Washington Law Review

Volume 26 | Number 2

5-1-1951

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WASHINGTON LAW REVIEW

AND

STATE BAR JOURNAL

The Far Eastern Section is jointly sponsored by the *Law Review* and the Far Eastern Institute.

COMMENTS

THE IMPLIED EASEMENT AND WAY OF NECESSITY IN WASHINGTON

HAROLD J. HUNSAKER

The implied easement arises by inference of law when certain facts concerning the conveyance of land are found by the court. There are two general fact patterns: (1) prior to severance of land there exists a quasi-easement[1] for the benefit of one part of the land to the detriment of the other; (2) after conveyance of part of a tract of land, the grantor or grantee has no access to land respectively retained or conveyed. The easement arising from the former will be termed an "implied easement" while the latter will be referred to as a "way of necessity." Though both easements are implied, the two will be distinguished by the above terminology to facilitate discussion.

"I think some inaccuracy of thought and expression has arisen in discussion by bench and bar of this doctrine of the creation of an

[1] A land owner cannot have an easement over his own land. The term "quasi-easement" is used to denote the use of one part of land for the benefit of another while both parts are held under common title. The quasi-easement is not a legal relation. 3 TIFFANY, REAL PROPERTY § 781 (3rd. ed. 1939).

easement by implication. . . ."[2] This statement seems *apropos* when considering the Washington law on implied easements. That the Washington law in this area is uncertain cannot be doubted. Whether misuse of terminology or inaccuracy of thought was the original cause of this uncertainty is not of particular moment. It is important to recognize that accuracy of thought is correlated with precision of expression and that as long as terms are misapplied, subsequent thought may be correspondingly defective.

The purpose of this comment is to determine the scope of the implied easement and the way of necessity in Washington. In doing so it is hoped that the terminology associated with such easements will be clarified to a certain extent. Specifically, the following questions must be answered: (1) May an easement be created by implied reservation? (2) May the common law way of necessity be created? (3) Assuming both exist, what effect does the Washington "private way of necessity" statute have upon either of them?

Implied Easements

An implied easement arises when there has been a unity of title, an apparent and continuous quasi-easement existing for the benefit of one part of the estate to the detriment of the other during such unity, and a certain degree of necessity that the quasi-easement exist after severance as a legal easement. Unity of title is an absolute requirement. The remaining characteristics are aids to construction. The absence of any one of them will not necessarily destroy the possibility of an easement, nor will the presence of all of them insure the creation of an easement.[3]

The doctrine of implied easements is based upon the presumed intentions of the parties to the conveyance. If the facts of the individual case are sufficient to allow a presumption to arise that both parties intended that rights co-extensive with the quasi-easement should pass with the dominant estate, such presumed intent will be given effect by the court.[4] As stated by Walsh, the question to be asked is, "Did the purchaser as an average reasonable man have the right to believe that he was acquiring with the property conveyed to him an easement in the property retained by the grantor, and did the amount paid by him

[2] Pitney, V. C. in Toothe v. Bryce, 50 N.J.Eq. 589, 25 Atl. 182, 184 (1892).

[3] Rogers v. Cation, 9 Wn. (2d) 369, 115 P. (2d) 702 (1941); Cheda v. Bodkin, 173 Cal. 7, 158 Pac. 1025 (1916); 3 Tiffany, Real Property § 781 (3rd. ed. 1939).

[4] Wheeler v. Taylor, 114 Vt. 33, 39 A. (2d) 190 (1944); Dale v. Bedal, 305 Mass. 102, 25 N.E. (2d) 175 (1940); Scarborough v. Anderson Const. Co., (Tex. Civ. App.), 90 S.W. (2d) 305 (1936); Pioneer Mining Co. v. Bannack Gold Mining Co., 60 Mont. 354, 198 Pac. 748 (1921).

for the property include payment for such an easement because of the apparent physical situation of the two parcels with reference to one another at the time of sale?"[5] The *Restatement of Property* corroborates this method of approaching the problem and presents other factors to be considered.[6]

Keeping in mind that the creation of an easement depends entirely upon the presumed intent of the parties, it is apparent that if the owner of the dominant estate can show a necessity for the continuance of the easement, a presumption in his favor may be made more easily. Whether such a necessity exists depends upon the facts of the particular case and one of the most important facts is whether the quasi-dominant or the quasi-servient tenement was conveyed first. Where the quasi-dominant tenement is first conveyed, it is said that the grantor impliedly *grants* an easement across the land retained by the grantor. Where the quasi-servient tenement is first conveyed, the grantor impliedly *reserves* the right to an easement over the land of the grantee.

