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Real Property - Easements by Implication - Creation of Easements By Implied Reservations in Michigan

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COMMENTS

REAL PROPERTY — EASEMENTS BY IMPLICATION — CREATION OF EASEMENTS BY IMPLIED RESERVATIONS IN MICHIGAN — In 1910 *K* occupied an "old" house located on the westerly portion of her lot fronting on *H* Street. She built a "new" house on the east side of the lot, moved into it, and rented the "old" house to tenants. As a means of access to the west side and rear of the "new" house, she built and used a sidewalk which led from *H* Street between the two houses and which was one foot from the west side of the "new" house. This walk "was the only outdoor means of access to the new house's coal chute."[1]

In 1912 *K* conveyed the "old" house portion of the lot to *X* from whom defendants traced title. The deed to *X* described the portion conveyed as thirty-six feet in width. That made the conveyance include the sidewalk and even a portion of the eaves of the "new" house which was retained by *K*. Despite this deed, the sidewalk was used by *K* (together with *X* and successors) for many years.

In 1944 *K* conveyed the easterly portion—the "new" house part —to a grantee through whom plaintiff claims. The occupants of both portions continued to use the walk until 1955 when defendants razed the "old" house and built a structure that prevented any further use of the walk. In the resulting litigation the question was whether plaintiff had a right to use the walk as against defendants. The possibility of an easement by prescription apparently was quickly eliminated, presumably because the user after 1912 was not adverse. The case then turned upon whether *K*, in 1912, had impliedly reserved an easement over the premises now belonging to defendants, an easement represented by the walk. The trial court upheld the position of the defendants—no such easement. On appeal, *held,* reversed, *Harrison v. Heald,* 360 Mich. 203, 103 N.W.2d 348 (1960).

A lawyer consulted by plaintiff would probably have been impressed by the fact that *K* had so adapted and used the two parts of the lot as to subject the "old" house part to a use for the benefit of the "new" house part. He would quickly dismiss the idea that Michigan legislation would solve the problem. Turning to the case law, he may have noted *Smith v. Dresselhouse*[2] in which Ostrander, J., said:

[1] Harrison v. Heald, 360 Mich. 203, 204, 103 N.W. 2d 358 (1960).
[2] 152 Mich. 451, 454, 116 N.W. 387 (1908).

> "It is a general rule of the law of easements that where the owner of two tenements sells one of them, the purchaser takes the portion sold with all the benefits and burdens which appear at the time of the sale to belong to it as between it and the property which the vendor retains."

Our attorney might or might not have observed that in *Covell v. Bright*,[3] decided not long after the *Dresselhouse* case, the court said: "To entitle the complainant to a decree the burden was upon him to establish that the servitude was apparent, continuous, and strictly necessary to the enjoyment of his lands."

The easement claimed in the *Covell* case was by implied reservation, while the one in question in *Dresselhouse* was by implied grant. Perhaps plaintiff's lawyer might have noticed this. But he may also have found *Kamm v. Bygrave*[4] and *Rannels v. Marx*[5] in which the court, quoting from a Connecticut case,[6] said that when a grantor conveys part of his land,

> "[T]he law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made."

Of course, the lawyer should notice that the doctrine enunciated by the court in the *Kamm* and *Rannels* cases, as well as in the Connecticut case, was dictum so far as implied reservations are concerned. This same dictum may be found in *Dresselhouse,* but rejected in *Covell.* He might, however, find some comfort in the fact that the opinion in the *Kamm* case was written by Mr. Justice Black who presumably would be sitting in his case if it reached the highest court.

Now let us see what a lawyer consulted by defendants might be expected to have found in the Michigan case law.

Presumably he early would have noticed *Brown v. Fuller.*[7] In that case the court had to rule on a claim of an easement of drainage claimed to have been created by implied reservation. The *Dresselhouse* case apparently had been relied upon by the trial court. The reviewing court, after pointing out that the *Dressel-*

3 157 Mich. 419, 423, 122 N.W. 101 (1909).
4 356 Mich. 189, 96 N.W.2d 770 (1959).
5 357 Mich. 453, 98 N.W.2d 583 (1959).
6 Rischall v. Bauchmann, 132 Conn. 637, 643, 46 A.2d 898, 901 (1946).
7 165 Mich. 162, 130 N.W. 621 (1911).

