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## Witter v. Taggart and Ammirati v. Wire Forms, Inc.: The Potential Ramifications of New York's Newly Restrictive Definition of "Chain of Title" and Newly Expansive Definition of "Easement by Necessity"

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**WITTER v. TAGGART AND AMMIRATI v.  
WIRE FORMS, INC.: THE POTENTIAL  
RAMIFICATIONS OF NEW YORK'S NEWLY  
RESTRICTIVE DEFINITION OF "CHAIN OF  
TITLE" AND NEWLY EXPANSIVE  
DEFINITION OF "EASEMENT BY  
NECESSITY"**

*Kenneth Gartner\**

INTRODUCTION

Imagine yourself as a homebuyer. You and your family have undergone an extensive search that has finally led you to the house of your dreams. While other houses may have appealed to you, only this one boasted a majestic view of a permanently protected nature preserve. When you and your attorneys examine the deed to this house, you clearly see that the right to this scenic view is included in the deed and is part of the property. You buy the house with the knowledge that you will forever be able to enjoy the view from your backyard.

Years later, your neighbors construct a structure that destroys this view. You look to the justice system to protect your rights. Imagine your outrage when the highest court in your state refuses to protect your rights.

This was the plight faced by the Witter family. The Witters and the Taggarts owned adjoining properties in East Islip, Suffolk County, New York. The properties lay on either side of a narrow canal.<sup>1</sup> Both properties fronted onto the broad expanse of Champlin's Creek (also known as Winganhauppague Creek).<sup>2</sup> The

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1. *Witter v. Taggart*, 78 N.Y.2d 234, 577 N.E.2d 338, 573 N.Y.S.2d 146 (1991).  
2. Record on Appeal at 51, *Witter*.

two properties were both formerly part of the 134-acre Meadow Farm Estate of Charles Lanier Lawrance. After Lawrance's death, Lawrance's heirs in 1951 sold what became the Witter property to Witter's predecessors in title, W. Hunting Howell and Elizabeth H. Howell.<sup>3</sup>

The property's principal attraction and main economic value lay in its unobstructed view across Winganhauppague Creek to the permanently wooded forest land on the other side.<sup>4</sup> This unobstructed view was so important to the value of the property that when Lawrance's heirs conveyed the property to the Howells, the parties created and placed in the deed an easement of unobstructed view to run with the land.<sup>5</sup> In 1963, the Howells sold the property they had received from Lawrance's heirs to Witter.<sup>6</sup> Witter was shown the easement, and took note of the fact that the house on the irregularly

3. Record on Appeal at 28-33, 285-86, *Witter*.

4. See *infra* note 34. Any development of the land on the opposite side of the creek is prevented by the land's status as a preserve.

5. Record on Appeal at 30-33, *Witter*. The New York Court of Appeals in *Witter* believed that Lawrance personally, rather than his heirs entered into the conveyance to Howell, and that it was only thereafter that Lawrance died and his heirs conveyed the servient parcel. *Witter*, 78 N.Y.2d at 237, N.E.2d at 339, 573 N.Y.S.2d at 147, 577. Although the *Witter* court ultimately attributed no legal significance to this factual assumption — arrived at *sua sponte* — the assumption was, in any case, without any Record support. Lawrance predeceased the transfer of any portion of the Meadow Farm estate, and *both* relevant transactions were in fact entered into by Lawrance's heirs. Record on Appeal at 28-33, 285-86, *Witter*. In the deed the sellers promised:

The parties of the first part Charles Lawrance's heirs' hereby covenant that no docks, buildings, or other structures shall be erected, nor permitted to be erected, nor shall any trees, plants or shrubs be planted nor permitted to be planted upon other lands presently owned by the parties of the first part lying north of a line projected and directed outward on a true company course of southwest, commencing at that point where the south boundary courses of the described premises south 82 26' 30" west and north 89 23' 20" west intersect, which shall obstruct or interfere with the outlook or view from the premises hereinbefore described over the waters of Winganhauppague Creek.

Record on Appeal at 29-30, *Witter*.

Similarly, the buyer promised:

The parties of the second part [the Howells, grantees] covenant that they will not erect, or permit to be erected, any dock upon, nor use, or permit to be used, for the permanent mooring of boats or vessels, that portion of the described premises which adjoins the south line of the said premises for the length thereof identified by the courses north 89 23' 20" west and south 82 26' 30" west, but this restriction shall not be construed to prevent the bulkheading or staving of such shoreline.

Record on Appeal, at 30, *Witter*.

Both parties were bound by the following terms: "It is mutually agreed that the covenants herein contained shall run with the land herein described and shall bind the parties hereto, their heirs, executors, administrators and assigns." Record on Appeal at 30, *Witter*.

6. Record on Appeal at 23-27, *Witter*.

configured shorefront premises had been located and so constructed at an angle as specifically to maximize the use of the protected view.<sup>7</sup> Indeed, the house's main feature was an abundance of picture windows looking directly out on the protected view.<sup>8</sup> Witter thus bought and paid for the property (including the easement) in reliance on the existence of the easement.<sup>9</sup>

In 1962, another part of the Meadow Farm Estate was conveyed by Lawrance's heirs to Francis H. Hawkes.<sup>10</sup> The easement was not recited in Hawkes' deed itself.<sup>11</sup> This is the root of Witter's problem, since the Hawkes property was sold to the Taggarts in 1984.<sup>12</sup> While Lawrance's heirs sold the dominant parcel (eventually owned by the Witters) with the express promise that the view would be protected,<sup>13</sup> they did not record their promise in the deed of the servient parcel.<sup>14</sup>

The promise made by Lawrence's heirs to Witter's predecessor's was, however, and always has been, a matter of public record. Indeed, the Witter property's easement of unobstructed view was brought to Hawkes' attention, and Hawkes took title with actual notice: the certificate and report of title which Hawkes received from Security Title & Guaranty Company<sup>15</sup> reprinted the entire subject easement language in haec verba,<sup>16</sup> and listed the easement on Schedule B of the title policy as an exception ("Exception No. 10") to title insurance coverage.<sup>17</sup> For thirty-six years, both the owners of the former Howell property and the owners of the former Hawkes property honored the subject easement to their mutual benefit.<sup>18</sup> Taggart was the president and sole shareholder of Boatland, Inc., a commercial boat dealership in Lindenhurst whose "demonstrator" boats he customarily used for personal purposes.<sup>19</sup> When the Tag-

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7. Record on Appeal at 158-59, *Witter*.

8. *Id.* at 158-59, 164.

9. *Id.* at 158.

10. *Id.* at 39-40.

11. *See Id.* at 39-40.

12. *Id.* at 75.

13. *Id.* at 215.

14. *Id.* at 74-75. A dominant parcel is one receiving the benefit of a particular covenant or restriction, while a servient parcel is one whose use is in some way restricted or limited by the same covenant or restriction. Siegal, *N.Y. State Law Digest* No. 385

15. Record on Appeal at 215, *Witter*.

16. *Id.*

17. *Id.* at 227.

18. *Id.* at 158-59.

19. *Id.* at 174-80.

garts purchased the former Hawkes property from the Moorings, they were specifically deeded the use of a boat slip at the adjacent marina for the docking of any boat they might own.<sup>20</sup>

In June 1987, twenty-four years after he purchased his home, William Witter was surprised to see a seventy-foot wooden pier extending out into the creek from the Taggarts' shoreline.<sup>21</sup> The pier had been prefabricated off-site, so Witter did not have an opportunity to observe it until it was floated in and tied to poles sunk in the creek bed.<sup>22</sup> Witter immediately called Edward Taggart and when Taggart came over to Witter's property, Witter walked with Taggart down to the water line of Witter's property.<sup>23</sup> Witter showed Taggart the deed containing the easements, pointed out how the pier obstructed Witter's view in violation of the record easements, and requested the removal of the pier.<sup>24</sup> Taggart refused, and Witter commenced an action seeking an injunction requiring the dismantling of the pier.<sup>25</sup>

This article focuses on the injustices faced by the Witters as they sought to enforce their rights to an unobstructed view, across Chaplin's Creek to the scenic nature preserve. This fight took the Witters all the way to the highest court of New York State.<sup>26</sup> In deciding against the Witters, not only did the New York State Court of Appeals ignore facts, but it disregarded and revised existing precedent.<sup>27</sup> In *Witter v. Taggart*<sup>28</sup> the Court of Appeals created an absolute rule where a common grantor deeds out a portion of his premises (in a county utilizing a grantor-grantee title indexing system), and the deed contains a written express easement, the common grantor may nevertheless unilaterally invalidate the interest he has conveyed to this innocent purchaser simply by conveying his servient parcel to another without mention of the recorded easement.<sup>29</sup>

In arriving at this rule, the Court of Appeals failed to either (a) articulate the policy considerations which might support such an apparently startling result, or (b) overrule *Ammirati v. Wire Forms*,

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20. *Id.* at 89.

21. *Id.* at 159.

22. *Id.* at 159, 183.

23. *Id.* at 159.

24. *Id.*

25. *Witter v. Taggart*, 144 Misc. 2d 444, 543 N.Y.S.2d 644 (N.Y. Sup. Ct. 1989).

26. *Witter*, 78 N.Y.2d at 240-41, 577 N.E.2d at 339, 573 N.Y.S.2d at 147.

27. *See Witter*, 78 N.Y.2d at 240-41, 577 N.E.2d at 341-42, 573 N.Y.S.2d at 149-50.

28. 78 N.Y.2d 234, 577 N.E.2d 338, 573 N.Y.S.2d 146 (1991).

29. *See Id.*

*Inc.*,<sup>30</sup> a precedent which is directly contrary to the *Witter* holding. Instead, the court in *Witter* purported to "distinguish" *Ammirati* based upon facts which are not contained in and are in fact negated by both the *Ammirati* opinions and record. The result of the court's herculean effort to avoid overruling *Ammirati* was a decision which, rather than basing its result on sound and defensible policy considerations, (a) artificially limited the definition of the term "chain of title" to one which, if logically adhered to, denudes New York's Recording Act<sup>31</sup> of its primary value, and (b) expanded the concept of the "necessity" required to imply the existence of an easement beyond all previous expectations. These actions by the court possess the potential for wreaking havoc on the current title system in New York.

### I. EASEMENTS OF UNOBSTRUCTED VIEW

The value of an unobstructed view is settled and accepted.<sup>32</sup> Easements of unobstructed view are thus recognized as valid and have been enforced by the courts of New York since the beginning of the twentieth century.<sup>33</sup> The un rebutted testimony of an expert

30. 76 N.Y.S.2d 379 (N.Y. Sup. Ct. 1947), *rev'd*, 273 A.D. 1010, 78 N.Y.S.2d 844 (2d Dep't 1948), *aff'd*, 298 N.Y. 697 (1948).

31. N.Y. REAL PROP. LAW § 291 (McKinney 1989).

32. Note, *Securing a Right to View: Broadening the Scope of Negative Easements*, 6 PACE ENVTL. L. REV. 269 (1988) (describing numerous examples of how panoramic views of skylines and water increase the financial value of real estate).

33. *Zipp v. Barker*, 40 A.D. 1 (2d Dep't 1899), *aff'd*, 166 N.Y. 621 (1901). "[T]he plaintiff obtained an easement to light and air and unobstructed view; and with this easement a court of equity will not interfere, or permit interference by others who are privies to the covenant." *Zipp*, 40 A.D. at 6; see also *Easements*, Warren's Weed New York Law of Real Property, §23.01, at EASE-111 (citing *Zipp*); Annotation, *Express Easements of Light, Air and View*, 142 A.L.R. 467, 468 (1943) ("It is universally assumed, without controversy, that easements of light, air and view may be created by express grant"); 1 AM. JUR. 2d, *Adjoining Landowners* §90 (1962) ("There is no doubt that easements of light, air and view may be created by express grant"); *Rainbow Shop Patchogue Corp. v. Roosevelt Nassau Operating Corp.*, 60 Misc. 2d 896 (N.Y. Sup. Ct. 1969), *aff'd*, 34 A.D.2d 667 (2d Dep't 1970) (enforcing an easement of unobstructed view granted to the tenant of a store in a shopping mall against the erection of a kiosk obstructing shoppers' view of the tenant's store windows).

