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There is no Abandonment of an Easement Taken by Eminent Domain Unless There is an Intention to Abandon the Easement Prior to the Taking by Eminent Domain; Therefore the Easement Owner at the Time of Taking is Entitled to the Award.

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concept of the implied consent theory than the majority view. In short, in Texas, is the test really made mandatory by the statute? Does it mean that if the state fails to convict one of drunk driving, not having evidence of a chemical test because one refused, that his refusal was indeed reasonable?

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EASEMENT—ABANDONMENT—EMINENT DOMAIN—THERE IS NO ABANDONMENT OF AN EASEMENT TAKEN BY EMINENT DOMAIN UNLESS THERE IS AN INTENTION TO ABANDON THE EASEMENT PRIOR TO THE TAKING BY EMINENT DOMAIN; THEREFORE THE EASEMENT OWNER AT THE TIME OF TAKING IS ENTITLED TO THE AWARD. *San Antonio v. Ruble,* 13 Tex. Sup. Ct. J. 178 (Feb. 7, 1970).

Petitioner's predecessor in title executed an instrument conveying to a soil conservation district the right to construct and maintain certain dams for the purpose of preventing erosion of Petitioner's land.[1] In 1966, the City of San Antonio realized the Petitioner's land would become inundated by its proposed lake project, and it therefore required condemnation of this area. The Petitioner contends that the easement in the above instrument has been abandoned, because the intent to abandon was manifested by the transfer of the easement to the City following the condemnation and that the City, in taking the easement, frustrated its intended purpose, therefore extinguishing it. The lower courts held the easement had been abandoned with the exception of the actual dam sites. Held—*Reversed and Rendered* as to the total areas of the retardation dams and *Affirmed* as to the actual dam sites. There is no abandonment of an easement taken by eminent domain unless there is an intention to abandon the easement prior to the taking by eminent domain; therefore the easement owner at the time of taking is entitled to the award.

Eminent domain "is an extraordinary and dangerous power, and its

[1] 13 Tex. Sup. Ct. J. 178, 179 (Feb. 7, 1970): ". . . the Grantors do hereby Grant and Convey unto the Grantees, their successors, and assigns, the right, privilege and authority to enter upon, construct, operate and maintain an earthen fill dam and other structures for the retardation of the flow of floodwaters and reduction of sedimentation, over and upon . . . . To have and To hold the aforesaid easement or right-of-way unto the Grantees, their successors and assigns, for so long as Grantees, their successors and assigns, shall continue to use said easement or right-of-way for said purposes. In the event the maintenance and operation of such structures shall be abandoned by the Grantees, their successors and assigns, for a period of two years, the rights and privileges herein granted shall cease and determine. All property, fixtures, and improvements not removed by the Grantees within six months after expiration of this easement shall be and remain the property of the Grantors."

concession has always been surrounded by rigid limitations and carefully guarded from improper use."[2] "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, . . ."[3] Generally, the power to take property extends to every species of property and every character of right, title, or interest and embraces any interest that will be affected by the condemnation.[4] Easements have been characterized as a sufficient interest in realty to support an award of compensation for taking by eminent domain.[5] But before a taking may be compensated under eminent domain, it must be an enforceable interest and not a mere privilege enjoyed at the will of the owner of the servient estate.[6]

There are several ways in which an easement may be created.[7] The one involved in the *Ruble* case was created by express agreement. Generally, there is no requirement for specific language in the granting of an easement, and all that is necessary is that the language clearly show an intention to grant an easement.[8] However, if the grantor retains power of termination at his will, the estate granted will be less than an easement.[9] The intention of the grantor is to be determined from the instrument as a whole, and not from segregated or isolated parts thereof.[10] Therefore, if the intention to grant an easement can be determined by the entire instrument, the easement will have been created by the express agreement. The terms and conditions of the express easement are controlled by the instrument creating the easement.[11]

An easement may be extinguished or terminated by joinder of the dominant and servient estates,[12] abandonment of the easement by the owner,[13] taking of the easement by adverse possession,[14] completion of

2 Crawford v. Frio County, 153 S.W. 388, 390 (Tex. Civ. App.—San Antonio 1913, no writ).

3 TEX. CONST. art. I, § 17.

4 Houston North Shore Ry. Co. v. Tyrrell, 128 Tex. 248, 98 S.W.2d 786 (1936).

5 Sinclair Pipe Line Co. v. State, 322 S.W.2d 58 (Tex. Civ. App.—Ft. Worth 1959, no writ).

6 Sinclair Pipe Line Co. v. United States, 287 F.2d 175 (Ct. Cl. 1961).

7 21 TEX. JUR. 2d, *Easements*, § 12-33.

