. 77, 76 S.E. 2d 307 (1953). The reference to the alley in the deed to the plaintiffs' front lot was: "Beginning at a 10-foot alley on . . . corner . . . thence in an east direction 105 feet to a stake on a 10-foot alley to the beginning. . . ." The reference in the defendants' deed was: ". . . west 210 feet to an alley; thence with the east side of said alley north 210 feet to . . . line. . . ." Transcript of Record, pp. 17-18, Green v. Barbee, *supra*.

The court determined: (1) that the alley was not a way of necessity to either of the front lots at the time they were originally conveyed, since they fronted on a street; (2) that there was no allegation that the alleyway was the only means of access to the rear lot when it was originally conveyed; and (3) that there was no allegation that, at the time of the original conveyance, "the use of the alley had been so long continued and so obvious or manifest as to show that it was meant to be permanent; or that the easement was necessary to the beneficial enjoyment of the lot conveyed, . . . as being essential to the creation of an easement upon the severance of an estate."[2]

Facts similar to those in the principal case arose in *Milliken v. Denny*,[3] a prior North Carolina case, in which it was held that the mere description of land in a deed as bounded by an alley was not sufficient to create an easement in such alley. The court there ruled that the language in the deed did not estop the grantor from closing the alley, and that the testimony at the trial left nothing to guide them as to the grantor's intention save the deed itself, thus inferring that the grantor's intention would control if it could be determined. It was also noted that there was no evidence that the alley affected the value of the property, or that there was any declaration of easement by the grantors. In *Harris v. Carter*,[4] where plaintiff's land had been bounded on a public road which was later discontinued, the defendants were held to be equitably estopped from obstructing the road, but the court relied on the fact that buildings were erected, business was being conducted, and that the value of the lot would be seriously impaired by an obstruction of the road.

Jurisdictions other than North Carolina generally hold that where land is conveyed by deed describing it as bounded by a street or way, an easement in the street or way passes to the grantee by implication of law.[5] The easement so created is usually based on the theory that

[2] Green v. Barbee, 238 N. C. 77, 81, 76 S.E. 2d 307, 310 (1953).

[3] 141 N. C. 224, 225, 53 S.E. 867, 868 (1906), the court stated: ". . . the mere fact that the deed . . . called for 'a stone,' thence north 84 degrees and 22 minutes west 340 feet along the south side of the ten-foot alley, was not *per se* sufficient to impose an easement upon the ten feet of land referred to as an alley, which passed to the owners of the lot conveyed."

[4] 189 N. C. 295, 127 S.E. 1 (1925).

[5] Malone v. Jones, 211 Ala. 461, 100 So. 831 (1924); Crute v. Hyatt, 220 Ark. 537, 249 S.W. 2d 116 (1952); Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690 (1909); Hamil v. Pone, 160 Ga. 774, 129 S.E. 94 (1925); Iseringhausen v. Larcade, 147 La. 515, 85 So. 224 (1920); Teal v. Jagielo, 327 Mass. 156, 97 N.E. 2d 421 (1951); Casella v. Sneirson, 325 Mass. 85, 89 N.E. 2d 8 (1949); Haab v. Moorman, 332 Mich. 126, 50 N.W. 2d 856 (1952); Carlin v. Paul, 11 Mo. 32 (1847); McPherson v. Monegan, 120 Mont. 454, 187 P. 2d 542 (1947); Lindsay v. Jones, 21 Nev. 72, 25 Pac. 297 (1890); Hughes v. Lippincott, 56 N. M. 473, 245 P. 2d 390 (1952); *In re* Thirty-First (Patterson) Ave., 152 Misc. 849, 273 N. Y. Supp. 757 (Sup. Ct. 1934); Walters v. Smith, 186 Va. 159, 41 S.E. 2d 617 (1947). For a collection of cases, see 2 THOMPSON, REAL PROPERTY § 479 n. 25 (Perm. Ed. 1939).

having so described the land as bounded by a way, the grantor and those claiming under him are *estopped* to deny the existence of such a way or the grantee's rights therein.[6] Some courts hold the easement passes by *implied grant,* without relying on estoppel,[7] and the rationale of estoppel has been criticized as improperly applied to create this type of easement.[8] It has been stated however, that it is immaterial whether the easement operates "as an implied grant, covenant, warranty, or estoppel"; the question is whether the way was intended by the grantor as a boundary of the land conveyed.[9]

Where the street or way is not designated as a boundary but is referred to only for the purpose of description, the general rule does not apply, and no easement will be found,[10] as where the way is only coincident with the line described, the reference to the way having been made for the purpose of description "as any other mark or monument might have been referred to."[11] Nor does the rule apply where the description is false,[12] where the grantor does not own the fee in the

[6] See note 5 *supra.*

[7] *E.g.,* Tursi v. Parry, 135 Pa. Super. 285, 5 A. 2d 399 (1939), where the court also recognized authority holding that there was an implied covenant that a way existed as described in the conveyance and would be continued for the use of the grantee and those claiming under him.