Such easements have been recognized in California. See e.g., *Pacific Home Owners' Ass'n v. Wesley Palms Retirement Community*, 178 Cal. App. 3d 1147, 224 Cal. Rptr. 380 (Cal. Ct. App. 1986) (although "[a]s a general rule, a land owner has no natural right to air, light or an unobstructed view and the law is reluctant to imply such a right . . . [nevertheless] [s]uch a right may be created by private parties through the granting of an easement . . ." *Id.* at 1152, 224 Cal. Rptr. at 382); *Seligman v. Tucker*, 6 Cal. App. 3d 691, 86 Cal. Rptr. 187 (Cal. Ct. App. 1970) (granting a mandatory injunction requiring defendants to remove, or lower, an addition to a single family home which in violation of plaintiff's easement "unreasonably obstructed" the view from plaintiffs' home); *Petersen v. Friedman*, 162 Cal. App. 2d 245, 328

real estate appraiser was that blocking the view in the *Witter* case had resulted in a substantial diminution of the property's value.<sup>34</sup> Despite these unrefuted conclusions, neither the Supreme Court of Suffolk County,<sup>35</sup> the Appellate Division, Second Department,<sup>36</sup> nor

P.2d 264 (Cal. Dist. Ct. App. 1958).

In *Petersen*, the parties' common grantor, when conveying plaintiff's property to plaintiff's predecessor, had granted plaintiff's predecessor:

a perpetual easement of right to receive light, air and unobstructed view over that portion of the real property hereinabove described, to the extent that said light, air and view will be received and enjoyed by limiting any structure, fence, trees or shrubs upon said property hereinabove described or any part thereof [to certain specified height limits] . . .

*Petersen*, 162 Cal. App. 2d at 246-47, 328 P.2d at 265.

The servient parcel retained by the grantor was subsequently transferred by mesne conveyances to defendants. The defendants erected a television aerial which exceeded the limited height. Plaintiff instituted an action seeking an injunction requiring that the aerial be taken down, and prevailed. *Id.* In affirming that judgment, the Appellate Court held:

[t]he language of the easement is clear and leaves no room for construction or determination of the intent of the parties, as contended by the defendant. Its purpose is to avoid any type of obstruction of the light, air and view without regard to the nature thereof. The reservation was not limited to the use then being made of the servient estate, but extended to all uses to which the servient estate might thereafter be devoted . . .

162 Cal. App. 2d at 247, 328 P.2d at 266.

Such easements have also been recognized in other states. *See e.g.*, *Roehrs v. Lees*, 178 N.J. Super. 399, 429 A.2d 388 (1981)(reversing trial court and finding for plaintiff in action based on defendant's construction of the second floor of his house in such a manner that it encroached on 25-foot setback requirement meant to protect plaintiff's unobstructed ocean view); *Gawtry v. Leland*, 31 N.J. Eq. 385 (1879)(enjoining a landowner from building a large, permanent ocean front pavilion, where a covenant prevented him from building anything which might obstruct or interfere with the view or prospect from a structure on the grantor's premises, and where "[i]t is obvious that it was the intention of the parties that the ocean front of the lot should be kept free from everything which could, in any way, to any considerable extent, obstruct the view of the ocean . . .") *Id.* at 388); *McDonough v. W.W. Snow Construction Co.*, 131 Vt. 436, 306 A.2d 119 (1973) (affirming an injunction requiring defendant to take down the second story of a house which encroached on plaintiff's right to an unobstructed view of Lake Champlain and the Adirondack Mountains lying beyond).

34. In his sworn affidavit, expert real estate appraiser, James G. Taylor stated the following conclusions:

The property is considered to be unique and to have had exceptional views across Champlin Creek (Wingahauppague Creek). The view, which adds a substantial value to the property, has been partially obstructed as a result of the construction of a large pier directly opposite the dwelling. The pier which is sufficient in size to dock three boats is also lighted, which further disturbs the views provided from the main living area. . . [i]t is my opinion that if the subject property were to be sold, the selling price would be substantially lower as a result of the loss in the unobstructed waterviews . . .

Record on Appeal at 164-165, *Witter* (emphasis added).

35. *See Witter v. Taggart*, 144 Misc. 2d 444, 543 N.Y.S.2d 644 (N.Y. Sup. Ct. 1989).

36. *See Witter v. Taggart*, 167 A.D.2d 397, 561 N.Y.S.2d 808 (2d Dep't 1990).

the New York Court of Appeals,<sup>37</sup> seemed to address this issue. These courts seemed more persuaded by the issue of chain of title.<sup>38</sup>

## II. CHAIN OF TITLE

The term "chain of title" is a highly abstract concept that is difficult to define.<sup>39</sup> Theoretically, the "chain of title" refers to the "rationale often invoked to resolve priority between competing claimants to interests in land."<sup>40</sup> Typically, a purchaser of land embarks upon a title search to ensure that the seller actually has the right to sell it and that the land is free from all hidden liens and encumbrances.<sup>41</sup> Since sales of real property are required to be in writing<sup>42</sup> and to be publicly recorded,<sup>43</sup> the "chain of title" concept is intrinsically linked to local recording statutes.<sup>44</sup>

Suffolk County, New York uses a grantor-grantee indexing system.<sup>45</sup> In a grantor-grantee index:

[a]s each instrument is received, the name of the grantor, mortgagor, vendor, or other granting party is placed on the appropriate page of the index followed by the name of the other party to the document, the book and page of the record, description of the property, dates, etc. At the same time there is entered alphabetically in the same index, or in a separate index, the name of the grantee, mortgagee, vendee, or other receiving party with like information as to the instrument. Whether kept together, or (as is usually the case) separately, these are quite generally known respectively as the 'grantor index' and the 'grantee index.'<sup>46</sup>

While a title search involves checking these indices,<sup>47</sup> a searcher is only required to discover conveyances that are in his or her "chain

37. *Witter v. Taggart*, 78 N.Y.2d 234, 577 N.E.2d 338, 573 N.Y.S.2d 146 (1991).

38. See *Witter*, 144 Misc. 2d 444, 543 N.Y.S.2d 644 (N.Y. Sup. Ct. 1989); *Witter*, 167 A.D.2d 397, 561 N.Y.S.2d 808 (2d Dep't 1990); *Witter*, 78 N.Y.2d 234, 577 N.E.2d 338, 573 N.Y.S.2d 146 (1991).

39. See Cross, *The Record "Chain Of Title"*, 57 COLUM. L. REV. 787, 788 (1957).

40. Cross, *supra* note 39 at 787.

41. See Cross, *supra* note 39 at 787.

42. N.Y. REAL. PROP. LAW § 316-a(1) (McKinney 1989).

43. *Id.*

44. Cross, *supra* note 39, at 787.

45. "Section 316 of the Real Property Law . . . adopts the grantor-grantee index as the official type of index for the entire state," even while exempting recording offices that have adopted numerical indexing from its provisions. Pedowitz, *Real Estate Titles* 34 New York State Bar Ass'n 34 1984 (construing N.Y. REAL PROP. LAW § 316-A (McKinney 1989)).

46. PATTON, PATTON ON TITLES, at 224 (2d ed. 1950)(citations omitted).

47. See *supra* notes 45-46 and accompanying text.



of title."<sup>48</sup> While a purchaser is deemed to have constructive notice of any transactions that are within the "chain of title,"<sup>49</sup> any transactions outside are deemed to be irrelevant.<sup>50</sup> Strangely, a transaction may be fairly discoverable, but considered not to be a part of the "chain of title."<sup>51</sup> This has lead one commentator to charge that "the chain of title reasoning is totally impertinent because all transactions relating to the particular tract are readily discoverable."<sup>52</sup>

### III. INCONSISTENCIES IN THE *WITTER* OPINION

"Chain of title" was a central issue in *Witter*.<sup>53</sup> The Court of Appeals held:

[C]onsistent with long-standing precedents and property principles, the Taggarts did not have actual or constructive notice of this restrictive covenant because it was never included in their deed or direct chain of title. There being no other imputable constructive or inquiry notice, they are not bound by that covenant.<sup>54</sup>

The issue of notice is central to this analysis. Section 291 of New York's Real Property Law<sup>55</sup> does not define "notice,"<sup>56</sup> but the

48. Cross, *supra* note 39 at 789. The argument in favor of restrictive notions of chain of title is that:

The difficulty in discovering all existent restrictive covenants . . . is easily demonstrable. [Charging] purchasers with constructive notice of all that could be discovered by a search of deeds and records, whether within the direct chain of conveyances or outside the direct chain of conveyances. . . [t]herefore [means] that, for safety's sake, the title examiner must look at each deed of any tract of land of both immediate and prior grantors that was executed during each one's ownership of the land in question. Furthermore, beyond requiring the title searcher to go beyond the index books into the actual deed books to look at deeds conveying lands other than the lands being searched, the title examiner must read *each* of these collateral deeds in *detail*, not merely their descriptions to find potential latent restrictions, servitudes, or easements imposed in such collateral deeds. When this requirement is considered with the rule existent that deeds are construed as a whole and meaning is given to every part without reference to formal divisions of the deed, it becomes obvious that the title searcher is given an entirely impracticable and unreasonable task

Stegall v. Robinson, 344 S.E.2d 803, 805-6 (N.C. App. 1986)(emphasis in original)(citations omitted).

49. *Witter*, 78 N.Y.2d at 238, 577 N.E.2d at 340, 573 N.Y.S.2d at 148.

50. *See id.*

51. Cross *supra* note 39, at 789.

52. Cross *supra* note 39, at 799.

53. *See Witter v. Taggart*, 144 Misc. 2d 444, 543 N.Y.S.2d 644 (N.Y. Sup. Ct. 1989); *Witter v. Taggart*, 167 A.D.2d 397, 561 N.Y.S.2d 808 (2d Dep't 1990); *Witter v. Taggart*, 78 N.Y.2d 234, 577 N.E.2d 338, 573 N.Y.S.2d 146 (1991).

54. *Witter*, 78 N.Y.2d at 241, 577 N.E.2d at 342, 573 N.Y.S.2d at 150.

55. *See* N.Y. REAL PROP. LAW § 291 (McKinney 1989).

courts, by construction, have made the recording of conveyances notice to subsequent purchasers claiming under the same grantor or through one who is the common source of title.<sup>57</sup>

#### A. *Buffalo Academy*

While both the Witter's and the Taggart's titles did devolve from a common source and the same grantors<sup>58</sup> the New York Court of Appeals nevertheless held that the Taggarts did not have "constructive notice" of the Witter easement.<sup>59</sup> The court relied upon 1935 case of *Buffalo Academy of the Sacred Heart v. Boehm Brothers*.<sup>60</sup>

In *Buffalo Academy*, the defendant had refused to accept from the plaintiff, as part of an agreed-upon settlement, a deed to a certain piece of property.<sup>61</sup> The defendant contended that plaintiff's title to the property was "unmarketable."<sup>62</sup> The title was alleged to be unmarketable because the property was encumbered by a restrictive covenant contained in a deed to a third-party's common grantor, although no mention had been made of the covenant in plaintiff's deed from the common grantor.<sup>63</sup> The restrictive covenant given by the common grantor to Kendall purportedly prevented a gasoline filling station from being erected and operated on any of the common grantor's remaining premises, including that which was eventually devised to the plaintiff.<sup>64</sup>

The holding of the *Buffalo Academy* court was that the covenant given by the grantor to Kendall was personal, and did not run with the grantor's remaining land (including plaintiff's):

[T]he . . . covenant is nothing more than an agreement prohibiting the grantor personally from becoming a competitor of grantee [Kendall Refining Company] in the filling station business. Nowhere do we find any provision extending such prohibition to the assigns of the grantor. Thus, the covenant is personal to the grantor and cannot by implication be impressed upon future owners of other premises. . . [t]herefore his obligation under this covenant

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56. See N.Y. REAL PROP. LAW § 291 (McKinney 1989).

57. *Tarbell v. West*, 86 N.Y. 280, 287-88 (1881).

58. See *supra* pp. 165-68.

59. *Witter*, 78 N.Y.2d at 241, 577 N.E.2d at 342, 573 N.Y.S.2d at 150.

60. 267 N.Y. 242, 196 N.E. 42 (1935).

61. *Id.* at 244-45, 196 N.E. at 42.

62. *Id.*

63. *Id.* at 245, 196 N.E. at 43.