For an implied grant, the grantee, as a general rule, need only show a reasonable necessity for the easement.[7] What the courts mean when they use the term "reasonable" may be best defined by establishing its outer extremities. It has been said that the easement will not be implied to avoid a mere inconvenience.[8] On the other hand, if the easement will be highly convenient for reasonable use of the land, the requirement may be satisfied.[9]

Although logically it would seem that the presumption in favor of an implied reservation to the grantor should require no greater degree of necessity than in the case of the implied grant, the law is otherwise. This results from the application of the rules stating that a conveyance

[5] 2 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY § 235 (1947).

[6] "(a) whether the claimant is the conveyor or the conveyee, (b) the terms of the conveyance, (c) the consideration given for it, (d) whether the claim is made against a simultaneous conveyee, (e) the extent of necessity of the easement to the claimant, (f) whether reciprocal benefits result to the conveyor and the conveyee, (g) the manner in which the land was used prior to its conveyance, and (h) the extent to which the manner of prior use was or might have been known to the parties." RESTATEMENT, PROPERTY § 476 (1944).

[7] Venegas v. Luby, 49 N.M. 381, 164 P. (2d) 584 (1946); Ferrel v. Durham Bank & Trust Co., 221 N.C. 432, 20 S.E. (2d) 329 (1942); Freieden v. Western Bank & Trust Co., 72 Ohio App. 471, 50 N.E. (2d) 369 (1943); Dean v. Colt, 151 Or. 331, 49 P. (2d) 362 (1935).

[8] Frensdorf v. Stumpf, 30 N.Y.S. (2d) 211; Shandy v. Bell, 207 Ind. 215, 189 N.E. 627 (1934); Bean v. Dow, 84 N.H. 464, 152 Atl. 609 (1930); Holtz Amusement Co. v. Schorr, 204 N.Y. Supp. 733, 122 Misc. Rep. 712 (1924); Goudie v. Fisher, 79 N.H. 424, 111 Atl. 282 (1920); Heyman v. Biggs, 223 N.Y. 118, 119 N.E. 243 (1918).

[9] Keen v. Bump, 310 Ill. 218, 141 N.E. 698 (1923); Adams v. Gordon, 265 Ill. 87, 106 N.E. 517 (1914).

must be construed against the person drafting the instrument[10] and that a grantor cannot derogate from his own grant.[11] The latter rule is so strictly applied in England that one may not have an easement by implied reservation.[12] The American courts do not apply the rule with such strictness, but do require a higher degree of necessity than for the implied grant.[13] The usual term is "strict" necessity. The *Restatement* tactfully avoids this term by stating, ". . . circumstances which may be sufficient to imply the creation of an easement in favor of the conveyee may not be sufficient to imply the creation of one in favor of the conveyor."[14]

The minorities are of two minds: one demanding strict necessity for both the implied grant and the implied reservation,[15] and the other requiring reasonable necessity for either.[16]

The terms "strict" and "reasonable" are generalizations intended to indicate the standard by which the court will decide whether the necessity requirement has been met. The cases, even within a given jurisdiction, have not given these terms a specific content so they are of slight aid in predicting the result of a particular case.

Implied Easements in Washington

The latest case on implied easements in Washington is *Wreggitt v. Porterfield*.[17] *P* and *D* owned adjacent property which had been owned by a bank in 1898. A permit for a sewer was issued to the bank for the purpose of connecting the house now on *D*'s lot to the main sewer. Either at this time or subsequent to conveyance by the bank (*the actual time was never decided*), a sewer was constructed from *P*'s property to a community outhouse towards the rear of the properties and thence through *D*'s lot to the street which abutted both pieces of property. *D*'s property was the first to be conveyed by the bank. *D*

[10] Restatement, Property § 476 (1944).
[11] Wheeldon v. Burrows, L.R. 12 Ch.D. 31 (1879).
[12] *Ibid.*
[13] Wheeler v. Taylor, 114 Vt. 33, 39 A. (2d) 190 (1944); Blumberg v. Weiss, 129 N.J.Eq. 34, 17 A. (2d) 823 (1941); Dale v. Bedal, 305 Mass. 102, 25 N.E. (2d) 175 (1940).
[14] Restatement, Property § 476 (1944).
[15] Miller v. Skaggs, 79 W.Va. 645, 91 S.E. 536 (1917). The court states that strict necessity is not absolute necessity. Rather, it is reasonable necessity as distinguished from mere convenience.
[16] State *ex rel.* McNutt v. Orcutt, 211 Ind. 523, 199 N.E. 595 (1936); Shandy v. Bell, 207 Ind. 215, 189 N.E. 627 (1934); *cf.* Ciski v. Wentworth, 297 Pa. 317, 147 Atl. 51 (1929); Scarborough v. Anderson Const. Co., (Tex. Civ. App.), 90 S.W. (2d) 305, (1936).
[17] 136 Wash. Dec. 593, 219 P. (2d) 589 (1950).

had broken and capped *P*'s sewer during excavation. *P* sued *D* on the theory of implied grant of an easement for the sewer.

