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REAL PROPERTY-EASEMENTS-IMPLIED GRANT OF RIGHT OF WAY

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REAL PROPERTY—EASEMENTS—IMPLIED GRANT OF RIGHT OF WAY—Plaintiffs claimed an easement by implied grant in a driveway situated wholly on defendants' land, but directly adjoining the land of plaintiffs. The driveway had been constructed at a time when both pieces of property were owned by X. X had conveyed part of the land to plaintiffs' remote grantor, and three months later had conveyed the adjoining portion, including the driveway, to defendants' remote grantor. The driveway had fallen into disrepair and at the time of the action was in such a depreciated state as to be practically useless. On the opposite side of plaintiffs' house there was space on which a driveway of the same dimensions as the disputed way could be constructed. In an action to enjoin defendants from interfering with plaintiffs' use of the drive, the trial court denied the injunction. On appeal, *held,* affirmed. Necessity is an essential element for establishing an easement by implication, and the facts here do not sustain a finding of necessity. *Wilp v. Magnus,* (Okla. 1951) 230 P. (2d) 733.

It is commonly declared, in agreement with the Oklahoma Supreme Court, that necessity is an element essential to the creation by implied grant of an easement of right of way.[1] The general rule is that where the owner of land, one part of which is subject to a quasi easement in favor of another part, conveys the quasi dominant tenement, an easement corresponding to such quasi easement is thereby vested in the grantee of the land, provided the quasi easement is of an apparent, continuous, and necessary character.[2] The courts have been unable to agree, however, as to what is a sufficient degree of necessity.[3] In the principal case, a narrow view of the term is adopted, the court deciding the element of necessity was missing since there was evidence that an alternate way could have

[1] 3 TIFFANY, REAL PROPERTY, 3d ed., 269 (1939); 9 R.C.L. 763 (1919). For an excellent history of the judicial establishment of necessity as an essential element of implied easement, see Toothe v. Bryce, 50 N.J. Eq. 589, 25 A. 182 (1892).

[2] 3 TIFFANY, REAL PROPERTY, 3d ed., 255 (1939).

[3] See cases collected in 34 A.L.R. 233 at 235 (1925).

been constructed by the plaintiffs entirely on their own property.[4] In light of the confusion and indefiniteness caused by attempts to define this term, the question arises as to whether necessity is actually an *essential* element of easements by implied grant.[5] It is submitted that it is not, and that the reasonable basis of an implied easement is the intent of the grantor and grantee at the time of the severance of the quasi servient and the quasi dominant tenements.[6] The necessity of a quasi easement at the time of severance is an important aid in determining the intent of the parties; however its absence or presence in any given case should not be conclusive.[7] As a clear indication of the dominant role of intent in this theater of the law of real property, the cases hold that even though necessity and the other so-called essential elements are present, an expressed intent that no easement passes by implication will be controlling.[8] The danger of abandonment of intent as the basis for implication is aptly illustrated by the principal case, the latest in a series of Oklahoma decisions involving implied easements.[9] In addition to the possibility of an alternate way, the Oklahoma court attempts to show the absence of proof of necessity by evidence that the driveway was in such a condition of disrepair that it was practically useless. It would appear, however, that the condition of the drive as of the time of the bringing of the action is immaterial in a consideration of whether or not an easement arose by implication on the severance of the quasi dominant and quasi

[4] To the same effect see Jennings v. Lineberry, 180 Va. 44, 21 S.E. (2d) 769 (1942). Other states take a much broader view of the term. Thus, the Illinois court, in Koubenec v. Moore, 399 Ill. 620 at 625, 78 N.E. (2d) 234 (1948), held: ". . . it is not necessary that the easement claimed by the grantee be really necessary for the enjoyment of the estate granted. It is merely sufficient if it is highly convenient and beneficial to the estate granted." There are a few cases holding that strict necessity is required. Douglass v. Lehman, (D.C. Cir. 1933) 66 F. (2d) 790; Burling v. Leiter, 272 Mich. 448, 262 N.W. 388 (1935), noted in 34 MICH. L. REV. 882 (1936).