64. *Id.*

stopped at himself and never attached to the lots transferred to the plaintiff.<sup>65</sup>

In *Witter*, to the contrary, the deed itself expressly provided that the easement did, in fact, "run with the land".<sup>66</sup>

### 1. *Witter's Use of Buffalo Academy*

The court in *Buffalo Academy* did go on to state that the restrictive covenant was not contained in any deed within the plaintiff's chain of title, and that absent certain undefined "exceptional circumstances" a purchaser takes with constructive notice from the record only of encumbrances in his chain of title.<sup>67</sup> However, since the decision in *Buffalo Academy* was premised on the personal nature of the covenant, the court's further observations constituted only dicta. Moreover, since the defendant in *Buffalo Academy* obviously had actual knowledge of the covenant contained in Kendall's deed, the Court of Appeals' discourse on constructive notice was even not relevant to the facts of that case.<sup>68</sup> The *Buffalo Academy* case also did not involve a covenant or easement contained in the deed severing the dominant and servient estates. Rather, there, the common grantor had previously subdivided a tract of 84 acres into 538 separate and distinct lots pursuant to a filed map.<sup>69</sup> The lot of Kendall in *Buffalo Academy* was also geographically remote from the plaintiff's lot.<sup>70</sup> Since the common grantor's property had already been subdivided, the deed to Kendall containing the covenant was not itself the instrument of severance of the two geographically distinct lots, and no title relationship was created between the plaintiff's and Kendall's lots.<sup>71</sup> The *Witter* action was properly controlled by the 1947 case of *Ammirati v. Wire Forms, Inc.*<sup>72</sup>

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65. *Id.* at 248, 196 N.E. at 44.

66. Record on Appeal at 30, *Witter*. In *Witter*, the Court of Appeals stated that the Howell "deed provided that the covenant expressly ran with the *dominant land*" *Witter*, 78 N.Y.2d at 237, 577 N.E.2d at 339, 573 N.Y.S.2d at 147 (emphasis in original). While the court ultimately attributed no legal significance to this cryptic conclusion, the fact is that the conclusion was, if not mistaken, at best half-true: The language of the mutual covenants creating the easement provided that they would run not merely with the dominant land, but with the described "other [servient] lands presently owned by the parties of the first part *i.e.*, the common grantors." Record on Appeal at 29-30, *Witter*.

67. *Buffalo Academy*, 267 N.Y. at 250, 196 N.E. at 45.

68. *See id.* at 242, 196 N.E. at 42.

69. Record on Appeal at 6, *Buffalo Academy*.

70. *Id.*

71. *See id.* at 6-7.

72. 76 N.Y.S.2d 379 (N.Y. Sup. Ct. 1947), *rev'd*, 273 A.D. 1010, 78 N.Y.S.2d 844 (2d

B. *Ammirati v. Wire Forms, Inc.*

In *Ammirati*, the common grantor's original lot fronted on Montauk Avenue in Brooklyn. The grantor, in 1926, conveyed part of the lot (on which was erected premises known as 73 Montauk Avenue) to plaintiff's predecessor, while retaining the remainder of the lot (on which was erected premises known as 77 Montauk Avenue).<sup>73</sup> The deed of severance of the premises provided Ammirati's predecessor with an easement over a strip of the retained servient parcel (77 Montauk Avenue) which adjoined the conveyed, dominant parcel (73 Montauk Avenue), "which strip . . . is to be used as a driveway for egress and ingress for pleasure automobiles "to and from garages to be 'rected' at the rear of the premises."<sup>74</sup>

In the twenty-two years following the conveyance, neither the original grantee nor the grantee's successors (including Ammirati) ever erected the contemplated garages. To the contrary, Ammirati or her predecessors affirmatively graded the rear yard of 73 Montauk Avenue so that it was four to six inches above the grade of the 77 Montauk Avenue property<sup>75</sup> and obstructed the easement by *fencing off* the rear yard of 73 Montauk Avenue from the 77 Montauk Avenue driveway.<sup>76</sup>

The servient premises retained by the grantor were subsequently mortgaged by an instrument which made no reference to the easement.<sup>77</sup> The mortgage was foreclosed, and no mention of any easement was made in the referee's deed or in any subsequent conveyances, including the eventual conveyance of the servient estate to Wire Forms Inc. (Wire Forms).<sup>78</sup> Wire Forms purchased the 77 Montauk Avenue premises with the knowledge that the property could not be used for its intended business purpose unless access to the driveway were under the defendant's sole control.<sup>79</sup> When Wire Forms erected a gate across the driveway, Ammirati brought her easement to their attention.<sup>80</sup> Wire Forms rebuffed Ammirati, arguing that they (Wire Forms) knew nothing of the easement when the property was purchased, and that if the easement were honored,

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Dep't 1948), *aff'd w/o opinion*, 298 N.Y. 697 (1948).

73. Record on Appeal at 25, *Ammirati*.

74. *Ammirati*, 76 N.Y.S.2d at 380.

75. Record on Appeal at 79, *Ammirati*.

76. *Ammirati*, 76 N.Y.S.2d at 380.

77. *Id.*

78. *Id.*

79. Record on Appeal at 85, *Ammirati*.

80. *Id.*

their (Wire Forms) property could not be put to its intended use.<sup>81</sup> Since Wire Forms sought to bar Ammirati's access to the easement portion of the servient premises, Ammirati, as beneficiary of the easement and owner of the dominant estate, commenced legal action.<sup>82</sup>

Ammirati's complaint was originally dismissed based on the "chain of title" concept that had been articulated in *Buffalo Academy*.<sup>83</sup> On appeal Ammirati's counsel argued to the Appellate Division, Second Department that:

Whether the easement deed is or is not in the defendant's chain of title, and therefore, binds it with notice, is to be determined by two fundamental interrelated factors. One, is that the source of title is from the common grantor. The other, is that the plaintiff's and defendant's plots were once one whole plot. The severance created a title relationship between the two plots. That is, the common grantor actually created the two plots the instant that she severed the whole. By the very nature of the severance, that which was conveyed out (plaintiff's plot) became the determining factor of that which was retained (defendant's plot). Therefore, the instrument of severance had to be inspected by an intending prudent purchaser

81. *Id.*

82. *Ammirati*, 76 N.Y.S.2d at 379-80. In her complaint, Ammirati alleged:

. . . Upon information and belief, that all of the deeds and instruments of the grantors and mortgagors in the chain of title to defendant Wire Forms Inc.'s premises, in violation of the covenants and declarations of the previous grantor and common owner in its chain of title, to wit: Rebecca Dasheff, neglected and failed to recite said easement, as so created and established . . .

Record on Appeal at 13-14, *Ammirati*.

Wire Forms, Inc., in its answer, "admit[ted] that all of the deeds and instruments of the grantors and mortgagors in defendant's chain of title failed to recite said alleged easement."

Record on Appeal at 18, *Ammirati*.

At trial, the parties in *Ammirati* specifically stipulated:

It is further stipulated and agreed that by mesne conveyances the premises above described, as sold to the L.R.S. Building Corp. by Rebecca Dasheff, eventually became the property of the plaintiff in this action. That the parcel which was retained by said common owner . . . [was] foreclosed and eventually through mesne conveyances became the property of the defendant, the Wire Forms, Inc., who is now the holder and owner thereof. . . [and] [i]t is stipulated, agreed, and consented to that as to the parcel which was retained by Rebecca Dasheff, the common owner, which was mortgaged and then foreclosed and which parcel eventually became the defendant's parcel from the mesne conveyances, that none of the instruments as well as the mortgage in that chain of title contained the recitation of the easement . . .

Record on Appeal at 25-26, *Ammirati*.

83. "[Since] [t]here is no claim of actual notice. . . [i]n the absence of exceptional circumstances. . . New York should follow the general well-settled principle that a purchaser takes notice from the record only of encumbrances in his direct chain of title." *Ammirati*, 76 N.Y.S.2d at 380-81 (quoting *Buffalo Academy*, 267 N.Y. at 251, 196 N.E. at 45).

and that same deed contained the easement declaration. The defendant therefore had notice . . .<sup>84</sup>

In accepting this argument, the Appellate Division reversed, denied Wire Forms motion for dismissal, and granted judgment for Ammirati.<sup>85</sup> The Appellate Division held that "an examination of the title of defendant Wire Forms, Inc. [the servient parcel] would have disclosed" the existence of the easement.<sup>86</sup> The Appellate Division further held that the deed to Ammirati's predecessor must be regarded as constructive notice of the easement to defendant Wire Forms, Inc.<sup>87</sup>

Indeed, in her successful brief to the Court of Appeals, Ammirati observed that Wire Forms mistakenly believed the issue to be whether the defendant (Wire Forms) could be bound by a deed outside its chain of title, when the issue actually was what was meant by the term "chain of title":

Various statements appear throughout the defendant's brief that there is no reference to the easement in the instruments in the chain of title of the defendant Wire Forms, Inc., and that such is undisputed. On the contrary, the basic question in this case is the determination of the defendant's title.<sup>88</sup>

Thus, in *Ammirati* the recorded deed of severance by the common grantor of a dominant estate creating an easement across adjacent retained and previously undivided lands was determined to be a part of the chain of title of the servient as well as the dominant estate. Therefore:

[A]n examination of the title of defendant Wire Forms, Inc., would have disclosed, in the deed of Rebecca Dashell [the common gran-

84. Brief of Appellant in Appellate Division at 8, *Ammirati v. Wire Forms Inc.*, 273 A.D. 1010, 844 N.Y.S.2d 844 (2d Dep't 1948).

85. *Ammirati*, 273 A.D. at 1010, 78 N.Y.S.2d at 845.

86. *Id.*

87. *Id.*

88. Brief of Respondent in Court of Appeals, at 8-9, *Ammirati v. Wire Forms, Inc.*, 298 N.Y. 697, 82 N.E. 789 (1948). Ammirati's successful brief went on to state:

[T]he Appellate Division decided when it reversed the trial court, that though the Rebecca Dasheff [common grantor] deed to the L.R.S. Building Corporation [plaintiff's predecessor] admittedly is a part of plaintiff's chain of title, nevertheless, because of the history of defendant's title, said deed necessarily [also] forms a part of the decedent's chain of title and is an instrument which had to be examined by the defendant to properly determine the condition of its title.

Brief of Respondent in Court of Appeals, at 8-9, *Ammirati v. Wire Forms, Inc.*, 298 N.Y. 697, 82, N.E. 789 (1948).

tor] to L.R.S. Building Corporation [plaintiff's predecessor], the creation of the easement in question. The existence upon the record of this deed containing the easement must be regarded as constructive notice to defendant Wire Forms, Inc.<sup>89</sup>

### 1. Why *Ammirati* Controls *Witter*

An examination of the Record on Appeal and the trial court decision in *Ammirati* confirms that *Ammirati*'s applicability to the *Witter* facts. In the *Witter* case, as in *Ammirati* but in contrast to *Buffalo Academy*, there had been no subdivision into separate lots.<sup>90</sup> As in *Ammirati*, but in contrast to *Buffalo Academy*, the deed to *Witter*'s predecessor was itself the "instrument of severance" separating the plaintiff's (*Witter*'s) land from the remaining lands which adjoined it.<sup>91</sup> These points of distinction from *Buffalo Academy* are the very ones urged by counsel for the plaintiff in *Ammirati*<sup>92</sup> and accepted by the Appellate Division, Second Department.

### 2. How the New York Court of Appeals Distinguished *Ammirati*

The New York Court of Appeals in *Witter* attempted to harmonize *Ammirati* with *Buffalo Academy*, and to distinguish *Ammirati* from *Witter* by asserting:

*Ammirati* . . . is readily harmonized with *Buffalo Academy*'s 'exceptional circumstances' qualifying clause. . . Our affirmance only of the result reached in *Ammirati* . . . did not alter the general principles articulated in *Buffalo Academy* and is readily supportable in view of the sui generis features in *Ammirati* . . . i.e., a landlocked dominant parcel with an affirmative easement by necessity. The circumstances constituting the 'necessity' ordinarily also constitute inquiry notice of the easement, which limits the common

89. *Ammirati*, 273 A.D. at 1010, 78 N.Y.S.2d at 845.

