#28.7 179

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- section line easements
- motion to dismiss
- repeal of statutes

THE SUPREME COURT OF THE STATE OF ALASKA

LUTHER A. BRICE, SAM R. BRICE, ANDY M. BRICE, LUTHER L. BRICE, and HELENKA M. BRICE,

Appellants,

v.

STATE OF ALASKA, DIVISION OF FOREST, LAND AND WATER MANAGEMENT, STATE OF ALASKA DEPARTMENT OF TRANSPORTATION AND PUBLIC FACILITIES, STATE OF ALASKA, FAIRBANKS NORTH STAR BOROUGH, LINDA K. JOHNSON, WARREN L. GRIESE, MARY L. JOHNSON, BEA C. BACHNER, SUSAN K. GRIESE, BEATRICE I. HERNING, JEFFREY P. BURTON, GARY L. CRUTCHFIELD, HOWARD C. GUINN, KELLEY EVERETTE, JEAN MURRAY, LOREN E. HITE, LUCILLE M. THAYER, FRANK S. TOWSE, DENNIS E. SUNDERLAND, PAUL HENRY, GEORGE P. McCOY, JOE SULLIVAN, TED D. JOHNSON, WILLIAM A. BAILEY, GUY SATTLEY, DONALD JOHNSON, EDITH SZMYD, ELEANORE L. THORGAARD, KAREN A. JOSEPHS, DANIEL M. WIETCHY, KAREN TONY, and BOB MERRITT,

Appellees.

File No. 7039

O P I N I O N

[No. 2731 - September 23, 1983]

	Chief R/W Agent
	Asst. Chief R/W Agent
✓	Neg. & PF
✓	Appraisals
✓	Rel. & Prop. Mgt.
✓	R/W Eng.
✓	Title
✓	Airports
✓	R/W Materials
✓	Pre-Audit
	Admin.
	Return to:
✓	File

Johnson. The property is described as the northeast one-quarter of the southeast one-quarter of section 22, township one north, range one east, Fairbanks Meridian[2] (hereinafter "the property").[3] The property lies to the south of the Tungsten Subdivision and to the north of Chena Hot Springs Road.

The Tungsten Subdivision contains residential lots that were obtained by lottery in 1981, and certain of the lot owners wish to build an access road to the subdivision from Chena Hot Springs Road. They notified the Brices of this desire in spring 1982, indicating that they planned to build a road along a section line highway easement between sections 22 and 23.

The Brices filed a complaint on April 23, 1982, naming the State, the Fairbanks North Star Borough, and various lot owners in the Tungsten subdivision as defendants. The Brices claimed that no easement existed along the eastern edge of the property (where section 22 joins section 23), and asked that the court bar the construction of any road on the alleged easement. On the same date, the Brices

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2. All references to sections of land are to sections located in T1N, R1E, F.M.

3. The Brices also own property bounding the property here in dispute on the north and east, lying in both sections 22 and 23, but they do not challenge the existence of easements across this property.

v. Mears, 602 P.2d 421 (Alaska 1979), holding that trial courts commit error unless they expressly state whether they have excluded or considered materials outside the pleadings in ruling on a Rule 12(b)(6) motion. Id. at 426. We went on to address the alternatives available on review when such an express declaration has not been made. The reviewing court may either (1) reverse the decision and remand for proper consideration as either a Rule 12(b)(6) motion or a Rule 56 summary judgment motion; (2) review the decision as if it were a Rule 12(b)(6) decision, with accompanying exclusion of the materials external to the pleadings; or (3) review the decision as if it were the grant of summary judgment after conversion of the Rule 12(b)(6) motion to one for summary judgment. Id. at 427. Since the reviewing court has three alternatives and may choose the most appropriate one, see Douglas v. Glacier State Telephone Co., 615 P.2d 580, 591-92 (Alaska 1980), there is no merit to the contention that the court's erroneous failure to state whether it had excluded or considered the external material requires a remand here.

We have concluded that we should treat the dismissal as if it were the entry of summary judgment after conversion of the Rule 12(b)(6) motion into one under Rule 56. As we stated in Douglas, we consider it important that the Brices had a "'reasonable opportunity' to present evidentiary material pertinent to a summary judgment motion,

The Alaska territorial legislature accepted this dedication of public lands for highway purposes in 19 SLA 1923,[4] section 1 of which provided:

> A tract of four rods wide between each section of land in the Territory of Alaska is hereby dedicated for use as public highways, the section line being the center of said highway. But if such highway shall be vacated by any competent authority the title to the respective strips shall inure to the owner of the tract of which it formed a part by the original survey.[5]

In Girves v. Kenai Peninsula Borough, 536 P.2d 1221 (Alaska 1975), we held that acceptance of the federal grant was within the power of the territorial legislature. Id. at 1225; see also State v. Alaska Land Title Association, ___ P.2d ___, Op. No. 2681 at 22 (Alaska, May 27, 1983). Indeed, the parties do not dispute that the 1923 act impressed the public lands in Alaska not otherwise reserved for public uses with section line highway easements. The dispute concerns the repeal of 19 SLA 1923 in 1949.

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4. This statute was reenacted in slightly different form in the 1933 compilation of Alaska laws. 1721 CLA 1933. The reasoning of the subsequent discussion of 19 SLA 1923 also applies to 1721 CLA 1933.

5. Four rods is equivalent to 66 feet. Since the Brices only challenge the easement along the section line between sections 22 and 23 as it applies to the property here in dispute, the disputed easement is 33 feet wide.

When a repeal is not accompanied by a specific saving provision, it is presumed that the legislature intended the general saving statute to apply. 2A C. Sands, Sutherland Statutory Construction § 47.13 (4th ed. 1973). A saving statute preserves rights unless the repealing act reveals an intention not to do so. Alaska Public Utilities Commission v. Chugach Electric Association, 580 P.2d 687, 692 (Alaska 1978), overruled on other grounds, City and Borough of Juneau v. Thibodeau, 595 P.2d 626, 629 (Alaska 1979); 2A C. Sands § 47.13. No such intention is revealed by 1 SLA 1949.[6]

Additionally, as the State notes, to hold that the 1949 repeal of 19 SLA 1923 vacated all previously accepted easements would be to give the repeal retroactive effect.

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6. The Brices contend that this saving statute was intended only to encompass the part of the 1949 compilation entitled the Civil Code, and therefore that it does not apply to statutes regarding highways, which were located elsewhere in the 1949 compilation. However, the terms of the statute itself require rejection of this argument. The statute states in pertinent part:

> The repeal . . . of any statute shall not affect any offense committed . . . prior to such repeal . . . ; nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but the same may be enforced, . . . prosecuted, and punished under the repealing . . . statute . . . .

(Emphasis added.) This saving statute clearly encompassed not only civil but also criminal statutes, which also did not appear in the Civil Code of the 1949 compilation.

pleadings. In so doing, it would find that the land was entered in 1943 by Warren Culpepper, who abandoned the entry later that year, and then entered in 1950 and patented in 1952 by Robert Johnson. Neither the entries nor the patent, however, affected the easement established in 1923, since a patentee takes property subject to a 43 U.S.C. § 932 easement. State v. Alaska Land Title Association, ___ P.2d at ___, Op. No. 2681 at 35; see Girves v. Kenai Peninsula Borough, 536 P.2d at 1224. Thus, treating the court's dismissal of the Brices' complaint as having occurred following conversion of the Rule 12(b)(6) motion to one for summary judgment, we hold that the court correctly dismissed the Brices' complaint. The property is subject to an easement for highway purposes bordering the section line between sections 22 and 23. See note 5 supra.

AFFIRMED.