8 Kothe v. Harris County Flood Control Dist., 306 S.W.2d 390 (Tex. Civ. App.—Houston 1957, no writ).

9 Sinclair Pipe Line Co. v. United States, 287 F.2d 175 (Ct. Cl. 1961).

10 Peterson v. Barron, 401 S.W.2d 680 (Tex. Civ. App.—Dallas 1966, no writ).

11 Kothe v. Harris County Flood Control Dist., 306 S.W.2d 390 (Tex. Civ. App.—Houston 1957, no writ); *see also*, Baer v. Dallas Theater Center, 330 S.W.2d 214 (Tex. Civ. App.—Waco 1959, writ ref'd, n.r.e.).

12 Howell v. Estes, 71 Tex. 690, 12 S.W. 62 (1888); Tirado v. Tirado, 357 S.W.2d 468 (Tex. Civ. App.—Texarkana 1962, writ dism'd w.o.j.).

13 Shaw v. Williams, 332 S.W.2d 797 (Tex. Civ. App.—Eastland 1960, no writ).

14 Galveston v. Williams, 69 Tex. 449, 6 S.W. 860 (1888); Walton v. Harigel, 183 S.W. 785 (Tex. Civ. App.—Galveston 1916, no writ).

the purpose for which the easement was granted,[15] or misuse of the easement.[16]

The question now before us is what effect does eminent domain have upon an easement. That is, does the imminent possibility of condemnation act as an abandonment of the easement when the purpose of the easement will be frustrated after condemnation? Before there is an abandonment, the intention to abandon must be clearly shown.[17] However the mere non-use of the easement is not sufficient to show abandonment unless attended with other circumstances.[18] The controlling question is intention to abandon and must be clearly shown before abandonment will be found.[19] The determination of abandonment is shown from the surrounding circumstances in each case. The *Restatement of Property* defines intention to abandon as the intention not to make in the future the uses authorized by the easement.[20] It is only necessary for there to be a use permitted under the condemnation that is inconsistent with the use permitted under the easement to constitute an extinguishment of the easement.[21] The case of *Griffith v. Allison*,[22] illustrates the rule in Texas: "It appears to be well settled that an abandonment, even of an easement acquired by purchase, occurs when the use for which property is dedicated becomes impossible, or so highly improbable as to be practically impossible, or where the object of the use for which the property is dedicated wholly fails." There is language in a recent Texas case indicating that the purpose of the easement must become physically impossible before the easement is extinguished.[23] The question is, does the present case come within the meaning of the rule expressed in *Griffith v. Allison*? That is, was there an abandonment? And if there was, when did it occur—at the time condemnation became imminent or after the award was given?

The cases cited in the majority opinion state the rule to be that a grantee who has not breached a condition subsequent in a fee simple determinable is entitled to the award of any damages resulting from a condemnation.

> Obviously, the condemnation of the tract by the state made impossible the continued use of the field for the purposes specified

15 Woodmen of the World v. Goodman, 193 S.W.2d 739 (Tex. Civ. App.—Dallas 1945, no writ); Steele v. Ainsworth, 249 S.W.2d 656 (Tex. Civ. App.—Eastland 1952, no writ).

16 Perry v. City of Gainesville, 267 S.W.2d 270 (Tex. Civ. App.—Ft. Worth 1954, writ ref'd n.r.e.).

17 Dallas County v. Miller, 140 Tex. 242, 166 S.W.2d 922 (1942).

18 Adams v. Rowles, 149 Tex. 52, 228 S.W.2d 849 (1950).

19 Dallas County v. Miller, 140 Tex. 242, 166 S.W.2d 922 (1942).

20 RESTATEMENT OF PROPERTY, § 504c (1944).

21 *Id.*, § 507c (1944).

22 128 Tex. 86, 93, 96 S.W.2d 74, 77 (1936).

23 Kearney v. Francher, 401 S.W.2d 897 (Tex. Civ. App.—Ft. Worth 1966, writ ref'd n.r.e.).

> in the deed. However, it is uniformly held that realty does not revert where the use specified in the deed is discontinued solely because of a taking under the powers of eminent domain.[24]

This case is not directly on point because it involves a conveyance of fee title subject to a condition subsequent. The court summarized the problem as abandonment of easements with no mention of future interest. Yet the court relied on the rules of future interest to determine whether the easement had been extinguished. There are no Texas cases directly in point, but the court could have adopted the rule in *Griffith v. Allison*. This case was subsequently modified by the language used in *Kearney v. Francher* to the extent that the easement is not extinguished until it has become physically impossible for execution of the purpose intended.[25] Therefore, the result would be the same without confusing the law of future interest with the law of easements, because extinguishment could not have occurred before condemnation. Once the servient and dominant estates have been condemned by the same authority they will be merged into one estate through the doctrine of merger.[26] With the basic proposition that an easement is such an estate for the loss of which there should be compensation, when it is taken by eminent domain,[27] the court could have awarded the owner of the easement the compensation and, in the process, formulated a rule to clarify this area of easements.