The trial court found for *P* on the basis of implied grant. The Supreme Court reversed this finding and stated that for an *easement by implication* the following essentials must be found: "(1) Unity of title and subsequent separation by grant of the dominant tenement; (2) apparent and continuous user; (3) the easement must be reasonably necessary to the proper enjoyment of the dominant tenement."

Should we assume that the court meant the term "easement by implication" to apply to easements by implication as a general class or only to easements by implied grant? The court does not say. If applied to the implied grant situation, Washington law would be in accordance with the rule of the majority of the states. Taken literally, however, this statement of the elements would deny the existence of the implied reservation since the implied reservation can be created only when the *servient* tenement is conveyed to the grantee. The quoted elements refer to only the "dominant tenement." Assuming that this alone does not prevent the creation of an implied reservation, difficulty is again encountered when considering the requisite necessity for the implied reservation. While the majority of states requires strict necessity for its creation, the Washington court requires only reasonable necessity.

A brief summary of the decisions prior to the *Wreggitt* case will serve to point out the manner in which the implied reservation has apparently been eliminated. The first thorough examination[18] of the implied easement in Washington occurred in the case of *Bailey v. Hennessey*.[19] Therein it was stated that "Easements by implication arise where property has been held in a unified title, and during such time an open and notorious servitude has apparently been impressed upon one part of the estate in favor of another part, and such servitude, at the time that the unity of title has been dissolved by a division of the property or a severance of the title, has been used and is reasonably necessary for the fair enjoyment of the portion benefitted by such use." That this statement was meant to apply only to implied grant situations became more apparent with the decision of *Berlin v.*

[18] Prior cases were: Lindbloom v. Berkman, 43 Wash. 256, 86 Pac. 567 (1906); Jemo v. Tourist Hotel Co., 55 Wash. 595, 104 Pac. 820 (1910); Malsch v. Waggoner, 62 Wash. 470, 114 Pac. 446 (1911); Schumacher v. Brand, 72 Wash. 543, 130 Pac. 1145 (1913); Roe v. Walsh, 76 Wash. 148, 135 Pac. 1146 (1913); Cogswell v. Cogswell, 81 Wash. 315, 142 Pac. 665 (1914); Davison v. Columbia Lodge No. 8, K. of P., 90 Wash. 461, 154 Pac. 383 (1916).

[19] 112 Wash. 45, 191 Pac. 863 (1920).

Robbins,[20] wherein the elements found in the *Wreggitt* case were first stated. The *Berlin* case stated the elements as requirements for the *implied grant*. At this point the law was on solid ground, but not for long. Rather than cite the *Berlin* case as applying strictly to an implied grant situation, the elements were cited in *Rogers v. Cation*,[21] and in subsequent cases,[22] as the basis of an *easement by implication*. Regardless of the reason for this change in terminology, the result is confusion.

Few cases have mentioned the implied reservation[23] and no case in Washington has been decided on the theory. *Dicta* indicates that the court will require strict necessity for its creation.[24] In the *Wreggitt* case, the court makes an attempt to distinguish the implied grant and reservation, but insofar as clarifying the law nothing is accomplished; in the next paragraph the two terms are used interchangeably.[25]

We should assume that the court meant the broad term "easement by implication" to refer only to the implied grant situation since all the decided cases have been based on that theory. We have, however, no assurance that this assumption will be vindicated in future cases.

Way of Necessity

The way of necessity is implied in accordance with the presumed intent of the parties and the requisites of public policy.[26] The need for a way of necessity usually occurs when the grantor conveys land to which the grantee can have access only by passing over the land of the grantor or that of a stranger, or the converse situation wherein the grantor has no access to land retained.[27] Ordinarily, a grantor or

[20] 180 Wash. 176, 38 P. (2d) 1047 (1934). The *Berlin* case cited no Washington cases for authority. *Cf.* Davison v. Greenfield, 118 Wash. 454, 293 Pac. 948 (1922); Ashton v. Buell, 149 Wash. 498, 271 Pac. 591 (1928); Hansen v. Runkel, 177 Wash. 384, 32 P. (2d) 103 (1934).

