Part I: EASEMENT LAW in NEW YORK

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Introduction

- Definition of EASEMENT:
  - Interest in Real Property
    - Must be in writing: General Obligations Law 5-703
    - Must be recorded: Real Property Law §291
  - Comprised of 2 Tenements:
    - one Dominant and
    - one Servient
  - They can be Public or Private, Express or Implied
  - They are a property right less than fee ownership
  - they permit an individual to do “something” upon someone else’s property
COMPARED to other rights

- **License**
  - not an interest in real property,
  - personal to the holder,
  - not assignable and
  - are of limited duration
  - nothing more than an excuse for the act, which would otherwise be a trespass
  - Franchises are licenses

Compared to other rights

- “A document is a lease “if it grants not merely a revocable right to be exercised over the grantor’s land without possessing any interest therein but the exclusive right to use and occupy that land”... It is the conveyance of “absolute control and possession of property at an agreed rental which differentiates a lease from other arrangements dealing with property rights”

- “A license, on the other hand, is a revocable privilege given “to one, without interest in the lands of another, to do one or more acts of a temporary nature upon such lands”

- Union Sq. Park Community Coalition, Inc. v. New York City Dept. of Parks & Recreation, 22 N.Y.3d 648 (N.Y. 2014)
Compared to other rights

- the plaintiff’s right to use the defendant’s land for the purpose of agriculture during the repayment period of a loan to defendant was considered a license, not an easement.

Compared to other rights

- **Covenants:**
  - An agreement or promise to do or not to do something
  - They can be personal or can run with the land
- **Negative Easements:**
  - Another term for Restrictive Covenants
  - They restrain landowners from making otherwise lawful uses of their property
Compared to other rights

- **Covenants con’t**
- **Enforceable between:**
  - Grantor and Grantee
  - Grantee and Grantee (where there are mutual covenants)
  - Adjoining land owners who have mutual reciprocal covenants

COMPARED to other rights

- **Covenant Examples:** (private zoning)
  - Limiting further subdivision
    - Limiting division
    - Setting Minimum lot sizes
  - Limiting future uses
    - Residential only
    - No saloons/junkyards other unsavory uses
    - No mobile homes
    - No blocking the view
Compared to Other Rights

- Lateral Support
- Air Space or Air Rights
- Mineral Estate or Mineral Rights
- Riparian Rights
- Littoral Rights

Gas and Oil Leases:

NY General Construction Law §39. Property, personal

...Oil wells and all fixtures connected therewith, situate on lands leased for oil purposes and oil interests, and rights held under and by virtue of any lease or contract or other right or license to operate for or produce petroleum oil, shall be deemed personal property for all purposes except taxation.
Compared to other rights

- Profits:
- the right to take a product from the land
- A profit may also constitute an appurtenant easement where there is a dominant and servient estate.

Types of Easements
Types of Easements

- **Public**
  - Acquired for the benefit of the public

- **Private**
  - Acquired for the benefit of private land owners

Types of Easements

- **Express**
  - Some writing evinces the existence of the easement

- **Implied**
  - Implied easements are inferred from the circumstances
Types of Easements

- Appurtenant
  - A benefit attached to the property
  - Inseparable from the land and a grant of the land carries with it the grant of the easement
  - “run with the land”

Types of Easements

- Easements in Gross:
  - are licenses,
  - personal,
  - non-assignable,
  - non-inheritable,
  - expire upon the death of the holder,
  - sometimes called “Personal Easements”.

- There is no dominant estate, the “dominant estate” is a person
- Stranger to the Deed Rule
  - Often see a personal right conveyed to a third party in a deed between A and B.
Types of Easements: In Gross

- Tuscarora Club of Millbrook v. Brown, 215 N.Y. 543 (1915)
- Deed: Sarah Brown to Margaret Carroll
- “Reserving the right to William H. Brown, Jr. to fish in the said Mill Brook Stream.”

