

## Ways of Necessity - Implied in Law or Implied in Fact - *Condry v. Laurie*

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### Recommended Citation

*Ways of Necessity - Implied in Law or Implied in Fact - Condry v. Laurie*, 9 Md. L. Rev. 84 (1948)

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## WAYS OF NECESSITY—IMPLIED IN LAW OR IMPLIED IN FACT

### *Condry v. Laurie*<sup>1</sup>

The complainants-appellees instituted suit to enjoin the defendant-appellant from interfering with the complainants' use of a private road over the property of the defendant.

It appeared that the complainants and the defendant owned adjoining parcels of land, the defendant's parcel adjoining the county road and the complainants' parcel being an inner lot and not adjoining the county road. Both parties derived their respective titles from a common grantor. In 1920, the common grantor conveyed the inner parcel to the complainants' predecessors in title who were given in the deed a "license to use the private road from the County Road to and from the property now conveyed . . . while they shall remain owners of this property".<sup>2</sup> The complainants purchased this inner parcel in 1941.

At the trial, the defendant offered evidence to show that the complainants had acquired in 1943 another parcel of land adjacent to, and south of, the parcel purchased in 1941, that they could reach the county road by way of a road along this adjacent land and that this road was open to the public. The Court refused to receive further evidence on these matters and granted an injunction, enjoining the defendant from interfering with the complainants' use of the road. The decree was based on the ground that the complainants were entitled to the use of the road as a way of necessity.

Upon appeal the decree was reversed and the case remanded with instructions to the trial Court to receive additional evidence for the purpose of determining whether or not the complainants had access to the county road by means of another way other than over the land of the defendant. The position of the Court of Appeals may be fairly stated to have been that the complainants were entitled to a way of necessity, that a way of necessity continues to exist only so long as the necessity exists, and that if the complainants had other means of access to the county road, their way of necessity was extinguished.

Judge Henderson filed a dissenting opinion, in which Judge Grason joined, taking the position that a way of

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<sup>1</sup> 184 Md. 317, 41 A. 2d 66 (1944).

<sup>2</sup> *Ibid.*, 184 Md. 319, 41 A. 2d 67.

necessity arises by virtue of the implied intent of the parties to a grant, that the license given in the deed of the complainants' grantor indicated an intention *not* to create a way of necessity, that the complainants could acquire no greater rights than their grantor, and that the bill should be dismissed.

These two opposing views raise the interesting question as to the right of a remote grantee to claim an easement by way of necessity where the immediate grantee has never claimed nor opened such a way.

The answer depends on what legal concept is adopted with respect to the creation of a way of necessity and the nature of the incidents logically flowing from its creation.<sup>3</sup>

The majority opinion states that "it is universally accepted that where a person conveys to another a parcel of land surrounded by other land and there is no access to the land thus conveyed except over the grantor's land, the grantor gives the grantee by implication a right of way over his own land to the land conveyed by him".<sup>4</sup> The doctrine is based upon social policy which favors the full utilization and occupancy of land. The law follows the dictates of this policy and will imply the grant. But according to the Court: "it is only brought into existence from the necessities of the estate granted".<sup>5</sup> In other words, the basis of the implication is the necessity of ingress and egress over the grantor's land. It is imposed by law regardless of the intent of the parties. The easement does *not* arise from the presumed intent of the parties to the deed.

On the other hand, we find that the dissent adopts the concept that a way of necessity arises from the presumption that it was the *intention* of the parties that the grantee should have access to his lands over the lands of the grantor. Strictly speaking, the necessity itself does not create the way. It is merely evidence of the intent of the parties. The presumption that the parties intended a way of necessity to arise can be rebutted by the evidence derived from reference to the terms of the deed, to extrinsic acts of the parties, and to the surrounding circumstances.

It is believed that, upon careful analysis, both these opposing views contain elements which should be considered as underlying the basic principles governing the

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<sup>3</sup> The scope of this note is limited to the legal concept of the creation of a way of necessity by implied grant to the extent that it bears on the above-stated right of a remote grantee; the note does not purport to concern itself with the creation of a way of necessity by implied reservation.

<sup>4</sup> *Supra*, n. 1, 184 Md. 321, 41 A. 2d 68.

<sup>5</sup> Quoting *Oliver v. Hook*, 47 Md. 201, 309 (1877).

creation of a way of necessity although each concept has over-emphasized an essential characteristic out of its proper proportion.

Did the complainants' grantors, the licensees, have a way of necessity? This question is left unanswered by the Court. From the language used it would seem, by implication, that the Court would answer the question affirmatively. After holding that the complainants' grantors acquired a mere personal license to use the road over the defendant's land, the Court, without citing any authority therefor, states: "when the licensees were no longer owners of the property, succeeding owners were still entitled to a way of necessity, although the way might not necessarily be same as that used by the licensees".<sup>6</sup> What is the meaning of those words?

If it is assumed, that in the opinion of the Court, a way of necessity was not created out of the deed of 1920 and that therefore the complainants' grantors did not possess a way of necessity, on what theory can it be said that the complainants were entitled to a way of necessity? It is difficult to conceive of any theory, if the orthodox doctrine is accepted that a way of necessity arises by implication out of a grant. There is simply no grant to which we can look for its creation.

On the other hand, the logical inference from the Court's language seems to be that the licensees *did* have a way of necessity over the defendant's land, although the way was never located nor used (since the licensees passed to and fro by virtue of their license<sup>7</sup> and therefore had no occasion to claim the way) yet that this way, although inchoate and dormant, so to speak, became appurtenant to the land of the licensees; that the way passed to subsequent grantees as an easement appurtenant, ready to rise and spring up in the future, when the necessity for its existence arose,<sup>8</sup> as when the license was terminated by the conveyance to the complainants. But, if the above be true, what becomes of the proposition that the fact of necessity gives

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<sup>6</sup> *Supra*, n. 1, 184 Md. 323, 41 A. 2d 69.