90. Compare *Witter v. Taggart*, 78 N.Y.2d 234, 577 N.E. 2d 338, 573 N.Y.S.2d 146 (1991) [and] *Ammirati v. Wire Forms, Inc.*, 76 N.Y.S.2d 379 (N.Y. Sup. Ct. 1947), *rev'd*, 273 A.D. 1010, 78 N.Y.S.2d 844 (2d Dep't 1948), *aff'd w/o opinion*, 298 N.Y. 697 (1948) with *Buffalo Academy of the Sacred Heart v. Boehm Bros.* 267 N.Y. 242, 196 N.E. 42 (1935).

91. Compare *Ammirati v. Wire Forms, Inc.*, 76 N.Y.S.2d 379 (N.Y. Sup. Ct. 1947), *rev'd*, 273 A.D. 1010, 78 N.Y.S.2d 844 (2d Dep't 1948), *aff'd w/o opinion*, 298 N.Y. 697 (1948) with *Buffalo Academy of the Sacred Heart v. Boehm Bros.* 267 N.Y. 242, 196 N.E. 42 (1935).

92. See Brief of Appellant in Appellate Division at 11-13, *Ammirati v. Wire Forms, Inc.*, 273 A.D. 1010, 78 N.Y.S.2d 844 (2d Dep't 1948); Brief of Respondent in Court of Appeals at 12-15, *Ammirati v. Wire Forms, Inc.*, 298 N.Y. 697 (1948).

grantor servient owner's ability to extinguish the easement. In this case, the Taggarts did not have inquiry notice of a covenant in the deed to Witter's fully accessible parcel located *across* the canal.<sup>93</sup> In fact, the Court of Appeals was wrong on all counts. The dominant parcel in *Ammirati* was *not* landlocked — it was denominated "73 Montauk Avenue," and fronted on that Brooklyn street. The easement was merely intended to provide more convenient access to the *rear* of the street-front lot.<sup>94</sup> Thus, in *Ammirati*, there was no "necessity" for the easement.<sup>95</sup> Indeed, in the 22 years prior to the *Ammirati* trial, not only had the structure to which the easement was intended to provide access never been erected, but the easement owner had affirmatively blocked the easement by regrading her land and erecting an obstructing fence.<sup>96</sup> Finally, the *Witter* court noted that circumstances amounting to necessity will ordinarily constitute inquiry notice of the easement. Accordingly, the absence of those circumstances in *Ammirati* negated any inquiry notice. Even the original trial court held that "[t]here is no claim of actual notice and the physical appearance of the property would not indicate usage of the strip of land by the plaintiff."<sup>97</sup> While imaginative, the rationale given by the *Witter* Court for refusing to either follow *Ammirati* or straight forwardly overrule it, is wholly unsupported.<sup>98</sup>

For over forty years, the holdings of *Ammirati* and *Buffalo Academy* existed without clashing. These cases finally collided in *Witter*.<sup>99</sup> Though decided over a decade after *Buffalo Academy*,<sup>100</sup>

93. *Witter*, 78 N.Y.2d at 240-41, 577 N.E.2d at 341-42, 573 N.Y.S.2d at 149-50.

94. *Ammirati*, 76 N.Y.S.2d at 380.

95. As that term necessity had previously been understood under New York law; see *infra* notes 171-173 and accompanying text.

96. Record on Appeal at 79, *Ammirati*; *Ammirati*, 76 N.Y.S.2d at 380.

97. *Ammirati*, 76 N.Y.S.2d at 380.

98. In support of its restrictive interpretation of *Ammirati*, the Court of Appeals cited 3 Powell, *The Law of Real Property* (rev. ed. 1991) (78 N.Y.2d at 237, 239, 573 N.Y.S.2d 148, 149). In fact, Powell reads *Ammirati* in a manner at odds with the *Witter* court's revisionist recreation of that case:

Some jurisdictions, such as New York, do not charge subsequent purchasers with notice of covenants and restrictions found in deeds to other properties coming out of the common grantor. *But see Ammirati v. Wire Forms, Inc.*, 273 A.D. 1010, 78 N.Y.S.2d 844 (2d Dep't), *aff'd w/o opinion*, 298 N.Y. 697, 82 N.E.2d 789 (1948), for an indication that this rule may not be applied with respect to easements over the land retained by the grantor which appeared in the recorded deed of the land conveyed. A purchaser of the land retained may be required to read other deeds out of the common grantor, which are not in the direct chain of title, to ascertain whether these deeds contain any easements over the land retained.

3 POWELL, *THE LAW OF REAL PROPERTY*, ¶424, at 34-271, note 11 (1991).

99. *Witter*, 78 573 N.Y.S.2d at 149-150, 577 N.E.2d at 341-42 N.Y.2d at 240-41.

100. *Compare Ammirati v. Wire Forms, Inc.*, 76 N.Y.S.2d 379 (N.Y. Sup. Ct. 1947),



the sensible approach to the "chain of title" issue discussed in *Ammirati* was disregarded by the Court of Appeals in *Witter*.<sup>101</sup>

It has been previously noted that the "chain of title" concept is highly abstract and has led to many problems.<sup>102</sup> This thesis is important when analyzing *Ammirati*. *Ammirati* recognized that grants from common plots of land may be within each other's "chain of title".<sup>103</sup>

#### IV. VARYING NOTIONS OF "CHAIN OF TITLE"

The principle enunciated in *Ammirati* was, until *Witter*, consistently applied in this state and elsewhere. In *Long Building, Inc. v. Brookmill Corp.*,<sup>104</sup> the Record on Appeal reveals that the servient and dominant estates had previously been held by a single owner as part of an "entire tract."<sup>105</sup> One parcel was conveyed to Elnora Realty Corp. by way of a deed which created an easement across the retained adjacent land.<sup>106</sup> The dominant parcel was later conveyed by Elnora to the defendant Brookmill Corp.<sup>107</sup> The retained land was conveyed to Long Building, Inc., with no mention of the easement.<sup>108</sup> As owner of the servient parcel, Long Building, Inc., brought an action to extinguish the easement. The Appellate Division, in refusing plaintiff's request, cited *Ammirati* and held that "[t]he recording of the deed which created the easement of a right of way over the grantor's remaining adjacent land constituted constructive notice to plaintiff when it later took title to the servient parcel from the same grantor."<sup>109</sup>

The Appellate Division, First Department in *Holt v. Fleischmann*,<sup>110</sup> while enforcing an easement of light and air over the defendant's premises, held:

In examining the title it was to be found that in 1866 Ann Bushnell, the owner of the whole tract, conveyed a portion of it, retain-

*rev'd*, 273 A.D. 1010, N.Y.S.2d 844 (2d Dep't 1948), *aff'd w/o opinion*, 298 N.Y. 697 (1948) with Buffalo Academy of the Sacred Heart v. Boehm Bros. 267 N.Y. 242 (1935).

101. *Witter*, 78 N.Y.2d at 240-41, 577 N.E.2d at 341-42, 573 N.Y.S.2d at 149-150.

102. See *supra* notes 47-52 and accompanying text.

103. See *Ammirati*, 273 A.D. at 1010, 78 N.Y.S.2d at 845.

104. 276 A.D. 1987, 95 N.Y.S.2d 841 (2d Dep't 1950).

105. Record on Appeal at 11-13, *Long Building*.

106. *Id.* at 18-19.

107. *Id.*

108. *Id.* at 22-23.

109. 276 A.D. at 1087, 95 N.Y.S.2d at 842 (citing *Ammirati*, 273 A.D. at 1010, 78 N.Y.S.2d at 844, *aff'd*, 298 N.Y. 697, 82 N.E.2d 789.)

110. 75 A.D. 593, 78 N.Y.S. 647 (1st Dep't 1902).

ing another portion for herself. Her deed to Holt was recorded and contained the covenant which restricted the portion of land retained by her. Thus there was placed on record *a deed which separated her ownership of the whole tract*, and which deed, had it been inspected, would have at once disclosed the fact that the premises retained by Ann Bushnell were burdened with the easement in favor of her grantee.<sup>111</sup>

The *Ammirati* doctrine or an even broader pro-notice rule is generally the rule in other states:

It is ordinarily held that if a deed or a contract for the conveyance of one parcel of land with a covenant or easement affecting another parcel of land owned by the same grantor is duly recorded, the record is constructive notice to a subsequent purchaser of the other parcel.<sup>112</sup>

111. *Holt*, 75 A.D. at 599-600, 78 N.Y.S. at 651 (emphasis added). *Holt* was expressly distinguished by the Court of Appeals in *Buffalo Academy*, albeit for reasons different from those later found applicable in *Ammirati*. In *Holt*, the restriction sought to be enforced was a front line for adjacent houses. The court in *Buffalo Academy* stated:

Any one building in a residential section who projects his house farther into the street line than the adjacent house might be said to be put on notice as to whether he is restricted from so doing, either by a general plan of building or by some right or easement which his adjacent neighbor may have acquired.

*Buffalo Academy*, 267 N.Y. at 251, 196 N.E. at 45; See, e.g., *Simmons v. Crisfield*, 197 N.Y. 365, 90 N.E. 956 (1910) (an executor transferred land owned by the decedent's estate pursuant to a deed creating an easement over adjoining lands, and then sold the adjoining lands by a deed containing no mention of the easement, but the purchaser of the servient parcel was nonetheless bound); *Spencer v. Lighthouse*, 114 A.D. 591, 143 N.Y.S. 1118 (3d Dep't 1914). In *Whistler*, the trial term Justice (in an opinion adopted by the Appellate Division) held:

It is true that the covenant does not appear directly in the chain of title of the defendant's lot . . . . Reasonable prudence would require of the defendant, when about to purchase this lot, to examine the conveyances made by his grantor, Elizabeth P. Ladow, during the time she owned the lot which she was about to convey to him, to determine whether or not there had been any conveyances by her of the lot, or any part thereof, she was about to convey to him. *An examination of the record would have disclosed that, in April of the same year, his vendor had conveyed to these plaintiffs the adjoining lot and in the conveyance of said adjoining lot is the covenant in question . . .* I conclude, therefore, that the defendant was chargeable with notice of this covenant and is bound by its terms; that the covenant was intended as a restriction upon the adjoining lot for the benefit of this property and for enhancing its value; and that, from a violation of this covenant, the defendant may be enjoined.

*Whistler*, 81 Misc. at 521-22 (emphasis added).

112. 66 Am. Jur. 2d, *Records and Recording Laws* §120 (footnote omitted) (1973). For example, "[s]uppose A, owning lots x and y, conveys lot x to B who records the deed containing a restriction on lot y for the benefit of x. Subsequently A conveys lot y to C, and the deed makes no reference to the restriction. By the majority rule, the record of the deed of lot x containing the restriction upon lot y gives constructive notice to a purchaser of lot y." Note, *Title Search in Virginia*, 26 VA. L. REV. 385, 391 (1940).

It has also been stated that:

The weight of authority is to the effect that if a deed or a contract for the conveyance of one parcel of land, with a covenant or easement affecting another parcel of land owned by the same grantor, is duly recorded, the record is constructive notice to a subsequent purchaser of the latter parcel.<sup>113</sup>

In the Vermont case of *Moore v Center*,<sup>114</sup> the plaintiffs instituted an action for injunctive relief to protect an easement in lands of the defendant.<sup>115</sup> The plaintiffs owned an island, and wished to have convenient access to it via a particular shoreline.<sup>116</sup> In order to facilitate this they obtained by recorded deed from the grantor, fee title to an access strip leading from a nearby highway to the lake's low water mark.<sup>117</sup> The recorded deed, which severed the access strip from other lands of the grantor, also granted to the plaintiffs an easement to park their automobile in an area adjoining the access strip.<sup>118</sup> The common grantor thereafter died, and his widow conveyed the remaining portion of his lands to the defendant.<sup>119</sup> The defendant erected a garage, driveway and retaining wall on the site of the parking easement, and prohibited the plaintiffs from further parking their automobile on his lands and premises.<sup>120</sup>

The lower court concluded that the defendant had no actual or constructive notice of the plaintiffs' easement, and consequently dismissed the plaintiffs' complaint.<sup>121</sup> The Supreme Court of Vermont reversed, holding:

[The defendant] contends the plaintiffs' easement was extinguished since he purchased the property in 1950 without notice. He argues that the plaintiffs' grant concerns other lands of the common grantors which are outside his chain of title, and the recording of the deed of July 13, 1949 is not constructive notice of the easement created in that instrument. Th[is] argument is unsound. It is based on the erroneous notion that since the title to the fee of the domi-

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113. Annotation, *Record of Deed or Contract for Conveyance of One Parcel with Covenant or Easement Affecting Another Parcel Owned by Grantor as Constructive Notice to Subsequent Purchaser or Encumbrancer of Latter Parcel*, 16 A.L.R. 1013 (1922).