Types of Easements: Purposes

- Right of Way (ROW)
- an easement that grants the right to pass over the surface of the land of another for a particular purpose, usually to access something
- Common Terms that indicate a ROW:
  - Ingress: a right to enter
  - Egress: a right to exit
  - Regress: a right to re-enter or go back
Types of Easements: Purpose

- Highways/Streets
  - May be fee owned or easements for highway purposes
  - Depends on the manner of creation
  - Presumption of an easement unless fee can be show to have been acquired

Types of Easements: Purpose

- Shared Driveway
  - Cross easement or reciprocal easement by which each owner of a portion of a driveway grants the other an easement over their respective portion
  - Beware the prohibition of granting yourself an easement over your own lands
Types of Easements: Purpose

- Water Rights
  - Draw water
  - Access a body of water
  - Lay pipes
  - Use a well

Types of Easement: Purpose

- Utilities
  - Storm drains
  - Sewer pipes
  - Electrical and transmission lines
  - Telephone and cable
  - Gas lines
Types of Easements: Purpose

- **Light and Air**
  - Easement that perpetually allows light and air to enter the windows of a building from an adjoining lot
  - Express easements only
  - Exceptions:
    - Property bounded on street
    - Strictly necessary and was the intent of the parties

Types of Easements: Purposes

- **Party Walls**
  - Easement of the owner of either building extends only over so much of his neighbor’s lands as the party wall stands upon,
  - Easement right of support of the wall and presence of the flues

- **Aviation**
  - Easement for Avigation purposes of the airspace over certain properties
  - Usually defined as a plane with a rise and a run
  - *Kupster Realty Corp v. State of New York*, 93 Misc 2d 843 (Ct of Claims, 1978) [for the Republic Airport in Farmingdale, NY]
Types of Easements: Purposes

- **Burial Plots**
  - A “property right”
  - Yet no dominant & servient estates
  - Easement for burial purposes
  - Privilege of
    - Erecting tombstones and monuments
    - Protecting them from injury or spoilation (injunction)

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Types of Easements: Purposes

- **Conservation Easements:**
  - No dominant and servient estates
  - "Conservation easement" means an easement, covenant, restriction or other interest in real property...which limits or restricts development, management or use of such real property for the purpose of preserving or maintaining the scenic, open, historic, archaeological, architectural, or natural condition, character, significance or amenities of the real property
Types of Easements: Purposes

- Conservation Easement con’t.
- It is not a defense in any action to enforce a conservation easement that:
  - (a) It is not appurtenant to an interest in real property;
  - (b) It can be or has been assigned to another holder;
  - (c) It is not of a character that has been recognized traditionally at common law;
  - (d) It imposes a negative burden;
  - (e) It imposes affirmative obligations upon the owner of any interest in the burdened property, or upon the holder;
  - (f) The benefit does not touch or concern real property; or
  - (g) There is no privity of estate or of contract. ECL § 49-0305

- “Conservation easements are of a character wholly distinct from the easements traditionally recognized at common law and are excepted from many of the defenses that would defeat a common-law easement” Argyle Farm & Props., LLC v Watershed Agric. Council of the N.Y. City Watersheds, Inc., 2016 N.Y. App. Div. LEXIS 562 (N.Y. App. Div. 3d Dep’t Jan. 28, 2016)
Conservation Easement con’t.

Affirmative & Negative Easements

- Also known as Affirmative and Negative Restrictions or Covenants

Little boxes on the hillside, Little boxes made of ticky tacky, Little boxes on the hillside, Little boxes all the same. There’s a green one and a pink one, And a blue one and a yellow one, And they’re all made out of ticky tacky And they all look just the same.

Little Boxes by Malvina Reynolds
Affirmative & Negative Easements

- Negative easement is one which restrains a landowner from making certain use of his land which he might otherwise have lawfully done but for that restriction
- Runs with the land

- Affirmative Easement:
  - a covenant to do an affirmative act, as distinguished from [one] merely negative in effect,
  - does not run with the land so as to charge the burden of performance on a subsequent grantee

Affirmative & Negative Easements

- Affirmative Easements do not run with the land
- Exception to the rule:
  - “The burden of affirmative covenants may be enforced against subsequent holders of the originally burdened land whenever it appears that
  - (1) the original covenantor and covenantee intended such a result,
  - (2) there has been a continuous succession of conveyances between the original covenantor and the party now sought to be burdened and
  - (3) the covenant touches or concerns the land to a substantial degree.”
Affirmative & Negative Easements

Example:
To furnish steam heat to the neighboring building touched and concerned the land and was enforceable against subsequent grantee.