Some of the cases mention both estoppel and an implied covenant as the basis for the rule: *E.g.,* Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 690 (1909); Casella v. Sneirson, 325 Mass. 85, 89 N.E. 2d 8 (1949). See 3 TIFFANY, REAL PROPERTY § 799, p. 307 (3rd ed., Jones, 1939), where it is said: "The statement . . . that the reference to a street involves an 'implied covenant' on the part of the grantor that there is such a street, appears ordinarily to mean merely that he is precluded from denying the existence of the street."

[8] See discussion in 3 POWELL, REAL PROPERTY § 409, p. 412 (1952), where it is stated: "The fact remains, that the easement exists because of the combined effect of a pegphrase in the conveyance and of the circumstances of the conveyance. It is, therefore, understandable that some courts speak of such an easement as arising from 'implication.' It is neither accurate nor useful to speak of these easements as created by 'dedication' or by 'estoppel.'"

[9] Lankin v. Terwilliger, 22 Ore. 97, 100, 29 Pac. 268, 269 (1892), where the court says that the easement "rests upon the fact that the grantor, by describing the land as bounded by a way . . . intends thereby to confer upon the grantee, as appurtenant to the granted premises, the right to use such way. . . ."

The easement so sought is to be distinguished from easements arising by implication of law as ways of necessity. Casella v. Sneirson, 325 Mass. 85, 89 N.E. 2d 8 (1949). It is also to be distinguished from easements arising where there is an existing use at the time of severance of the estate. Hughes v. Lippincott, 56 N. M. 473, 245 P. 2d 390 (1952).

[10] Bates v. Johnson, 217 Ky. 673, 290 S.W. 474 (1927); Lankin v. Terwilliger, 22 Ore. 97, 29 Pac. 268 (1892); *see* Malone v. Jones, 211 Ala. 461, 100 So. 831 (1924); Talbert v. Mason, 136 Iowa 373, 113 N.W. 918 (1907).

[11] Lankin v. Terwilliger, 22 Ore. 97, 102, 29 Pac. 268, 270 (1892). The deed described the land by metes and bounds: ". . . commencing at a point on the west side of the country road at the . . . corner of . . . the 'Old Cemetary,' . . . thence with the meander of said road. . . ." *See* Talbert v. Mason, 136 Iowa 373, 113 N.W. 918 (1907); *cf.* Bates v. Johnson, 217 Ky. 673, 290 S.W. 474 (1927) (To a point "near" a road and running "just below" a road, held a reference for the purpose of description).

[12] Teasley v. Stanton, 136 Ala. 641, 33 So. 823 (1903). The description by courses and distances showed the lot was 105 feet distant from the "reserve"

way,[13] or where there are "peculiar facts and circumstances";[14] but the fact that the land was bounded by the "side" of a road is not such an exception, and an easement will be found.[15]

The principal case[16] would thus seem to indicate that North Carolina is *contra* the general rule, and does not recognize an easement where land is described in the deed as being bounded by a way. The court holds in effect that the intention of the grantor was to mention the alley only for descriptive purposes. And though a reference only for descriptive purposes is an exception to the rule,[17] the court speaks of the deed as calling for an alley as a boundary of the lot conveyed, and this type of description falls within the general rule. In the opinion of the court in the *Green* case[18] neither the general rule nor the principle of estoppel were referred to, although the court did recognize that there was authority elsewhere running contrary to their holding.

The principal case, as well as *Milliken v. Denny*,[19] indicates that the reference to an alley in a deed, bounding the lot conveyed by the alley, will not suffice to create an easement by implication, nor will it estop the grantor and those claiming under him from closing the alley, but that there must be something in addition, showing an intention on the part of the grantor to create an easement.[20] That the court would apply estoppel even if it were shown that the grantee bought the land on the representation that there was a right of way, and that the value of the land was affected by the alley as an easement, seems doubtful where the facts are such as are involved in the principal case, since the defendants there ostensibly had no notice of any representation

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on which it was fronted in the deed. No implied covenant arose, the description being false.

[13] *See* Talbert v. Mason, 136 Iowa 373, 113 N.W. 918 (1907).

[14] *In re* Opening One Hundred and Sixteenth Street, 1 App. Div. 436, ——, 37 N. Y. Supp. 508, 516 (1st Dep't 1896), where the "conveyance of a comparatively small triangular piece of land did not grant as an appurtenance to it the beneficial use of a piece of property many times its size and value, and all for the consideration of one dollar."