114. 204 A.2d 164 (1964).

115. *Id.* at 165.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 166.

120. *Id.*

121. *Moore*, 204 A.2d at 166.

nant estate is not a part of the defendant's tract, the easement created in favor of that estate is outside the defendant's line.<sup>122</sup>

In the North Carolina case of *Reed v. Elmore*,<sup>123</sup> the common grantor owned a tract of land containing 154 acres.<sup>124</sup> She deeded one portion to the plaintiff.<sup>125</sup> The deed contained a covenant prohibiting the erection of any building on a certain portion of both the land deeded to the plaintiff, and the land retained by the grantor.<sup>126</sup> The grantor subsequently deeded the land covered by the restriction to a purchaser.<sup>127</sup> The deed to the purchaser contained no restrictions and made no reference to the common grantor's deed to the plaintiff.<sup>128</sup> The purchaser thereafter conveyed the servient premises and by mesne conveyances it came into the hands of defendants.<sup>129</sup> None of the mesne conveyances contained any restriction or made any reference to the deed to plaintiff.<sup>130</sup> The defendants then caused the property acquired by them, including the portion lying within the restricted area, to be divided into residential building lots.<sup>131</sup> The plaintiff commenced an action for declaratory and injunctive relief.<sup>132</sup> The Supreme Court of North Carolina, affirming the trial and intermediate appellate courts, sustained a judgment in favor of plaintiff.<sup>133</sup>

122. *Moore*, 204 A.2d at 167.

123. 98 S.E.2d 360 (1957).

124. *Id.* at 361.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* The term "mesne conveyances" refers to "intermediate conveyance[s]. . . one[s] that occupy . . . an intermediate position in a chain of title between the first grantee and the present holder." BLACK'S LAW DICTIONARY 333 (6th ed. 1990).

130. *Id.* at 361.

131. *Id.*

132. *Id.*

133. *Id.* at 368. The court's reasoning was elaborated on in a concurring opinion which held:

A, the owner of a certain land, be it a 200-foot lot or a 10-acre tract, decides to sell a portion thereof, *e.g.*, one-half to B. A's deed to B sets forth explicitly their agreement, *to wit*, the imposition of identical restrictive covenants on the portion thereof conveyed to B and on the portion thereof retained by A. The restrictive covenants do not purport to affect any land other than said 200-foot lot of 10-acre tract. Only A and B, and their respective heirs and assigns, are bound by said mutual restrictive covenants. The deed from A to B is duly recorded. Hence, a subsequent purchaser from A of the portion of said lot or tract retained by A is charged with notice that A has imposed upon it said restrictive covenants.

*Id.* (Bobbitt, J. concurring).

In *Stegall v. Robinson*,<sup>134</sup> North Carolina's intermediate appellate court in explaining the *Reed* rule, held that:

Simply stated *Reed* stands for the rule that in title examination when checking the grantor's out conveyances it is not enough to merely ensure that the subject property was not conveyed out previously. The title examiner must *read* the prior conveyances to determine that they do not contain restrictions applicable to the use of the subject property.<sup>135</sup>

In the Virginia case of *Corbett v. Ruben*,<sup>136</sup> the owners of one parcel (parcel No. 1) granted the owner of another parcel (parcel No. 2) an easement for the off-street parking of seven automobiles on parcel No. 1, for the use and benefit of the owner and occupants of apartments located on parcel No. 2.<sup>137</sup> In an action brought by a successor owner of parcel No. 1 to "clear title," the Supreme Court of Virginia held, "the title Corbett [*i.e.*, the owner of parcel No. 1] acquired was burdened by the easement, an encumbrance he accepted with constructive, if not actual, notice."<sup>138</sup>

In *Pusey v. Clayton*,<sup>139</sup> the plaintiff received from a common grantor a deed to property which severed the demised property from adjoining retained land of the grantor, and which created an easement over the retained servient parcel.<sup>140</sup> The retained servient parcel was subsequently conveyed by instrument which made no mention of the easement, and the property was then re-conveyed to

The concurrence further recommended that flexible, and fact-specific approach to this issue:

In one sense, when A conveys the retained portion of said lot or tract to a subsequent purchaser, A's deed to B is not in such purchaser's chain of title, that is, A's deed to B is not the source of or a link in such purchaser's title. But in another sense, A's deed to B is in the purchaser's chain of title, that is, such subsequent purchaser is charged with notice of such recorded deed in like manner as he would be charged with notice of a recorded deed of trust, judgment or other record lien imposed during the period of A's ownership. Thus, such purchaser's title, while it does not pass under A's deed to B, is limited by the terms of A's deed to B whereby the restrictive covenants are imposed. The sense in which the expression 'chain of title' is used in decided cases must be considered in the light of the facts of each case and in relation to the context in which it is used.

*Id.* at 368 (Bobbitt, J. concurring).

134. 344 S.E.2d 803 (N.C. Ct. of App.), *appeal denied*, 347 S.E.2d 456 (1986).

135. *Id.* at 805. This opinion noted that the *Reed* holding is highly controversial. *Id.* at 805-06. It also noted that while there have been attempts to draft legislation that would overrule *Reed*, such proposed legislation has not been enacted and recognized that *Reed* still controlled. *Id.*

136. 290 S.E.2d 847 (1982).

137. *Id.* at 848.

138. *Id.* at 850.

139. 1986 WL 2636 (Del. Ch. 1986).

140. *Id.*

the defendant by a deed which also did not mention the easement.<sup>141</sup> The Court of Chancery of Delaware held that the defendant nevertheless had constructive notice of the easement:

[T]he uncontroverted facts and circumstances present here [show] that Clayton is bound by the grant of the easement because it was granted by his predecessor-grantor after that grantor acquired title and before the conveyance to the predecessor of Clayton. That is one of the purposes for a search of the Grantor Indices in a title search and it is not unreasonable under the facts present here to impose on Clayton the duty to have examined the conveyance from Dolan [*i.e.*, the common grantor] to Pappas [*i.e.*, the plaintiff] to see if it affected his title.<sup>142</sup>

#### V. ANALYZING *WITTER* IN LIGHT OF "PRACTICAL EXIGENCIES" OF SEARCHING TITLE

Thus, as detailed above, the various states have defined differently the necessary scope of a title examination, from North Carolina which requires that all deeds out from a common grantor be read in full,<sup>143</sup> to New York, which, after *Witter*, holds that such deeds may be wholly ignored.<sup>144</sup> *Ammirati* articulated a middle ground based upon the contiguity of the premises involved and the fact of the easement's having been contained in a deed of severance. The *Buffalo Academy* rule "represented a pragmatic judicial response to the exigencies of conducting a title search" under a grantor-grantee title indexing system.<sup>145</sup> An examination of those exigencies reveals that the balance struck by *Ammirati* between the purpose of the recording system to protect existing recorded interests, and the countervailing desire by the courts to relieve title searchers of onerous requirements, was a wise one.

A title searcher in Suffolk County, New York is required to examine every deed "out" from grantors in a prospective purchaser's chain of title during the period within which that grantor held title to the premises subject to the search.<sup>146</sup> Thus, if the Taggarts' title searcher had done a proper job, the deed creating the *Witter* easement must have been discovered at some point during that search.

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141. *Id.*

142. *Id.* (citations omitted).

143. *See supra* notes 123-142 and accompanying text.

144. *Id.*

145. *Andy Assocs., Inc. v. Bankers Trust Co.*, 49 N.Y.2d 13, 24 (1979).

146. *See* N.Y. REAL PROP. LAW § 291 (McKinney 1989); *infra* note 149 and accompanying text.

The only policy issue properly before the *Witter* court was what level of scrutiny must be given to each of the deeds a title searcher obtains and examines and having taken the deed creating the *Witter* easement into his hands, whether the title searcher was bound to read and review the easement language.

### A. Policy Behind Recording Acts

In *Jackson v. Post*,<sup>147</sup> it was held that "[t]he object of the recording acts is to prevent frauds — to prevent the person having title to land from selling it more than once, and thereby defrauding one or more of the purchasers."<sup>148</sup> In Suffolk County, New York, a title searcher therefore must physically review all deeds out by the grantor of the premises during the period said grantor held title to those premises. This is because the Suffolk County grantor-grantee indexes have historically contained, for each transaction listed, only the names of the grantor and the grantee, the liber and page at which the actual deed resides, and the date of the transaction. No other identification or description of the property has been provided.<sup>149</sup>

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147. 15 Wend. 588 (N.Y. Sup. Ct. 1836).

148. *Id.* at 594.

149. The Suffolk County Administrative Code has since 1979 called for the endorsement of block and lot numbers upon instruments presented for filing. Suffolk County Administrative Code § A18-3. Those numbers are reflected in the grantor-grantee index of those instruments as well. *Id.* However, the deed containing the *Witter* easement was made and recorded in 1951. At present § 316-a of the New York Real Property Law provides that all real estate transactions must be recorded:

Every instrument affecting real estate or chattels real, situated in the county of Suffolk, which shall be, or which shall have been recorded in the office of the clerk of said county on and after the first day of January, nineteen hundred fifty-one, shall be recorded and indexed pursuant to the provisions of this act.

N.Y. REAL. PROP. LAW § 316-a(1) (McKinney 1989).

Moreover, this section provides that the official records are the grantor-grantee lists: For the purposes of indexing under the provisions of this act all conveyances, mortgages, or other instruments recorded and indexed or reindexed under the provisions of this act shall be so indexed or reindexed under the proper town book of index indicated in the description hereinbefore provided for, and in an order and sequence known as the 'first letter of the last name and first letter of the first name method'. The corporate names shall be indexed under the first letter of the first substantive word of the name of the corporation, or in the event of a corporation using the proper name of an individual, such as John Smith, Inc., such index shall be under Smith, John, Inc., as well as John Smith, Inc.

N.Y. REAL. PROP. LAW § 316-a(7) (McKinney 1989).

Title searchers in Suffolk County thus still search the official grantor-grantee records, and use the unofficial tax map designations as a "back-up" only. Since no tax map designations were required until 1979, they are not available for searches that proceed farther back than 1979.

Thus, if a grantor took title to subject premises in 1950, and conveyed the premises in 1957, a title searcher would have to examine each conveyance in which the grantor is listed as "grantor" between 1950 and 1957 in order to ensure that the grantor had not conveyed to another, whose title would have priority, an interest in the identical premises.

In addressing this issue, it is essential to note that the number of deeds out from a grantor which the title searcher must review is limited, thereby ameliorating the burden on the title searcher since the Suffolk county grantor-grantee indexes are not county-wide in scope but are, rather, organized by township.<sup>150</sup> One searching title for property (such as the Taggarts') in the Town of Islip thus need not (unless the property straddles a town line) search for any deeds "out" from the grantor in the books of record for any other township.

In order to make the determination that an interest in the property whose title is being examined has not been "sold twice," the title searcher must review the metes and bounds description of the premises in each of the grantor's conveyances listed in the particular township's index during the period.<sup>151</sup> This search ensures that all or a part of the premises sought to be purchased by the prospective purchaser were not included in such a conveyance.<sup>152</sup> *Ammirati*, until *Witter*, had stood for the proposition that a title searcher is put on notice if after a review of the metes and bounds description in one of grantor's "deeds out" it is revealed that the deed out severed adjacent property from a larger freehold of which the premises whose title the searcher is examining former another part.<sup>153</sup> Accordingly, the title searcher, perceiving a "title link" between the two premises had to go further and review the contents of the entire deed.<sup>154</sup>

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150. See N.Y. REAL PROP. LAW §316-a(2) (McKinney 1989).