Example:
To construct a shaft (from a mill wheel) to provide a good connection to the neighboring property was an obligation of the grantor that he could not pass to his grantee to perform upon conveyance of the property.

Express easements
Creation and Existence of Easements
Express easements

- occurs when the easement is
- (1) conveyed in writing,
- (2) subscribed by the creator, and
- (3) burdens the servient estate for the benefit of the dominant estate.

The easement passes to subsequent owners of the dominant estate through appurtenance clauses, even if it is not specifically mentioned in the deed.
Express Easement

When lot 1 was sold by Grantor, this filed map was recorded and Grantor made the conveyance of Lot 2 subject to the ROW shown on this referenced map.

Express easements

General Obligations Law § 5-703. Conveyances and contracts concerning real property required to be in writing

1. An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing....
Express easements

- Document conveying an interest in real property must have:
  - Grantor
  - Grantee
  - Proper designation of the property
  - Recite the consideration
  - Contain operative words
  - Be acknowledged before delivery
  - Execution and delivery attested to by a subscribing witness

- Types of Documents capable of conveying a real property interest:
  - Map filed in EDPL Proceeding
  - Will
  - Agreement
  - Deed
    - Grants
    - Reservations

Express easements

- Limitations from the common law (things you can’t do):
  - Convey an easement to yourself over your own lands even if they are separate parcels
  - Create or grant an easement over another person’s lands
  - Create or grant an easement to a third party in a deed between A&B
  - Piggy-back easements
EXPRESS EASEMENTS

Adjoining Parcels owned by same person. She attempted to grant an easement over one of the parcels to herself → Nullity

EXPRESS EASEMENTS

An individual cannot grant or have an easement over land they own “because all the uses of an easement are fully comprehended in the general right of ownership.” Will v. Gates, 89 NY2d 778 (1997). There is no servient or dominant estate, they have merged by the unity of title in a common owner. Id. at 784.

RESULT: LEGAL NULLITY
Express Easements

Express easements: Limitations

- Fatal Errors of Law:
  - Grants an easement over her own lands to herself
  - Grants to Parcel B, Parcel A’s easement of necessity over the lands of others
    - Grants an easement over lands she doesn’t own and can’t burden
    - Attempts to “Piggy-back” the easement for Parcel A to benefit Parcel B as well
Express Easements: Limitations

- Hunt v. Pole Bridge Hunting Club, Inc. 219 A.D.2d 618 (2d Dept, 1995) (Orange County, NY)
- Hunt had a ROW for his 21.7 Acre parcel
- Hunt and friend acquired an adjacent 529 Acre parcel
- Hunt and friend used the ROW for Hunt’s 21.7 Acre parcel to reach their 529 Acre parcel

Express Easements: Limitations

- The Court citing Williams v. James, L.R. 2 C.R. 577 and Mancini v. Bard, 42 N.Y.2d 28, held:
  - “the owner of the dominant tenement may not subject the servient tenement to servitude or use in connection with other premises to which the easement is not appurtenant”
- NO PIGGY-BACKING
Express Easements: Limitations


- Grantor (G) owned property on the St. Lawrence River in the Village of Alexandria Bay
- G subdivided and conveyed out the parcel along the River to Plaintiff (P) and retained the parcel along the public highway.
- G did not grant P a ROW to reach the Public Highway
- G then conveyed his retained lands to Defendant (D) and reserved to himself and P a ROW to reach P's land from the Public Highway
- P is a stranger to the Deed
- G has an easement in gross because he no longer owns lands appurtenant
- P’s successor builds a hotel on its parcel
- D blocks access
- P then tried to acquire G’s easement BUT it was not transferable because it was in gross.

Express Easements: Lands of Thomson

Thomson Motor Lodge: Vacant Commercial Property
Express Easements: Lands of Thompson

- Alternative 1:
  - Within the deed to P, Grantor could have granted a ROW to P over his retained lands.
  - When Grantor conveyed to D all he had to say was that the conveyance was subject to the ROW granted to P.