The dissenting opinion based its decision on the interpretation of the executed instrument as a license. The distinction between a license and an easement is often subtle. The major distinction is the intent of the parties as determined by the instrument.[28] An easement is an interest in land;[29] a license is generally of a more limited nature.[30] The prominent distinction is the power of termination. Generally, a license may be revoked at the will of the landowner.[31] The power of termination is inconsistent with the purpose of granting an easement.[32] In any event, the terms of the instrument are controlling. In a recent Texas case the court of civil appeals held an instrument to create an easement where the sole purpose was construction of a reservoir for

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24 State v. Independent School Dist. No. 31, 123 N.W.2d 121, 126 (Minn. 1963); *see also*, Browder, *The Condemnation of Future Interest*, 48 VA. L. REV. 46 (1962).

25 Kearney v. Francher, 401 S.W.2d 897 (Tex. Civ. App.—Ft. Worth 1966, writ ref'd n.r.e.).

26 Howell v. Estes, 71 Tex. 690, 12 S.W. 62 (1889).

27 TEX. CONST. art. I, § 17.

28 Griffith v. Allison, 128 Tex. 86, 96 S.W.2d 74 (1936).

29 Settegast v. Foley Bros. Dry Goods Co., 114 Tex. 452, 270 S.W. 1014 (1925); Ropte v. Evan, 67 S.W.2d 396 (Tex. Civ. App.—Austin 1933), *rev'd on other grounds*, 128 Tex. 75, 96 S.W.2d 973 (1936).

30 *Id.*

31 Davis v. Clark, 271 S.W. 190 (Tex. Civ. App.—Ft. Worth 1925, writ dism'd).

32 Sinclair Pipe Line Co. v. United States, 287 F.2d 175 (Ct. Cl. 1961).

storing water and for taking water until the grantees ceased to use the premises for those purposes.[33] The granting clause contained the following terms: ". . . have granted, conveyed and let . . . ."[34] The grantee contended the instrument conveyed a determinable fee simple, but the court held it an easement, "We have long since relaxed the strictness of the ancient rules of construction of deeds, and have established the rule for construction of deeds, as for the construction of all contracts—that the intention of the parties, when it can be ascertained from a consideration of all parts of the instrument, will be given effect when possible. That intention, when ascertained, prevails over arbitrary rules."[35] Applying the above rule, the parties' intention to create an easement is shown by such language as "all property . . . not removed by grantee within six months after expiration of this easement . . ."; "TO HAVE AND TO HOLD the aforesaid easement . . . shall continue to use said easement . . . ."[36] The fact that the habendum clause was followed by the terms or conditions by which the estate could be terminated indicated that there was an intention to grant some interest in realty. All these factors indicate an intent to grant an easement. The term "right-of-way" was used with the term easement in describing the estate, but this does not forbid the interpretation of the instrument as granting an easement because this term has been construed to grant an easement where there were no other words in the granting clause.[37] The granting clause generally determines the interest conveyed and prevails over other conflicting or ambiguous clauses, but the true intention of the parties must be determined from the four corners of the instrument.[38]

As stated in *Griffith v. Allison*, an easement may be abandoned by the terms of the instrument granting the easement.[39] The instrument expressly stated when the easement was to be extinguished; *i.e.* two years from the date of failure of the purpose for which it was created. There was an extension of six months in which the owner of the easement could remove his improvements. There was no evidence other than the fact of condemnation which would frustrate the purpose of the easement. The effective date of taking by eminent domain is the date of termination. However, before the landowners could claim the value of the land free of the easements, the easements must terminate before their land is taken by eminent domain. The court held that the

[33] Shaw v. Williams, 332 S.W.2d 797 (Tex. Civ. App.—Eastland 1960, no writ).
[34] *Id.* at 799.
[35] *Id.* at 799.
[36] 13 Tex. Sup. Ct. J. 178, 179 (Feb. 7, 1970).
[37] Hidalgo County v. Pate, 443 S.W.2d 80 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.).
[38] *Id.* at 85.
[39] Griffith v. Allison, 128 Tex. 86, 96 S.W.2d 74 (1936).