[21] 9 Wn. (2d) 369, 115 P. (2d) 702 (1941).

[22] Merriweather v. Peterson, 183 Wash. 78, 48 P. (2d) 220 (1935); White v. Berg, 19 Wn. (2d) 284, 142 P. (2d) 260 (1943); Bushy v. Weldon, 30 Wn. (2d) 266, 191 P. (2d) 302 (1948); Evich v. Kovacevich, 33 Wn. (2d) 151, 204 P. (2d) 839 (1949).

[23] Davison v. Columbia Lodge No. 8, K. of P., 90 Wash. 461, 154 Pac. 383 (1916); Cogswell v. Cogswell, 81 Wash. 315, 142 Pac. 665 (1914); Schumacher v. Brand, 72 Wash. 543, 130 Pac. 1145 (1913).

[24] *Ibid.*

[25] "In order to give rise to the presumption of a reservation of an existing easement or quasi-easement, where the deed is silent upon the subject, the necessity must be of such a nature as to leave no room for doubt of the intention of the parties . . . We are satisfied that such necessity does not exist. From the foregoing, it is apparent that the third and last of the three essentials to an implied grant of an easement by implication is missing." 136 Wash. Dec. 593, 595; 219 P. (2d) 589, 590 (1950).

[26] 3 TIFFANY, REAL PROPERTY § 793 (3rd. ed. 1939).

[27] Other rights coming under the same or similar procedure are termed "easements of necessity." This comment treats only the way of necessity. For distinction and examples, see 3 TIFFANY, REAL PROPERTY §§ 792, 793 (3rd. ed. 1939).

grantee will not place himself in the position of owning land to which he has no access. The presumption, therefore, is that the parties intended there should be a right of access to the land conveyed or retained. This presumption is rebutted by proof of contrary intent. The presumption exists although a way of necessity in favor of the grantor is contrary to the rules that the grantor cannot derogate from his own grant and that a conveyance must be construed against the person drafting the instrument. In this case, the presumption is based on the public policy that all land should be put to use.

Unity of title is an absolute requirement, there being, at common law, no right to a way of necessity over the land of a stranger.[28] Remoteness as to time of unity and the existence of intervening conveyances are immaterial.[29] Where the grantee is cut off by land other than his grantor's, his only remedy lies in condemnation proceedings provided by statute.

A quasi-easement existing prior to severance for the benefit of the quasi-dominant tenement to the detriment of the quasi-servient tenement is not necessary.

Since there is no quasi-easement to support the inference of intent, construction of the conveyance must be based, in large part, upon the existing necessity for the way. While it has been said that reasonable necessity is sufficient, the requirement is generally stated in terms of absolute necessity. The difference, however, is not as great as the terms indicate, since the reasonable necessity used in this context is of a higher degree than when used in reference to implied easements.[30]

WAYS OF NECESSITY IN WASHINGTON

The Constitution of the state of Washington provides for the condemnation of private ways of necessity over privately held lands.[31] In

[28] Schulenbarger v. Johnstone, 64 Wash. 202, 116 Pac. 843 (1911); Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681 (1903); Long v. Billings, 7 Wash. 267, 34 Pac. 936 (1893).

[29] 3 TIFFANY, REAL PROPERTY § 793 (3rd. ed. 1939).

[30] 3 TIFFANY, REAL PROPERTY §§ 786, 794 (3rd. ed. 1939).

[31] "Private property shall not be taken for private use, except for private ways of neecessity, and drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefore be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. . . ." WASHINGTON STATE CONSTITUTION, Art. 1. § 16.

effect, the provision is a public policy measure which prevents the private individual from tying up a portion of the resources of the state. The constitutional section and its later definitive statutory counterpart are compatible with the federal Constitution guaranteeing due process of law.[32]

Shortly after adoption of the Washington Constitution it was held that the constitutional provision was not self-executing and that " . . . the legislature must define what are to be 'private ways of necessity,' authorize persons to apply for them, and prescribe the method by which the necessary land is to be taken."[33] Prior to action by the legislature, the case of *Healy Lumber Co. v. Morris*[34] stated that the phrase "private way of necessity," as found in the Constitution was to be construed with reference to that which was deemed to be a way of necessity at common law. This meant that there would be no right to a statutory way unless there had been unity of title and a grant coupled with estoppel. If the law had proceeded no farther, the provision would have been either meaningless[35] or a substitution of condemnation proceedings for the common law action, thereby abrogating the common law way of necessity.