- Alternative 2:
  - Grantor conveys property to P without a ROW.
  - P and Grantor could have subsequently entered into an Easement agreement and recorded it before Grantor conveyed remaining lands to D.

Express Easements: Limitations


- “A party cannot reserve an easement over another's property in favor of a third party who is not a party to the agreement.”

- STRANGER TO THE DEED
Express Easements: Limitations

“Kirschner’s reliance on the language in the agreements providing that the rights-of-way granted therein are “for the use and benefit of the properties owned by the parties [thereto], as well as other parties” (emphasis added) is misplaced. Such commonly used language is merely an indication that the right-of-way is not for the exclusive use of the grantee insofar as the grantor has either already conveyed rights-of-way over the same lands by some other instrument or is reserving the right to do so in the future.” McColgan, Supra.
Express Easements: Public

- Public Easements acquired pursuant to the Eminent Domain Procedure Law (EDPL) and its predecessor statutes Vest title upon filing of the Acquisition Map.

- EDPL §402 (A)(3) file a certified copy of such acquisition map in the office of the county clerk or register of each county in which such property or any portion thereof is situated, and thereupon, the acquisition of the property by the state, described in such map shall be deemed complete and title to such property shall be vested in the state.

Express Easements

- Typically the Condemnor obtains the fee, but sometimes they acquire something less, such as a permanent easement.

- In the absence of clear language that the fee was acquired only the interest necessary to fulfill the purpose will be presumed to have been taken unless it says Fee or indicates by other language such as “All Right, Title and Interest”
Express Easements: Public

1. The Appurtenance Clause:
   - Example: “Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises...”
   - Boilerplate language
   - “The purchaser will take the estate, with all the incidents and appurtenances which appear to belong to it at the time of the grant, as between it and the portion retained, though not then in actual use, providing the grantor has knowledge of their existence, and they are open and visible” Spencer v. Kilmer 151 NY 390 (1897)
Express Easements

- **Spencer v. Kilmer**
  - 1866 Defendant purchased large vacant lot in Saratoga
  - Bounded on the south by Congress Street, north by Spring Street, east by Circular Street and west by “Wall Brook”
  - It included 2 fish ponds which were supplied with water from the springs.
  - 1870 Defendant sold portion to John Morrissey upon which he built his Clubhouse (aka Casino)

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Express easements

- In 1870 Morrissey rented a portion of the property with the fish ponds (dominant estate) and eventually bought that portion of the property
- Spencer then acquired the rest of the property (servient estate) and ripped out all the pipes and sluices providing water to the ponds
Express easements

- Result: Spencer owed damages

Implied easements

Creation and Existence of Easements
Implied Easements: Generally

- Not expressed in writing, but implied from the circumstances of severance of title
- All types require a showing that there was unity of title in a common grantor as a prerequisite to implying the grant of an easement
- **Common Grantor**: both the purported servient estate and dominant estate were owned by the same person/entity

Implied Easements: TYPES

- Courts sometimes blend the elements of these four distinct easements
  - Implied easement in the bed of a former public hwy
  - Implied easement from pre-exiting use
  - Easement of Necessity
  - Paper Street Easement
Implied Easements: Former Hwy

- Implied Easement in the bed of a former Hwy
  - A Common Grantor owned dominant and servient estate in unity of title
  - Divided the property along the lines of the existing public highway to which s/he owned the underlying fee (the hwy was an easement hwy vs. fee hwy)
  - Highway is abandoned by 6 years of non-use and non-maintenance by the public (NY High Law 205)
  - Land no longer has access, is landlocked
  - Law will imply an easement in the abandoned hwy

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Implied Easement: Former Hwy

× “private easement of access arises in order to insure that a grantee or his successors in title are not deprived of the use of the right of way existing at the time title (to the lot) was acquired.” Kent v. Dutton, 122 AD2d 558 (4th Dept. 1986)
Implied Easement: Former Hwy

- Ciarelli v. Lynch et al., 69 A.D. 3d 1008 (3d Dept 2010)
- “As the evidence established that the road was a public highway, we need not reach the various arguments advanced by the parties regarding the existence of a private easement over it.”
Implied Easement: PRE-EXISTING use

- Unity and then separation of title
- the claimed easement must have, prior to separation, been so long continued and obvious as to show it was intended to be permanent, and
- the use must have been necessary to the beneficial enjoyment of the dominant estate at the time of the conveyance.