151. The metes and bounds description of a piece of real estate refers to the "boundary lines of land, with their terminal points and angles." BLACK'S LAW DICTIONARY 991 (6th ed. 1990). This term is used as "[a] way of describing land by listing the compass directions and distances by listing the compass directions and distances of the boundaries." *Id.*

152. *Id.*

153. Compare *Ammirati*, 273 A.D. at 1010, 78 N.Y.S.2d at 845 ("[t]he existence upon the record of this deed containing the easement must be regarded as constructive notice to defendant Wire Forms, Inc.") with *Witter*, 78 N.Y.2d at 241, 577 N.E.2d at 342, 573 N.Y.S.2d at 150 ("to the extent that the Appellate Division Memorandum in *Ammirati* may be read inconsistently with *Buffalo Academy*. . . we add that it [*Ammirati*] should not be followed")(emphasis in original).

154. This would only be done in those cases in which a "title link" was perceived. Ordinarily, a title searcher was not required to go beyond the metes and bounds description in



*Ammirati*, therefore, neither imposed upon the title searcher the obligation to actually read the entire deed out from grantors in the chain of title, nor did it unnecessarily exalt the convenience of the title searcher above protected property interests. Rather, it protected the legitimate, properly recorded interests which adjoining landowners may have obtained from a common grantor rather than sacrificing those interests in order to minimally reduce the extent of the search a title searcher must perform. In effect, it drew a middle line between the North Carolina rule of *Reed*<sup>155</sup> and the now-adopted *Witter*<sup>156</sup> rule.

If the Taggarts' title company, neglecting to perceive or guide their title search by the previously established *Ammirati* rule, failed to uncover the Witter easement, presumably "[t]he loss [if any] should fall where it belongs—on a negligent title company.<sup>157</sup> New York courts would thus not be put in the position of perpetrating an injustice and then lamenting, as did the trial court in *Ammirati*: "[w]hat action an owner of a dominant estate should take to protect his easement where similar facts exist I do not know."<sup>158</sup> A restrictive list of recordable instruments is unjust "[i]f the recording system has a purpose to protect existing positions as well as the positions those who claim to be innocent purchasers think they achieve . . . ."<sup>159</sup> Yet, this is the precise effect of *Witter*: easements contained in deeds of severance have been rendered effectively "unrecordable" (since their recording has been held not to operate so as to give constructive notice to a purchaser of the servient estate) and thus illusory. Such a result is inconsistent with the Recording Act's purpose "to protect existing positions."<sup>160</sup>

scrutinizing a deed out from a common grantor.

155. See *supra* notes 123-142 and accompanying text.

156. See *supra* notes 28-29 and accompanying text.

157. *Goldstein v. Gold*, 106 A.D.2d 100, 100, 483 N.Y.S.2d 375, 377 (2d Dep't 1984). The Taggarts' title company, in fact, never claimed not to have reviewed the language of the Witter easement! The Taggarts' title company claimed only that the Witter easement was covered by an "exception" to the Taggarts' title policy. Record on Appeal at 262 N.1, *Witter*.

158. *Ammirati*, 76 N.Y.S.2d at 380-81; see, e.g., Cross, *Weaknesses of the Present Recording System*, 47 IOWA L. REV. 245 (1962) (describing the problems that will occur from relegating recorded conveyances to an "unrecorded" status merely because they are considered to be out of a rigid definition of "chain of title") [*hereinafter* IOWA].

159. IOWA *supra* note 158 at 250.

160. *Id.*; see also *Fryer v. Rockefeller*, 63 N.Y. 268, 274 (1875) ("The benefit of the recording of a deed is, that it thus becomes a defense against a subsequent purchaser bona fide."); *Foss v. Riordan*, 84 N.Y.S.2d 224, 233 (N.Y. Sup. Ct. 1947), *aff'd*, 273 A.D. 982 (2d Dep't 1948), *appeal dismissed*, 298 N.Y. 509 (1948) ("The recording of [an] instrument [is] constructive notice to the world of the contents thereof").

In *Witter*, the Court of Appeal's misunderstanding of *Ammirati* may in part be the brevity of the language of the *Ammirati* opinion itself. The specific facts of the dispute in *Ammirati* were only explicitly detailed in the original lower court decision.<sup>161</sup> The Appellate Division, Second Department reversed that decision,<sup>162</sup> and specifically limited *Buffalo Academy* to its facts.<sup>163</sup> Taken in the context of the lower court decision and the briefs on appeal,<sup>164</sup> the *Ammirati* holding seems clear. However, the Appellate Division, Second Department's decision did not systematically address all of these issues.<sup>165</sup> Instead, it held only that "[f]indings of fact and conclusions of law inconsistent herewith are reversed and new findings and conclusions will be made."<sup>166</sup>

## VI. PROCEDURAL ISSUES

*Ammirati's* true holding may have misunderstood because the New York Court of Appeals in *Ammirati*, although affirming the decision of the Appellate Division, Second Department,<sup>167</sup> did so without issuing an opinion.<sup>168</sup> In New York, affirmance without opinion by the Court of Appeals is a procedural loophole that in effect leaves open the question of just what was actually affirmed.<sup>169</sup> Thus, although a review of the record leaves no doubt as to the import of *Ammirati*, the opinion's procedural posture left the *Ammirati* holding ripe for the extensive revisionism that occurred in the *Witter* opinion.<sup>170</sup> The Court of Appeals seemingly had carte blanche to decide *Witter* based on any issue it saw fit to discuss.

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161. *Ammirati*, 76 N.Y.S.2d at 379-80.

162. *Ammirati*, 273 A.D.2d at 1010, 78 N.Y.S.2d at 845.

163. "The case of *Buffalo Acad[emy]*. . . is inapplicable. . . [i]t deals only with a covenant imposing building restrictions upon the use to which property may be put. . . [s]uch restrictions are not analogous to an easement. . . [t]hat case, therefore, must be confined to its own facts." *Ammirati*, 273 A.D.2d at 1010, 78 N.Y.S.2d at 845.

164. See *supra* pp. 175-78.

165. Compare Brief on Appeal at *Ammirati* with *Ammirati*, 273 A.D.2d at 1010, 78 N.Y.S.2d at 845.

166. *Ammirati*, 273 A.D.2d at 1010, 78 N.Y.S.2d at 845.

167. *Ammirati*, 298 N.Y. at 698.

168. *Id.*

169. *Palmer v. Travis*, 223 N.Y. 150, 156, 119 N.E. 437 (1918).

170. *Witter*, 78 N.Y.2d at 240-241, 573 N.Y.S.2d at 149-150, 577 N.E.2d at 341-2. Possibly, *Ammirati* had no opinion in order to save time on paperwork for the Court. See N.Y. Civ. Prac. L. & R. § 5522 (1992)(commentary at §5522:3). While conserving Court resources is a lofty goal, correctly construing precedent should take priority. Of what value are precedents whose true meaning can be obliterated merely because of vague language and the passage of time?

## VII. EASEMENT BY NECESSITY

While the Witters fought for what they considered to be a scenic easement,<sup>171</sup> the Court of Appeals, seemed to treat their claim as one that sought to protect an "easement by necessity".<sup>172</sup> This rationale has unduly expanded the concept of "easement by necessity." "Necessity" has historically been viewed in New York as one element required for the implication of an easement. In order to establish an "easement by necessity":

[P]laintiffs must prove: (1) that the properties that presently are in separate ownership must formerly have been in undivided ownership; (2) that prior to the separation of title, the use giving rise to the claimed easement 'shall have been so long continued and so obvious and manifest as to show that it was meant to be permanent'; (3) the use must be plainly and physically apparent on reasonable inspection; and (4) that the easement is necessary to the beneficial enjoyment of the land granted or retained.<sup>173</sup>

Some courts have recognized the existence of an easement by necessity even in the absence of those two middle elements, but this has classically been done only in the case of a "landlocked" parcel. As held by the appellate division in *Carlo v. Lushia*:<sup>174</sup>

A way of necessity arises where there is a conveyance of a part of a tract of land of such nature and extent that either the part conveyed or the part retained is "landlocked"; that is, it is entirely surrounded by the land from which it is severed, or by this land and the land of strangers.<sup>175</sup>

Implied easements are not favored by the law and the burden of proof rests with defendant to prove such entitlement by clear and convincing evidence.<sup>176</sup> The person seeking to establish the existence

171. *Witter*, 78 N.Y.2d at 236, 577 N.E.2d at 339, 573 N.Y.S.2d at 146.

172. "Our affirmance of only the result reached in *Ammirati* . . . did not alter the general principles articulated in *Buffalo Academy* and is readily supportable in view of the *sui generis* features in *Ammirati*, i.e., a landlocked dominant parcel with an affirmative easement by necessity." *Witter*, 78 N.Y.2d at 240-41, 577 N.E.2d at 342, 573 N.Y.S.2d at 150, (citations omitted)(emphasis added).

173. 2 Warren's *Weed on the New York Law of Real Property*, §6.01, at 36-EASE (4th ed. rev. 1990)(citations omitted).

174. 144 A.D.2d 211, 534 N.Y.S.2d 525 (3d Dep't 1988).

175. *Carlo*, 144 A.D.2d at 211, 534 N.Y.S.2d at 525 (citing *Rasch*, *New York Law and Practice of Real Property* §750, at 466-67)(*construing* *Palmer v. Palmer*, 150 N.Y. 139, 146-47, 44 N.E. 966, 967 (1896)).

176. *Hedden v. Bohling*, 112 A.D.2d 23, 24, 490 N.Y.S.2d 391, 392 (4th Dep't 1985); see also, 2 Warren's *Weed New York Real Property* § 6.01 at 36.

of the easement must show that it is reasonably necessary for the beneficial enjoyment of the property, and not a "mere convenience."<sup>177</sup> Indeed, it has even recently been held that "[a]bsolute necessity is the standard for a finding of an easement by necessity."<sup>178</sup>

In *Ammirati*, it could at *best* be said that what was at issue was *garage* access, not access to the property as a whole or the dwelling thereon.<sup>179</sup> Moreover, the garage was never erected, and the property was altered by fencing and grading to render a garage use impossible. One commentator has stated that "an implied easement by necessity is extinguished when the necessity ceases."<sup>180</sup>

Finally, even if a garage had been built, the courts in New York, in construing whether "necessity" exists, have determined that alternative access, even if achievable only at great expense to the alleged dominant property owner, will obviate the requisite "necessity." Thus, for instance, in *Abbott v. Herring*,<sup>181</sup> the court rejected the creation of an easement by necessity to allow the plaintiff to utilize a driveway for vehicular access to her dwelling, notwithstanding that the terrain made the driveway over which she sought an easement the *only* means of vehicular access, since the plaintiff had the option of parking in a garage located on a different portion of her property and then proceeding to the dwelling via a footpath.<sup>182</sup> Similarly, in *Ammirati*, even if vehicular access to the rear of Mrs. Ammirati's property was theoretically possible only via the easement

177. *Hedden*, 112 A.D.2d at 24, 490 N.Y.S.2d at 392; see also *Abbott v. Herring*, 97 A.D.2d 870, 469 N.Y.S.2d 268 (3d Dep't 1983), *aff'd*, 62 N.Y.2d 1028, 479 N.Y.S.2d 498 (1984).

178. *Van Schaack v. Torsoe*, 161 A.D.2d 701, 703, 555 N.Y.S.2d 836, 837 (2d Dep't 1988) (refusing to find easement over neighbor's driveway where plaintiffs' lot fronted on a public road, and holding that the fact "[t]hat the construction of a driveway from the plaintiffs' residence out to this road may be costly or inconvenient is not relevant.") *Van Schaack*, 161 A.D.2d 701, 703, 555 N.Y.S.2d 836, 837.

179. *Cf. Fink v. Friedman*, 78 Misc. 2d 429, 432 (N.Y. Sup. Ct., 1974).

180. *Fischer v. Liebman*, 137 A.D.2d 485, 488 (2d Dep't 1988). Commentators have further stated that:

Strict attention to the uses of the claiming dominant parcel contemplated by the parties at the time of the severance of the original unity of ownership is not desirable. To the extent that easements by necessity rest on the 'operation of law' for the realization of the social objective of full land utilization, the easement by necessity must be flexibly adaptable to the well-known likelihood of changing property uses.

3 POWELL, *THE LAW OF REAL PROPERTY* ¶410, at 34-80, note 35 (rev. ed. 1991); See also, *Palmer v. Palmer*, 150 N.Y. 139 (1896).

181. 97 A.D.2d 870, 469 N.Y.S.2d 268 (3d Dep't 1983), *aff'd*, 62 N.Y.2d 1028, 479 N.Y.S.2d 498 (1984).