house case involved a claim of implied grant, denied the claim of the drainage easement. Judge Ostrander who had authored the dictum in *Dresselhouse* was one of the prevailing judges in *Brown v. Fuller.* It was pointed out that an early English case, *Pyer v. Carter,*[8] had indicated a view that an easement could arise by implied reservation as easily as one by implied grant, but that the *Pyer* doctrine had "frequently been severely criticized, and was finally distinctly overruled in England" by *Wheeldon v. Burrows.*[9] Two members of the court dissented, but not on the ground that the *Dresselhouse* dictum was sound. On the contrary, their view was that the facts in *Brown v. Fuller* presented an instance of "strict necessity," and hence was within an exception recognized even by the English court.

The English law as settled by *Wheeldon* may be briefly summarized as follows. When the owner of Blackacre conveys a part of it and the deed is general in its terms, the owner cannot afterward take the position as against his grantee, or the grantee's successors, that he did not convey the described land absolutely nor that the land is subject to an easement which at the conveyance arose in his favor. As the court expressed it, a grantor will not be allowed to "derogate" from his grant. Two possible exceptions to this general rule were recognized: (1) if the claimed easement is "strictly necessary" for the use and enjoyment of the retained land, and (2) if the claimed reserved interest is connected with an easement acquired by the grantee by implication in such a way that they are "reciprocal."[10]

Decisions in American courts are far from harmonious. Although *Wheeldon v. Burrows* had had quite a lot of support in addition to *Brown v. Fuller,* not a few courts have applied the doctrine of *Pyer v. Carter* that no distinction is to be drawn between implied grant and reservation. This latter view was expressed by way of dictum in *Smith v. Dresselhouse.* In the *Restatement of Property,* section 476, a middle ground is taken. The fact that the claim is of an implied reservation rather than of a grant is

[8] 1 H. & N. 916, 156 Eng. Rep. 1472 (Ex. 1857).

[9] 12 Ch. D. 31 (1878). The court was of the opinion that Pyer v. Carter may have been rightly decided but not on the ground stated, namely that implied reservations are on the same footing as implied grants. It was thought that the *Pyer* case came within one of the exceptions to the broad doctrine that a grantor should not be allowed to derogate from his grant, which he attempts to do when he claims to have reserved an easement by implication.

[10] The court thought that Pyer v. Carter may have presented such a situation.

a "factor" to be taken into account; but it was found impossible to state how much weight should attach to that element.[11]

The decision in *Brown v. Fuller* thus put Michigan clearly in accord with the English law announced in *Wheeldon*.[12] Having reached this point in his study of the Michigan decisions, our hypothetical lawyer for the defendants would want to see whether (a) later Michigan decisions had weakened the force of *Brown v. Fuller* or (b) Michigan law as thus indicated was wholly out of line with the law elsewhere. He would find among the Michigan decisions two later cases in which the Michigan court had squarely faced the question of implied reservations.

In *Bubser v. Ranguette*,[13] in 1934, the doctrine of "strict necessity" for an easement by implied reservation was applied. The case involved a portion of a building that encroached upon the land first conveyed. Bushnell, J., said:

> "Having required strict necessity in cases involving stairways, drains, ways and sewers, we prefer to make no exception to that rule in encroachment cases even though, in such cases, the servitude be plainly apparent. To make such an exception, would leave for further litigation the exact amount of encroachment necessary to make the user apparent. Nor should the law favor unrecorded servitudes."

And as late as 1948, the court in *Von Meding v. Strahl*,[14] speaking through Butzel, J., said that "where an owner who has used a roadway or pathway over one part of his land for the benefit of another part conveys the part over which the road passes, an easement for the benefit of his remaining land can only arise where there are apt words of reservation in the conveyance . . . an implied easement cannot rest upon convenience."

The defendant's lawyer could and should notice *Burling v. Leiter*[15] which involved a claimed easement by implied grant, not reservation, because in his dissenting opinion in that case, Sharpe, J., repeated the discredited dictum of *Smith v. Dresselhouse*. The

11 RESTATEMENT, PROPERTY § 476, comment *a* (1944). See generally Comment, 57 MICH. L. REV. 724 (1959).

12 In the prevailing opinion in Brown v. Fuller, *supra* note 7, the following language is found at pp. 167-68: "While it is apparent from the record that it will be somewhat expensive to dispose of the sewage from complainant's building otherwise than over defendant's land, it by no means appears that it is impossible to do so."