Implied easements: pre-existing use

- Necessary means in this context of an easement based on pre-existing use:
  - “only reasonable necessity, in contrast to the absolute necessity required to establish an implied easement by necessity.” *Four S. Realty Co. v. Dynko*, 210 A.D.2d 622 (3d Dept 1994).
Implied easements: Pre-existing use

- Courts have used the reasonable necessity standard vs. absolute necessity standard to imply easements by necessity (Rudolph v. Ferguson; Simone v. Heidelberg)
- Have also said that terrain making access to a public highway impossible except over remaining lands of the common grantor allowed the implication of an easement by necessity (Stock v. Ostrander)

IMPLIED EASEMENT: NECESSITY

- Unity and separation of title
- At the time of severance of title,
- the way is ABSOLUTELY necessary for the landlocked parcel
- Significantly, “the necessity must exist in fact and not as a mere convenience” and must be indispensable to the reasonable use for the adjacent property. Simone v. Heidelberg, 9 NY 3d 177 (2009)
Implied Easements: necessity

- The necessity must arise upon severance of title, not at some later date
- there “must be shown a severance of unitary title which gives rise to an immediate necessity which may lie dormant but must, at the very least, exist contemporaneously with the severance.” Willow Tex, Inc. v. Dimacopoulos, 120 Misc.2d 8 (Sup. Ct. Queens Co., 1983)

Implied Easements: Paper Streets

- Common Grantor or sub-divider
  - Reference in deed or conveyance to the filed subdivision Map
  - Map shows streets abutting the lot
- Implied easement in the “streets” shown on the map for the lot, whether the streets have been built out or not
Implied Easements: Paper Streets

- the most important indicators of the grantor's intent are:
  - the appearance of the subdivision map and
  - the language of the original deeds.

“While courts in other jurisdictions have held that such an easement extends to all streets delineated on a subdivision map or plat (citations omitted), the prevailing and most current view in this State appears to be that a grantee acquires an easement by implication only over the street on which his property abuts, to the next intersecting streets, i.e., an easement of access.”

Don Busch owned cottage lots 101-107 plus an adjoining 73 Acre woodlot

In 1980 Tebbutt Road was built to the west along Busch’s boundary line

Don Busch created a driveway off Tebbutt Road, in nearly the exact location as the paper street shown on the map

In 2003 Harrington purchased lots 110&111 and began using Mr. Busch’s driveway to access his property from the west
Implied easements: Paper streets

- Specifically, since 1929, owners of lot 108 and all lots to its east accessed their properties by way of a dirt road (referred to as either “the road to Onchiota” or “the as-built road”) which begins at lot 107 and generally runs in an easterly direction. This road connects with another dirt road (referred to as “the road from Onchiota to the dam at the foot of Rainbow Lake” or Adirondack-Florida School Road or Meenahga Mountain Road). This latter road, in turn, connects with a main road (formerly known as County Route 30/Gabriels-Onchiota Road and now known as County Route 60/Gabriels-Onchiota Road).

Implied Easement: Paper Street

- “The record demonstrates that the intent of the parties’ common grantor was to provide a right of passage from the subject lots to the east (ultimately leading to a main road) with no intent, express or implied, to provide a right of passage along the paper road to the west. Busch v. Harrington, 63 A.D.3d 1333 (3d Dept., 2009).
Prescriptive Easements
Creation and Existence of Easements

Prescription (Private)

- open and notorious,
- adverse under a claim of right
- uninterrupted
- undisputed (continuous) use of land
- For the statutory period (10 years)
- (exclusive → sometimes an element, but it means a unique use that is adverse to the true owner)
Prescription (Private)

- Results in an easement by prescription
- Seasonal use is enough
- Compare with Adverse possession:
  - Possession of another’s land results in Title/ownership
  - Use of another’s land results in an Easement/right to continue to use