182. *Abbott*, 97 A.D.2d at 870, 469 N.Y.S.2d at 270.

driveway between the properties, Mrs. Ammirati had the option of parking on the street (in front of or near her home) and walking to 73 Montauk Avenue.<sup>183</sup>

In *Fink v. Friedman*,<sup>184</sup> the plaintiff's garage was situated in such a manner that it could not be entered other than by crossing over the defendant's driveway.<sup>185</sup> Rejecting the implication of an easement across defendant's driveway, the court held:

[T]here is a doctrine that a right of way may be formed if the use is strictly necessary, and without any alternative, for the proper enjoyment of the burdening parcel. The Finks do not pass the severe test, since, theoretically, their house could be moved a few feet south or east to provide garage access.<sup>186</sup>

In *Miller v. Edmore Homes Corp.*<sup>187</sup> the owners of a row of attached homes with garages at their rear and a common driveway leading from the garages to the main road, claimed that the driveway was too narrow to allow use of the garages unless its width was deemed expanded by the implication of a several foot easement by necessity across the lot just beyond the common driveway.<sup>188</sup> The Appellate Division, reversing the judgment of the trial court, refused to imply the existence of such an easement, holding:

The undisputed evidence established that, by relocation of the garages closer to the dwellings or by alteration of the garages in their present locations, ample space could be afforded between the garages and respondents' rear lot line to permit automobiles to be turned into and out of the garages, all within respondents' own lots. The fact that such relocation or alteration would entail monetary expenditure or result in diminution in value of respondents' properties is irrelevant.<sup>189</sup>

The *Witter* court, in effect has revised the *Ammirati* holding. In *Ammirati* no vehicular use of the rear yard had ever been made and no claim of "necessity" was ever advanced by either party.<sup>190</sup> The

183. See *Ammirati*, 76 N.Y.2d at 349.

184. 78 Misc. 2d 429, 358 N.Y.S.2d 250 (N.Y. Sup. Ct. 1974).

185. *Fink*, 78 Misc. 2d at 431, 358 N.Y.S.2d at 253.

186. *Id.* at 432, 358 N.Y.S.2d at 256 (citing *Heyman v. Biggs*, 223 N.Y. 118, 125-26, 119 N.E. 243, 245 (1918); *Matter of City of New York*, 250 A.D. 137, 293 N.Y.S. 107, 1019 (1937), *aff'd*, 274 N.Y. 503 (1937))."

187. 285 A.D. 837, 137 N.Y.S.2d 256 (2d Dep't 1955).

188. *Miller*, 285 A.D. at 837, 137 N.Y.S.2d at 325.

189. 285 A.D. at 838-39, 137 N.Y.S.2d at 327; see also *Van Schaack*, 161 A.D.2d at 703, 555 N.Y.S.2d at 838.

190. See *Witter*, 78 N.Y.2d at 240-41, 577 N.E.2d at 341-42, 573 N.Y.S.2d at 149-50.

Court of Appeals in *Witter* has drastically expanded the concept of "easement by necessity" by suggesting that even theoretical vehicular access to one's fenced-off rear yard garden is so crucial as to give rise to an easement by necessity over an adjoining driveway.<sup>191</sup> Indeed, although the Court of Appeals pays lip service in the *Witter* opinion to the adage that covenants restricting use will be strictly construed because "the law has long favored free and unencumbered use of real property,"<sup>192</sup> the court's expansion of the concept of easement by necessity flies directly in the face of that principle. To reach its desired result in *Witter*, the court had to extensively revise precedent. While the exact facts of *Witter* are unlikely to reoccur, the court has opened a Pandora's box with respect to cases likely to appear with relative frequency.

### A. *The Covenant-Easement Distinction*

A distinction between various categories of restriction based upon their legal characterization rather than the ability of a title searcher to locate them would appear illogical, since the rules regarding "chain of title" are based upon "the exigencies of conducting a title search" under a grantor-grantee title indexing system.<sup>193</sup> The *Witter* court in fact rejected such a distinction and overruled *Ammirati* to the extent it held to the contrary.<sup>194</sup> However, the *Witter* court also paradoxically appeared to rely on the distinction between an affirmative easement and a negative easement as a basis for distinguishing *Ammirati* (affirmative easement) and *Witter* (negative easement).<sup>195</sup> The court further asserted, ipse dixit, that the term "negative easement" is identical to and interchangeable with the term "restrictive covenant."<sup>196</sup>

All easements restrict the use to which the servient parcel may be put; an easement of ingress and egress, for instance, prevents the erection upon the servient parcel of any structure which might interfere with such use. Thus, the fact that in the *Witter* case the Taggarts' use of their property was "restricted" is not determinative of whether what is involved may be categorized as an "easement."

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191. *See id.*

192. *Id.* at 237, 577 N.E.2d at 340, 573 N.Y.S.2d at 148.

193. *Andy Assocs. Inc. v. Bankers Trust Co.*, 49 N.Y.2d 13, 23-24, 399 N.E. 1160 (1979), 424 N.Y.S.2d 139, 145.

194. *Witter*, 78 N.Y.2d at 241, 577 N.E.2d at 342, 573 N.Y.S.2d at 150.

195. *See id.*

196. *Id.* at 237, 577 N.E.2d 342, 573 N.Y.S.2d at 148.

Since easements classically involve adjoining pieces of land,<sup>197</sup> this provided the logical connection between *Ammirati's* limitation of the *Buffalo Academy* rule to encumbrances *other* than easements, and *Ammirati's* prime holding, that deeds of severance of adjoining properties form part of the chain of title of *both* the dominant and servient parcels.<sup>198</sup>

Easements also protect affirmative rights of the easement owner. The covenants in *Buffalo Academy* which the Appellate Division in *Ammirati* found were "not analogous to an easement,"<sup>199</sup> but were merely personal promises not to build or operate a gas station, made by the grantor to a third party grantee of premises geographically remote from those of the defendant.<sup>200</sup> The deed at issue in the *Witter* case, in contrast, involved two adjoining pieces of property and was expressly designed to protect *Witter's* affirmative right to an unobstructed view.<sup>201</sup> Such a right was previously classified as an easement by the court of appeals and all the other applicable authorities.<sup>202</sup>

Professors Bruce and Ely have observed that "[s]everal important legal ramifications flow from" the distinction between easements and restrictive covenants.<sup>203</sup> They state that what they refer to as

197. "An 'easement,' in the proper sense of the word, can only exist in respect of two adjoining pieces of land occupied by different persons, and can only impose a negative duty on the owner of the servient tenement." BLACK'S LAW DICTIONARY 510 (6th ed. 1990); see, e.g., WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 715 (1986)("[a] prescription that is held by one person in land owned by another and that entitles its holder to a specific limited use or enjoyment (as the right to cross the land or to have a view continue unobstructed over it.))"(emphasis added); *Town of Southampton v. Jessup*, 162 N.Y. 122, 126 (1900)(citing *Long Island R.R. v. Garvey*, 159 N.Y. 334, 338 (1899))("[a]n easement is permanent right conferred by grant or prescription, authorizing one landowner to do or maintain something on the adjoining land of another . . .").

198. Although not *directly* attributing any legal significance to the fact, the *Witter* court appeared to rest its distinction between the *Ammirati* and *Witter* cases in part on the issue of proximity. The *Witter* court first stated that *Ammirati* involved adjoining (emphasizing the word "adjoining") retained land. *Witter*, 76 N.Y.2d at 240, 577 N.E.2d at 342, 573 N.Y.S.2d at 149-150. Yet it subsequently observed that *Witter's* parcel was located across (emphasizing the word "across") a canal from the *Taggart's* property. *Witter*, 76 N.Y.2d at 241, 577 N.E.2d at 150, 573 N.Y.S.2d at 150. In fact, the *Witter* Record reveals that the retained servient parcel from which *Witter's* dominant parcel was severed adjoined *Witter's* parcel at "the center line of the canal." Record on Appeal, at 36, *Witter*.

199. 273 A.D. at 1010.

200. *Buffalo Academy*, 267 N.Y. at 247-48, 196 N.E. at 44.

201. Record on Appeal, at 29, *Witter*.

202. See, e.g., *Zipp v. Barker*, 40 A.D. 1, 6 (2d Dep't 1899), *aff'd*, 166 N.Y. 621, 59 N.E. 1133 (1901).

203. BRUCE AND ELY, THE LAW OF EASEMENTS AND LICENSES IN LAND ¶11.07 (1988).

"negative easements" usually concern light *and view*,<sup>204</sup> even while pointing out that the distinction between a "negative easement" and an "affirmative easement" is sometimes simply a matter of perspective:

An easement may contain both affirmative and negative features. Hence, language that the parties 'shall have the right jointly to use and enjoy said land' but that 'neither may erect any fence or structure . . . which will interfere with the light and air' has been found to include affirmative and negative aspects. It is affirmative in permitting enjoyment of the servient tenement. It is negative in prohibiting restriction of light and air.<sup>205</sup>

Similarly, an easement of unobstructed view is "negative" in prohibiting obstruction of the view, and "affirmative" in permitting enjoyment of the view by the easement owner.

Professors Bruce and Ely posit a rule for making what they nevertheless categorize as the "legally important distinction" between negative easements and restrictive covenants. This rule unmistakably requires the characterization of the *Witter* easement as an "easement":

The following rule of thumb may be helpful in distinguishing between these two interests. If the owner of the burdened land is prohibited from using his entire parcel for a certain purpose, such as commercial use, then the interest is probably a restrictive covenant. If, however, the owner of the burdened land is prohibited only from making a particular use of a certain portion of his land, such as building any structure in a specified area of modifying an existing structure, then the interest is probably a negative easement.<sup>206</sup>

Since the *Witter* case involved a permanent right conferred to one landowner over adjoining land and prohibited the owner of the burdened land only from making a particular use of a certain portion of his land, (building any structure in a specified area),<sup>207</sup> the interest is properly classified as an "easement," whether "negative" or "affirmative," rather than a "restrictive covenant."

This distinction was alluded to by the concurring opinion of the Supreme Court of North Carolina in *Reed*.<sup>208</sup> *Reed* is a case involv-

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204. *Id.* (emphasis added).

205. *Id.* at ¶2.03 (footnote omitted).

206. *Id.* at ¶1.07.

207. Record on Appeal at 158-161, *Witter*.

208. 98 S.E.2d 360 (1957); see *supra* notes 123-132 and accompanying text.



ing what professors Bruce and Ely would categorize as a "negative easement" imposed on retained land by a deed out from a common grantor (as in the *Witter* case).<sup>209</sup> In his concurrence in *Reed*, Justice Bobbit noted:

As I see it, the decisions relating to a uniform plan with reference to restrictive covenants where a developer sells a large number of lots have no application. In such cases, the question ordinarily posed is the enforceability of such restrictive covenants by the purchasers *inter se*.<sup>210</sup>

One New York commentator endorsed a *Buffalo Academy*-type limitation on constructive notice but nevertheless agreed with a *Reed*-type analysis. This commentator surmized that *Buffalo Academy* should free prospective purchasers from constructive notice only of those restrictive covenants which a grantor may have undertaken in one particular deed plan covering a large subdivision, without specifically mentioning the particular lot to which the restriction would be applicable.<sup>211</sup> This commentator acknowledged that "chain of title" would still encompass "all deeds by prior record owners actually transferring or encumbering the title to the *particular piece of land* of which the searcher is a prospective purchaser."<sup>212</sup>

Another linchpin of the distinction drawn between easements and *Buffalo Academy*-type restrictive covenants is the fact that easements were historically regarded as legal interests which could not be divested whether or not a purchase of the servient estate took title with actual notice.<sup>213</sup> The Recording Act, as a statute in derogation of the common law, must be read narrowly, so as not to invalidate a vested interest unless the statute plainly has this as its purpose.<sup>214</sup> This is not the case in a *Witter-Ammirati* type situation, where the deed establishing the plaintiff's easement was, in fact, recorded as required by the statute. Thus, the Supreme Court of Vermont, in *Moore v. Center*,<sup>215</sup> approvingly quoted:

209. *Reed*, 98 S.E.2d at 368, 98 S.E.2d 360 (1957); see *supra* notes 123-132 and accompanying text.