The Legislature, in 1913, enacted a statute[36] which set out the legal rights available under the constitutional provision. Subsequently the statutory way was held to be on an entirely different basis than the common law way of necessity. A grant coupled with estoppel was no longer a requisite.[37] This left open the question as to whether the two

[32] State *ex rel.* Mountain Timber Co. v. Superior Court, 77 Wash. 585, 137 Pac. 994 (1914); Ruddock et al. v. Bloedel Donovan Lumber Mills, 28 F. (2d) 684 (9th Cir. 1928).

[33] Long v. Billings, 7 Wash. 267, 34 Pac. 936 (1893).

[34] 33 Wash. 490, 74 Pac. 681 (1903). *See* Schulenbarger v. Johnstone, 64 Wash. 202, 116 Pac. 843 (1911).

[35] State *ex rel.* Mountain Timber Co. v. Superior Court, 77 Wash. 585, 137 Pac. 994 (1914).

[36] "An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain any drain, flume, or ditch, on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such drain, flume or ditch as the case may be. The term 'private way of necessity' as used in this act, shall mean and include a right of way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals and products may be transported and carried." REM. REV. STAT. § 6747 [P.P.C. § 32-1].

[37] State *ex rel.* Mountain Timber Co. v. Superior Court, 77 Wash. 585, 137 Pac. 994 (1914); *See* Sultan Ry. and Timber Co. v. Great Northern Ry., 58 Wash. 604, 109 Pac. 320, 1020 (1910).

ways co-exist. In the case of *State* ex rel. *Carlson v. Superior Court*[38] the issue was " . . . whether one, having a legal right to pass over the lands of his grantor, may reject the way that the law gives him and which his grantor cannot deny him, and compel a way of necessity over the lands of a stranger, where, upon an admeasurement of convenience and expense, it is held that the way over the land of a stranger is the more practicable than the way over the land of the grantor." Though the statutory way was denied due to lack of requisite necessity, the *dictum* gives strong indication that the two ways co-exist in Washington.

If *dicta* may be used as a basis of prediction, absolute necessity is required for the common law way of necessity in Washington.[39] The statutory way of necessity, however, requires only reasonable necessity.[40] Logically, therefore, this distinction, coupled with the fact that unity of title is not a requisite for the statutory way, indicates that many ways of necessity not available under the common-law rule may be available under the statute.

Conclusion

Though the Washington court has referred to the implied reservation of an easement, great doubt exists as to its validity in Washington. Assuming it does exist and the court requires strict necessity for its creation, the implied reservation will seldom be used. The private way of necessity statute, providing for the creation of a way where there is no unity of title and only reasonable necessity, has substantially replaced it. The implied reservation will be of service where there is unity of title, strict necessity and the cost of condemning land under the statute is more than the land owner is willing to pay.

As in the case of the implied easement, the co-existence of the statu-

[38] 107 Wash. 228, 181 Pac. 689 (1919).

[39] Schulenbarger v. Johnstone, 64 Wash. 202, 116 Pac. 843 (1911); Healy Lumber Co. v. Morris, 33 Wash. 490, 74 Pac. 681 (1903); Long v. Billings, 7 Wash. 267, 34 Pac. 936 (1893).

[40] State *ex rel.* Erchinger v. Gilliam, 163 Wash. 111, 300 Pac. 173 (1931); State *ex rel.* Schlief v. Superior Court, 119 Wash. 372, 205 Pac. 1046 (1922); State *ex rel.* Grays Harbor Logging Co. v. Superior Court, 82 Wash. 503, 144 Pac. 722 (1914); Samish River Boom Co. v. Union Boom Co., 32 Wash. 586, 73 Pac. 670 (1903). "So it might be said that, notwithstanding a statute gives a land-locked owner the right to condemn a way of necessity over the lands of a stranger, it is not a favored statute, and the taking will not be tolerated unless the necessity is paramount in the sense that there is no other way out or that the cost is prohibited." State *ex rel.* Carlson v. Superior Court, 107 Wash. 228, 232, 181 Pac. 689, 691 (1919). This necessity is probably of a greater degree than that required for the common law implied easement and of a lesser degreee than required for the common law way of necessity.

tory way and the common law way of necessity is not particularly advantageous. The statutory way would seem to be superior in that less is required for its creation. The cost of condemning land, again, will probably be the only deterrent to its use.