Prescription (Private)

- Once the elements are demonstrated, the purported servient estate holder must show the use was with permission or by license to defeat a finding of easement.
- Use in common with the general public will not result in an easement by prescription (Pirman v. Confer, 273 N.Y. 35 (1937))
- Use in common with neighbors and the servient estate holder is not “adverse”
Prescription (Public): Highways

- Use and Maintenance by the public for the statutory period results in a public easement for highway purposes

West Galway Road, Saratoga County NY

Prescriptive or User Highways

§ 189. Highways by use

- All lands which shall have been used by the public as a highway for the period of ten years or more, shall be a highway, with the same force and effect as if it had been duly laid out and recorded as a highway.....
Prescription or User Highway

- The Statutory Period is 10 years.
- Between 1959 and 1963 it was 15 years.
- Prior to 1959 it was 20 years.

Curtis v Town of Galway, 50 AD3d 1370 [2008].

Prescription or User Highways

- Village Law §6-626-Streets by prescription
- All lands within the village which have been used by the public as a street for ten years or more continuously, shall be a street with the same force and effect as if it had been duly laid out and recorded as such.
Prescription: Public Use

- “used by the public as a highway” Highway Law 189
- “used by the public as a street” Village Law 6-626

- What does that mean?
  - “naked use” by the public does not convert the roadway into a public highway. See *Pirman v. Confer*, 273 N.Y. 35 (1937).

Prescription: Public Use

- A public highway can be created “By prescription, or where land is used by the public for a highway for 20 years, with the knowledge, but without the consent, of the owner. The presumption of a grant of the right of way springs from the mere lapse of said period of time in connection with the adverse user by the public.” *Cohoes v. D&H Canal Co.* 134 N.Y. 397 (1892)
Prescription: Public Use

- New York Courts as late as 1913 recognized two methods to acquire a public highway by use:
  - 1) Public use that was hostile and without the consent of the landowner and
  - 2) Public use coupled with public maintenance.

Prescription: Public Maintenance

- “The words ‘used by the public as a highway’ mean that there must be an assumption of control, of maintenance, of repair in a continuing way, a taking charge by the public authorities, a treating of the road as a public highway like other town highways generally so that the town becomes responsible for its condition” Goldrich v. Franklin Gardens Corp 115 NYS 2d 72 (Sup. Ct. Nassau Co, 1952). Rev’d on other grounds, 282 A.D. 698 (2d Dep’t 1953) citing, People v. Sutherland, 252 N.Y. 86, at page 91.
Prescriptive Streets

- Courts interpreting the Village Law have applied the same test to find a Village Street created by prescription: public use coupled with public maintenance for the statutory period
  - Marchand v. NYS DEC, 19 NY3d 616 (2012)

General Rule

“The general rule is that when the language of the statute will bear a construction which will leave the fee in the landowner, that construction will be preferred. If the title to land in the bed of a highway depends upon presumptions, the general rule seems applicable that only an easement was taken.”

Limitations on Prescriptive Easements

- Real Property Law §261 Maintenance of telegraph or other electric wires raises no presumption of grant.
- Whenever any wire or cable used for any telegraph, telephone, electric light or other electric purpose, or for the purpose of communication otherwise than by the aid of electricity, is or shall be attached to, or does or shall extend upon or over any building or land, no lapse of time whatever shall raise a presumption of any grant of, or justify a prescription of any perpetual right to, such attachment or extension.

Equitable Easements

*Creation and Existence of Easements*
Equitable Easement

- “...a grant of an easement by an instrument which is unacknowledged and unattested may nevertheless support equitable rights and interests in property which, when established by possession and improvements, are effective against a subsequent purchaser of the servient estate who takes with actual knowledge of the possession and improvements.” Kienz v. Niagara Mohawk Power Corp., 41 A.D.2d 431 (4th Dept 1973)

- See also: Loughran v. Orange and Rockland Utilities, Inc., 209 A.D.2d 917 (3d Dept 1994)

Eminent Domain: Private Road

Kildare Road in Tupper Lake, Franklin County
Iron Mountain Forestry, Inc. v. Friedman, 33 Misc. 3d 1227A (1998)
Highway Law Section 300 et seq.