210. *Id.*

211. See sources cited *infra* note 212.

212. See note, *Recorded Deeds Not in Grantee's Direct Chain of Title Are Not Constructive Notice of Restrictive Covenants*, 6 SYRACUSE L. REV., 394, 396 (1955) (emphasis in original), (citing Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. PA. L. REV., 125, 174, 158 (1944)).

213. See *Moore*, 294 A.D.2d at 167; *Glorieux*, 96 A. at 95.

214. *Id.*

215. See 204 A.2d 164 (1964); *supra* notes 114-22 and accompanying text.

In such a case at common law, the purchaser would take subject to easement previously created, as being a legal interest, irrespective of whether he has notice thereof, and the rule in this respect could not well be regarded as changed by the adoption of the recording law, as applied to a case in which the grant of the easement does appear of record, though in connection with other lands, to which the easement is made appurtenant.<sup>216</sup>

Indeed, *Glorieux v. Lighthipe*<sup>217</sup> is one of the seminal cases cited in support of the *Buffalo Academy* rule, and was, in fact, cited in *Buffalo Academy* itself.<sup>218</sup> Yet in *Glorieux*, which involved a covenant in the nature of an equitable servitude, the Court of Errors and Appeals of New Jersey expressly held that a *Buffalo Academy*-type rule would *not* apply to easements:

The case differs from the conveyance of an easement or any interest that lies in grant. A grant takes effect regardless of notice; an equitable servitude is the creature of equity alone and depends entirely on the existence of notice. Confessedly, *Lighthipe's* covenant to insert restrictions in subsequent deeds, was not enforceable at law against *Glorieux*. it clearly was not a grant<sup>219</sup>

The Appellate Division of the Superior Court of New Jersey in *Garden of Memories, Inc. v. Forest Lawn Memorial Park Ass'n*,<sup>220</sup> while relying on *Glorieux*, held:

While it is unquestionably the duty of the purchaser to search the grantor and other pertinent recording indexes for each holder of record title for the period during which he held such title . . . , the apparent philosophy of *Glorieux v. Lighthipe* (citation omitted), is that the effect of the recording acts is to relieve a purchaser of constructive notice of the contents of any recorded deed not in his strict chain of title *except, seemingly, interests 'lying in grant' (grants of title; easements, etc.) created by a recorded deed of a prior holder of the title during his tenure.*<sup>221</sup>

#### VIII. POSSIBLE CONSEQUENCES OF THE WITTER HOLDING

If *Ammirati* was to be overruled at all, there could be but one sensible policy rationale for so acting. That rationale was neither ad-

216. *Id.* at 167(citing 2 Tiffany, Real Property, p. 2188 (1920 ed.).

217. 88 N.J.L. 199, 96 A. 94 (1915).

218. 267 N.Y. at 250.

219. 88 N.J.L. at 203, 96 A. at 96.

220. 109 N.J. Super. 523, 264 A.2d 82 (1970).

221. 109 N.J. Super at 533, 264 A.2d at 87 (emphasis added).

vanced by the defendants in *Witter*, nor considered by the court. The *Buffalo Academy* rule itself is inapplicable in those counties which have tract indexing systems, where encumbrances may be recorded directly against the affected land and no "name" search need be made. The Court of Appeals in *Andy Associates, Inc. v. Bankers Trust Co.*<sup>222</sup> held:

[W]here the 'block and lot' indexing method is used, there is no logical reason to afford potential purchasers additional protection by applying the time-honored rule that a purchaser is not chargeable with constructive notice of conveyances recorded outside of his direct chain of title. That rule, which was developed in cases where the purchaser had to rely upon the grantor-grantee system of indexing, simply represented a pragmatic judicial response to the exigencies of conducting a title search under such a system (see 6A Powell, Real Property, par 916).<sup>223</sup>

While tract indexing systems are utilized in both Nassau County and the five counties of New York City, New York State's other major population centers continue to utilize grantor-grantee indexing systems.<sup>224</sup> In those areas in which name indexing is used, an *Ammirati-Witter* situation will be relatively rare, since such a situation presupposes the existence of an easement over adjoining property once held in unitary ownership, individually severed rather than generally subdivided, with no physical indication of the easement's

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222. 49 N.Y. 2d 13 (1979).

223. *Id.* 23-24.

224. These include Erie County [Buffalo], Westchester County, Tompkins County [Syracuse], Monroe County [Rochester], Albany County, Broome County [Binghamton], and, of course, Suffolk County. Telephone interviews with Richard Hogan, Broome County Clerk (Mar. 27, 1992); Aurora Valenti, Tompkins County Clerk (Mar. 27, 1992); Paula Zeman, Westchester Deputy County Clerk (Mar. 27, 1992); Jane Hewett, Programmer Analyst, Erie County Clerk's Office (Mar. 27, 1992); Linda Donata, Secretary for the Albany County Clerk's Office (Mar. 27, 1992); Sue Gruttadaro, Data Entry Cashier, Monroe City (Apr. 3, 1992). Although far from affording the convenience of a tract index, an alphabetical index makes it possible to run a chain of title, either forward or backward, from any known owner. A searcher may begin with the name of the present owner and work backward under the proper letter of the grantee index till he finds the name of that party as grantee in a deed for the land involved. The data regarding the deed is copied from the index and the process repeated as to the grantor in that deed, thus finding the earlier deed in which he was grantee, and so on back for a certain number of years or back to the original grant from a sovereignty. *In order to ascertain mortgages and other encumbrances, the grantor indices must then be run forward as to each name for the period that the party of that name owned the premises.* Another method of search is to run the grantor indices, running the name of an early owner till the deed from him is found, then to run the name of the party to whom he conveyed and so on down to the date of search, noting en route the incumbrance given by the respective owner." PATTON ON TITLES §67 (2d ed. 1950)(citations omitted)(emphasis added).

existence — such as an easement of light, air, and/or view (*Witter*) or one which has been obliterated and forgotten although not technically “abandoned” (*Ammirati*) — and no mention of the easement in the conveyance of the servient estate. In most cases, however, one preparing to purchase property will be able to observe physical evidence of the easement, e.g., the road or path across the property, the vehicles or people moving thereon, the wires or pipes which had been placed thereon, etc.

The court of appeals might therefore have concluded that since situations in which dominant property owners would require the protection of the *Ammirati* rule would be relatively rare, while the increased level of title examination required by the *Ammirati* rule, even if minimal, would affect every title search performed in a county with a name indexing system, the burdens would be disproportionately high compared to the benefits. In a “balancing of evils,” therefore, the property rights of innocents such as Mrs. *Ammirati* and Mr. *Witter*, solely because of their infrequency, might have been deliberately sacrificed by the Court of Appeals to the countervailing economic interest of title companies. Such a result, based on the “practical exigencies” of these *sui generis* facts, has been extremely limited in its effect.<sup>225</sup>

The *Witter* court, however, failed to honestly and straightforwardly adopt such an analysis, opting instead to create a distinction between *Ammirati* and *Witter*, and a harmonization between *Ammirati* and *Buffalo Academy*. In so doing, it adopted a restrictive definition of the term “chain of title.” The *Witter* court held:

[P]urchasers like the Taggarts should not be penalized for failing to search every chain of title branching out from a common grantor's roots in order to unearth potential restrictive covenants. They are legally bound to search only within their own tree trunk line and are bound by constructive or inquiry notice only of restrictions which appear in deeds or other instruments of conveyance in that primary stem.<sup>226</sup>

But confining the parameters of a required search to a pur-

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225. The conclusion underlying such a “balancing” analysis would, however, itself be based upon a presumption with no record support, i.e., that *Ammirati* was not, prior to *Witter*, already being followed by title companies. In fact, if one presumes that title companies are entities capable of conforming their conduct and practices to legal precedent, then there is no basis for presuming that they were capable of conforming their actions to the dictates of *Buffalo Academy* but not *Ammirati*.

226. *Witter*, 78 N.Y.2d at 239, 577 N.E.2d at 342, 573 N.Y.S.2d at 149.

chaser's "own tree trunk line" — in effect ruling contrary to all prior authority that the chain of title may be constructed solely by running the title *backwards* from the present owner — excludes from the *Witter* court's definition of "chain of title" even prior recorded deeds out of the *same premises*! Such a result, by permitting property to be "sold twice," vitiates the very purpose of the recording statute, and bears the potential for chaos!<sup>227</sup> The *Witter* court was nevertheless constrained to hold in this fashion if it wished to reach its result without overruling *Ammirati*. The only alternative would have been to acknowledge that the term "chain of title" has, as recognized by *Moore v. Center*,<sup>228</sup> *Pusey v. Clayton*,<sup>229</sup> and *Reed v. Elmore*,<sup>230</sup> a broader scope than the simplistically rigid one adopted by the *Witter* court, and rejected by *Ammirati*.

The Court of Appeals suggested that Howell (*Witter's* predecessor) allegedly could have preserved the easement "by recording in the servient chain the conveyance creating the covenant rights so as to impose notice on subsequent purchasers of the servient land. . ."<sup>231</sup> This suggestion appears to reveal a fundamental misunderstanding by the *Witter* court of the distinction between a tract indexing system and name indexing system. In name, as opposed to a tract, indexing system, instruments cannot be recorded against the land or the parcel itself. Thus, the *Witter* court's suggestion is one which would have been impossible to follow. Since *Witter's* predecessor was not a direct predecessor in title of Taggart, *Witter's* name, whether placed on a deed of the dominant parcel containing an easement across the retained servient estate, or whether placed on a separate "deed of easement," could not and would not have appeared in the "tree trunk line" of the Taggarts' (the servient parcel's owners) direct predecessors, thus, according to the *Witter* court's definition of "chain of title," could not have provided any protection. Indeed, this is what was perceived by the *Ammirati* trial court which, based on

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227. By way of example, if Grantor sold Blackacre to A on January 1, and then once again sold Blackacre to B on February 1, the sale to B would presumably be invalid, since having already transferred Blackacre to A, Grantor had no interest in Blackacre to convey to B on February 1. Yet, under *Witter*, when B re-sells Blackacre, his buyer will not be held to constructive notice of the prior sale to A since the deed to A is a "deed out" to one who is not B's "direct predecessor," and whose name thus does not appear in B's "own tree trunk line," or "primary stem". See *Witter*, 76 N.Y.2d at 238-39, 577 N.E.2d at 342, 573 N.Y.S.2d at 148-49.

228. See *supra* notes 114-122 and accompanying text.

229. See *supra* notes 139-142 and accompanying text.

230. See *supra* notes 123-133 and accompanying text.

231. *Witter*, 78 N.Y.2d at 239-40, 577 N.E.2d at 342, 573 N.Y.S.2d at 149.

*Buffalo Academy*, had dismissed the plaintiff easement owner's complaint with the lament that "[w]hat action an owner of a dominant estate should take to protect his easement where similar facts exist, I do now know."<sup>232</sup>

### CONCLUSION

The fully restrictive nature of the *Witter* "chain of title" definition is illogical and counterproductive. The court in *Witter* should either have reversed and awarded judgment to *Witter* based upon the *Ammirati* decision, or, should have overruled *Ammirati* while explaining its decision in terms of the *sui generis* facts as those facts relate to the socio-economic interests at stake. By insisting on affirming judgment for the servient landowner and refusing to overrule *Ammirati*; the court was led to issue an opinion which plays fast and loose in its recapitulation of the facts of *Ammirati*. This has led to presumably unintended consequences, including a dramatic restriction of the term "chain of title" that strips the term of all utility, and an equally-dramatic expansion of the term "easement by necessity" broadening it beyond all prior expectation and desire.

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232. *Ammirati*, 76 N.Y.S.2d at 381. Even if the *Witter* court's suggestion was viewed as an acknowledgement that its restrictive chain of title definition is ephemeral, and that deeds "out" from a common grantor *must* be reviewed (at least as to their metes and bounds description), thus implying that a separate deed of easement containing a metes and bounds description of the servient parcel would give notice to a subsequent purchaser of the servient parcel, this suggestion does not provide much solace to *Witter*. When Howell, *Witter*'s predecessor, took title from the parties' common grantor in 1951 — three years after the Appellate Division's decision in, and the Court of Appeals' affirmation of, *Ammirati*, and one year following the Appellate Division's decision in *Long Building*. No real estate counsel or title company could have imagined that such a separate instrument was required, nor that an easement contained in a written deed would be voided forty years later by the Court of Appeals.