13 269 Mich. 388, 395, 257 N.W. 845 (1934).

14 319 Mich. 598, 605, 30 N.W.2d 363 (1948).

15 272 Mich. 448, 262 N.W. 388 (1935).

quotation by Mr. Justice Sharpe was not in itself particularly significant. It became so because one member of the present court picked it up in his opinion in *Kamm v. Bygrave,* referred to above, and one of the cases relied upon in deciding the *Harrison* case, the subject of this discussion. The *Kamm* case alone was one of implied grant. In a footnote appended to the opinion the following appears: "Mr. Justice Nelson Sharpe dissenting in *Burling v. Leiter* . . . quoted and relied on the rule of *Smith [v. Dresselhouse],* yet the majority at the time apparently overlooked it in a case which, on the facts, seemingly called for definite approval or repudiation thereof."[16]

Could it be that the majority in the *Burling* case paid so little attention to the quotation by Mr. Justice Sharpe because (a) the quotation was a mere dictum both in the *Smith* and *Burling* cases, (b) it was taken from an English case that had later been repudiated by the English court, and (c) it had been decisively repudiated by the Michigan court in the *Covell* and *Brown* cases nearly fifty years ago? Perhaps one or all of those reasons, rather than oversight, explained the court's disregard of the quotation. If the court in *Kamm* overlooked the difference between dictum and decision and also the difference between implied grant and implied reservation, at least it is not the only court which has ever done so.

This review of the law of easements by implication generally and in Michigan particularly indicates that the defendant's attorney might have been warranted in believing with some confidence in his client's position and that the trial judge was on safe ground in his judgment. But the reviewing court disappointed him when it found its guide not in the prior *decisions* of the court, but in a succession of *dicta.* Perhaps one must conclude that when a dictum, despite its repudiation, is nevertheless repeated often enough, it acquires more significance as a guide in deciding cases than a line of actual *decisions*!

Reasonable minds may differ over what the law regarding easements by implied reservation ought to be—opinions of courts have differed. If the court in the case under discussion had frankly pointed out that the rule of such cases as *Wheeldon v. Burrows* and *Brown v. Fuller* and succeeding cases ought, in their judgment, to be discarded, one might or might not agree. But the court decided the *Harrison* case, so far as one can tell from the opinion, without the slightest recognition of the fact that they were in effect

[16] Kamm v. Bygrave, *supra* note 4, at 195.

repudiating a considerable line of decisions. Such an important case as *Brown v. Fuller* is not even mentioned.

Now what is the law of Michigan in this field? How are lawyers to advise their clients, and how are trial judges to rule in the understandable hope that they will not be reversed?

In another case, sometime in the future, the court may do what the English court did in dealing with *Pyer v. Carter*—approve the actual decision but not the ground upon which the court relied. If it is the law that an implied reservation will be permitted only when the easement is "strictly necessary," and this had been the *law* of Michigan, it might later be said that in the *Harrison* case there was a strict necessity and that the decision should have been put on that ground. "Strict necessity" is not an element the presence or absence of which can always be agreed upon unanimously. In *Brown v. Fuller* the facts were such that two members of the court thought the existence of the claimed easement should be supported. Whether the element was present in the *Harrison* case is a question on which reasonable opinions might differ. If the court had reached its conclusion on that ground, this comment would never have been written.[17]

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[17] Games played without pre-determined rules are unthinkable. So with the more important affairs of life. The more this writer has dealt with law, the more definite is his opinion that in a surprisingly large area the chief merit in the law is not so much its content as its certainty. With outstanding exceptions, most people, it is believed, really want to conduct their affairs in accordance with the rule (the law). They often consult lawyers as to what those rules are, and in giving advice the lawyer is largely governed by what he figures the decision would be in a properly presented litigation. He rightly proceeds on the assumption that a court in the potential litigation would decide according to the law. While it is not maintained that the law, whether by statute or decision, should never be changed, it is submitted that perhaps too often courts in deciding a case lose sight of the fact that they are setting a guide for the people, for lawyers, and for trial judges, to say nothing of law teachers! With the pressures what they are upon many reviewing courts, a special burden is placed upon counsel. No doubt not a few decisions that stand out as aberrations are accounted for by slipshod preparation and presentations. The writer has not examined the record in our principal case so as to be in position to weigh this factor.

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