- § 300. Private road

  An application for a private road shall be made in writing to the town superintendent of the town in which it is to be located, specifying its width and location, courses and distances, and the names of the owners and occupants of the land through which it is proposed to be laid out.

Eminent Domain: Private Rd.

- “The taking of private property for the construction of private roads was permitted under the Colony of New York's statutes, and this provision was retained by the State of New York until 1843. In 1843 the New York Supreme Court... held that the statute was unconstitutional.” *Pratt v. Allen*, 116 Misc 2d 244 (Sup. Ct. Chemung Co., 1982)

- New York State’s Constitution was thereafter amended to allow private condemnation
Eminent Domain: Private Rd.

- Article 1 Section 7(c) of the NYS Constitution now states:
- Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceedings, shall be paid by the person to be benefited.

Eminent Domain: Private Road

- Highway Laws § 300-307 set forth the procedure
- It is now well established that “Public Purpose” or “Public Benefit” are not limited to sole occupancy or use by the public and includes opening up otherwise landlocked private properties for use and development (and taxation). *Pratt Supra.*
Eminent Domain: Private Road

- § 301. Jury to determine necessity and assess damages
- § 302. Copy application and notice delivered to applicant
- § 303. Copy and notice to be served
- § § 304-306 Relate to selecting and paying the jurors.
- § 307. Their verdict

“The Legislature evidently considered this method of laying out private roads the work of laymen rather than lawyers.” In Re Bell, 131 Misc. 734 (Sup. Ct. St. Lawrence Co., 1928)

Eminent Domain: Private Road

- Section 300 of the Highway Law cannot be used for:
  - Condemning public property for a private easement
  - Installation of Utilities

Location and Width
LOCATION by AGREEMENT/DEED

- Easement is defined in the writing as to location and width
- When the easement is stated as over a certain width:
  - whether the reference is to the width of the way or is merely descriptive of the property over which the grantee must have such a way as may be reasonably necessary depends on the circumstances of the case

Location by agreement/deed

- Examples:
  - that plaintiff holds "a right of way two rods (33 feet) wide along the shore of the aforesaid swamp to the highway".... Upon our review, we find that the presently constituted driveway, measuring 12 feet at its widest and 9 feet 8 inches at its narrowest point, has provided and continues to provide a reasonable and convenient means of ingress and egress, fulfilling the purpose for which it was created.” Serbalik v. Grey, 268 A.D.2d 926 (3d Dept. 2000).
Location by agreement/deed

- A 30 foot wide ROW granted in deed, established roadway was a 12 foot paved width, court held that the easement be limited to the 12 foot paved width. *Minogue v. Kaufman*, 124 A.D. 2d 791 (2d Dept. 1986).

- Where the easement granted a right to travel over a 20 foot strip of land or street at all times, the court found the entire 20 foot width that was in use was necessary for traveling purposes. *Mandia v. King Lumber and Plywood Co., Inc.* 179 AD2d 150 (2d Dept. 1992)

Practical location or existing way

Location and Width of Easements
Practical Location or existing way

- Once definitively located, by agreement or use, an easement cannot be moved unilaterally by one party
  - Definitively located = metes and bounds description
- Undefined location: the courts may exercise their equitable powers to locate an easement when the parties have failed to designate the route.

- If the location is not definitively fixed the easement can be moved by the servient estate holder,
- Example: a grant of easement “over the driveway in a south-westernly direction” is not a definitively fixed easement
Practical Location or existing way

- Easements by necessity are usually located upon the existing ways
- “their parcel became landlocked by other properties with no access to a public highway due to the nature of the surrounding terrain, except via the dirt road across the lands owned by Ostrander, defendant’s predecessor in title” Stock v. Ostrander 233 A.D.2d 816 (3d Dept 1996)

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Practical location or existing way

- Easements by prescription are located where the use occurred.
- Implied easements from pre-existing use and in a former public highway are located where the existing way was/is located.
- Paper street easements are where they are shown on the map
Width of easements

Location and Width of Easements

- Width used
- Width described
- Width reasonably necessary to fulfill the grant/purpose
The End.

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