[5] In Toothe v. Bryce, supra note 1 at 595, Pitney, V.C., stated: ". . . I think that an examination of . . . [the cases] . . . will show that in most, if not all, of those instances where the case was that of an implied grant of an easement in connection with the conveyance of a *quasi*-dominant tenement, the so-called 'necessity' upon which the judges relied was, in fact, no necessity at all, but a mere beneficial and valuable convenience, and that the elevation of a mere convenience to the level of a necessity was the result of an attempt to obliterate the distinction between an implied grant and an implied reservation . . ., and as the latter could only occur where the element of necessity was present, it was held that such element must also be present in the former case."

[6] 3 TIFFANY, REAL PROPERTY, 3d ed., 257 (1939); 5 PROPERTY RESTATEMENT §476 (1944); See Hunsaker, "The Implied Easement and Way of Necessity in Washington," 26 WASH. L. REV. 125 at 126 (1951).

[7] Wheeler v. Taylor, 114 Vt. 33 at 36, 39 A. (2d) 190 (1944); Philadelphia Steel Abrasive Co. v. Louis J. Gedicke Sons, 343 Pa. 524 at 527, 23 A. (2d) 490 (1942); Rogers v. Cation, 9 Wash. (2d) 369 at 376, 115 P. (2d) 702 (1941). See also Leesman, "The Rationale of the Quasi-Easement in Illinois," 30 ILL. L. REV. 963 (1936).

[8] Wheeler v. Taylor, supra note 7; Romanchuk v. Plotkin, 215 Minn. 156, 9 N.W. (2d) 421 (1943).

[9] The first of the Oklahoma cases concerned with implied grants of easements arrived at the conclusion that "necessity is the very gist of implied right," from the erroneous premise, "the terms 'way of necessity' and 'easement by implication,' are synonymous." Haas v. Brannon, 99 Okla. 94 at 98, 225 P. 931 (1924). In the next important case in this field the court found an easement by implication without any mention of a requirement

servient estates.[10] If an easement arises by implied grant, it does so at the time of the original conveyance of the quasi dominant tenement or not at all.[11] Although the Oklahoma Supreme Court has unfortunately not adopted this view, the criterion should be the intent of the original parties, and therefore factors not in existence at the time of that original conveyance are irrelevant and should not be considered.

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of necessity. Waken v. Gillespie, 153 Okla. 78, 4 P. (2d) 1028 (1931). The requirement of reasonable necessity was introduced in Curry v. Southwall Corp., 192 Okla. 590, 138 P. (2d) 528 (1943), but the court stressed the presumed intent of the parties. In Leeson v. Brooks, 199 Okla. 139 at 140, 184 P. (2d) 762 (1947), the Oklahoma court defined the term "necessity" by reference to the discussion in Rees v. Drinning, 64 Cal. App. (2d) 273 at 278, 148 P. (2d) 378 (1944), where it was held that " 'reasonably necessary to the beneficial enjoyment' of the property conveyed means no more than 'for the benefit thereof,' and that plaintiffs were not required to show that the easement as it existed was the only possible way of access to their garage." In Keller v. Fitzpatrick, (Okla. 1951) 228 P. (2d) 367, the Haas case was urged by the party denying the easement, but the court refused to apply the harsh doctrine of that decision on the ground that there were factual differences. In the principal case, the Oklahoma Supreme Court reverts to the erroneous authority of the Haas case and sets up necessity, unmodified by any adjective such as reasonable, as a *sine qua non*, and completely disregards intent as an element to be considered.

[10] Conditions occurring subsequent to the severance may be factors pointing to an abandonment of an easement, expressed or implied, but this aspect of easements is beyond the scope of this note, and was not considered by the Oklahoma court in the principal case.

[11] Read, Admr. v. Webster, 95 Vt. 239, 113 A. 814 (1920); The John Hancock Mutual Life Insurance Co. v. Patterson, 103 Ind. 582 at 589, 2 N.E. 188 (1885).