[15] Casella v. Sneirson, 325 Mass. 85, 89 N.E. 2d 8 (1949). It was held that such a description was just as effective to pass an easement as one bounding the land "by or on" a way although the rule had been held not to apply in an earlier Massachusetts case, McKenzie v. Gleason, 184 Mass. 452, 69 N.E. 1076 (1904), where the land was bounded by the "side" of a road.

[16] Green v. Barbee, 238 N. C. 77, 76 S.E. 2d 307 (1953).

[17] See note 10 *supra*.

[18] Green v. Barbee, 238 N. C. 77, 76 S.E. 2d 307 (1953).

[19] 141 N. C. 224, 53 S.E. 867 (1906).

[20] In North Carolina, when the grantor sells lots with reference to a plat or map on which there are streets and alleys laid out, he and those claiming under him are held to be estopped to deny the existence of an easement in the alley and the right of the grantee to use it. Broocks v. Muirhead, 223 N. C. 227, 25 S.E. 2d 889 (1943). See Note, 31 N. C. L. Rev. 202 (1953).

See 3 Powell, Real Property § 409 (1952), where easements created by the general rule and those passing by reference to a plat or map are discussed jointly and correlated to the same principle.

made by the original grantor. In view of these decisions, reliance should not be placed on a description in a deed of a way as a boundary, and perhaps the advice given in *Milliken v. Denny* should be followed: "If purchasers wish to acquire a right of way or other easement over other lands of their grantor, it is very easy to have it so declared in the deed of conveyance."[21]

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State Torts Claims Act—Right of Subrogation[1]

Does the right of subrogation exist under the provisions of the "Tort Claims against State Departments and Agencies Act"?[2] This question was recently answered affirmatively by the North Carolina

[21] 141 N. C. 224, 231, 53 S.E. 867, 870 (1906).

[1] The purpose of this note is not a detailed discussion of either subrogation or Tort Claims Acts but is merely to bring an important decision interpreting the Tort Claims Act of North Carolina to the attention of legal profession.

For a discussion of the Federal Tort Claims Act see, Baer, *Suing Uncle Sam in Tort,* 26 N. C. L. REV. 119 (1948); Fisher, *The Federal Tort Claims Act after Five Years,* 3 MERCER L. REV. 263 (1952); Hiley, *A Review of the Federal Tort Claims Act,* 14 GA. B. J. 301 (1952); Jackson, *The Tort Claims Act—The Federal Government Assumes Liability in Tort,* 27 NEB. L. REV. 30 (1947); Woolston, *Federal Tort Claims Act Digest,* 28 DICTA 143 (1951); Note, 4 WYO. L. J. 96 (1949); Comments, 42 ILL. L. REV. 344 (1947), 56 YALE L. J. 534 (1947).

For a comparison of the Federal Act and the English Act see Street, *Tort Liability of the State: The Federal Tort Claims Act* and *The Crown Proceedings Act,* 47 MICH. L. REV. 341 (1949).

See generally for discussions of tort liability of various states, Oberst, *The Board of Claims Act of 1950,* 39 KY. L. J. 35 (1950) (Kentucky); Troxell, *Tort Responsibility of the District of Columbia,* 19 B. A. D. C. 504 (1952) (District of Columbia); Note, 8 MONT. L. REV. 45 and 97 (1947) (Montana); Comments, 23 IND. L. REV. 468 (1948) (Indiana), 47 N. W. U. L. REV. 914 (1953) (Illinois), 90 OHIO ST. L. J. 501 (1948) (Ohio), 23 So CALIF. L. REV. 507 (1950) (California), 27 TEX. L. REV. 337 (1949) (Texas).

Also see Borchard, *Tort Claims against Government: Municipal, State and Federal Liability,* 3 A. B. A. J. 221 (1947); Smith, *Municipal Tort Liability,* 48 MICH. L. REV. 41 (1949).

In regard to subrogation generally, see, Gleason and Intrater, *A New Trend in Subrogation,* 38 GEO. L. J. 646 (1950); Mullen, *The Equitable Doctrine of Subrogation,* 3 MD. L. REV. 201 (1939). Also, see generally, 50 AM. JUR. *Subrogation* §§ 1-147 (1944).

[2] N. C. GEN. STAT. §§ 143-291 to 143-300 (1952). The pertinent section, N. C. GEN. STAT. § 143-291 (1952), reads in material part as follows: "The State Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the State Highway and Public Works Commission, and all other departments, institutions, and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of a negligent act of a State employee while acting within the scope of his employment and without contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted. If the Commission finds that there was such negligence on the part of a State employee while acting within the scope of his employment proximately causing the injury and no contributory negligence on the part of the claimant or person in whose behalf the claim is asserted, the Commission shall determine the amount of damages the claimant is entitled to be paid, including medical and other expenses, . . . but damage awarded shall not exceed $8,000."

For a summary of the North Carolina Act see, *A Survey of Statutory Changes in North Carolina in 1951,* 29 N. C. L. REV. 351, 416 (1951).