<sup>7</sup> In *Smyles v. Hastings*, 22 N. Y. 217 (1860), it was held that where there was no occasion for the intermediate grantees to assert the claim to a right of way by necessity, because the land was wild and unimproved, until it was acquired by a remote grantee, the right had never been lost.

<sup>8</sup> *Quaere*: Granted that the way became appurtenant and a remote grantee assert a claim to use the way, if the necessity arose, and granted further that a way of necessity lasts only so long as the necessity lasts, does the cessation of the necessity in a remote grantee so extinguish the way that the necessity subsequently arising in a still more remote grantee would be ineffective to give rise to "rejuvenate" the way?

rise to the implied grant of the way of necessity on which proposition the Court placed reliance and approved in its opinion?<sup>9</sup> For in 1920, there was no necessity. The grantees in the 1920 deed were given a license. It would seem that the two propositions are therefore contradictory and both cannot stand *vis-a-vis*. And it is felt that this seeming conflict can only be resolved if we conceive of the "necessity" as being one of physical fact, as being concerned only with the physical characteristics and interrelationship of the dominant and servient estates and as having no concern whatsoever with what legal rights or privileges *pro tem* the grantees and succeeding owners may possess.

If then it is conceded that out of the grant of 1920 to the complainants' grantor, a way of necessity was created and this way became appurtenant to the dominant estate, although it was never located nor used, the logical result would be that any and all subsequent grantees of the dominant estate *ad infinitum* could claim a way of necessity over the servient land whenever and however the necessity for such a way arose. This result would seem to be unduly harsh and restrictive of the grantor's freedom of contract. This objection is the underlying thought behind the dissenting opinion. If the way, in such circumstances as in the principal case, is to become appurtenant to the dominant estate and subsequent grantees of such estate can claim and assert the way whenever they can show the necessity therefor, how can the owner of the servient estate, the common grantor, protect himself from the possibility that at some future time, a remote grantee will assert a claim?

This question is answered by the dissenting opinion. A way of necessity, asserts the dissenting opinion, is created to effectuate the presumed *intention* of the parties. The presumption is rebuttable. "Any language in a deed that fairly indicates an intention not to create an easement by necessity will prevent its creation".<sup>10</sup> The license in the deed of 1920 negated an intention to create a way of necessity.<sup>11</sup> The reasoning of the dissenting opinion contains unanswerable logic within itself. The difficulty is in its major premise, to wit, that a way of necessity is merely

<sup>9</sup>There is authority for the proposition that at the time of severance, necessity for the way must exist. See: *Seymour v. Lewis*, 13 N. J. Eq. 439 (1861), 78 Am. Dec. 108; *Central Railroad Co. v. Valentine*, 29 N. J. L. 561 (1862); *DeLuze v. Bradbury*, 25 N. J. Eq. 70 (1879); *Connor v. Boyd*, 73 Pa. 179 (1873).

<sup>10</sup>*Supra*, n. 1, 184 Md. 326, 41 A. 2d 70.

<sup>11</sup>Moreover, the complainants were chargeable with notice, the deed of 1920 being a matter of public record.

created to effectuate the presumed intention of the parties.<sup>12</sup>

If this concept of the way is accepted, the argument that the intention may be rebutted by words in the deed<sup>13</sup> seems unanswerable. But, if we accept the view that the law will imply the way for reasons of social policy (assuming the necessity exists) it would seem that no words, however strong or express, would rebut the presumption. Considerations of social policy would be overriding.<sup>14</sup>

In the last analysis, then, the conflict between the two opposing views may be described as one of social policy for the full utilization of land versus a social policy in favor of freedom of contract.

Broadly speaking, it is felt that in the principal case, the result reached by the Court is the better and more justifiable one, although it is not clear in the light of well-accepted principles governing the creation of ways of necessity how the Court reached its result.

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<sup>12</sup> Professor Simonton in an interesting and exhaustive study has severely criticized the concept that a way of necessity arises from the presumed intention of the parties. "It is evident that the easement by necessity is imposed by operation of law, regardless of the knowledge of the parties as to the circumstances, and regardless of their actual intent, unless such intent be expressed. The attempt to base the easement on the presumed intent of the parties was doubtless due to the mode of juristic thinking of that period. During the 19th century, courts tried to simulate everything to property and there was a strong tendency to reduce everything in the nature of a legal transaction to contract. The notion was that rights arose because of the exercise of the wills of individuals, and so the attempt was made to have the easement by necessity appear to be due to an agreement of the parties. It is not strange that the judges concluded that the easement by necessity arose because of the presumed intent of the parties . . . This explanation was doubtless quite satisfactory to the mind of the jurist of the middle of the last century . . . [but] . . . confusion has frequently resulted where what is really a fiction is referred to as the intent of the parties." *Simonton, Ways By Necessity* (1926) 33 W. Va. L. Q. 64, 69.

<sup>13</sup> It has been found necessary, as a result, in some states, to enact statutes authorizing private land owners to condemn land for right of way purposes in cases where the condemnor's land is land-locked. See: Note, *Highways—Right of Access by Private Road Across Intervening Land—Decree of Necessity Required to Sustain Right* [Kentucky], 1939) 24 Wash. U. L. Q. 275.

<sup>14</sup> In the principal case, if the deed of 1920 had made an express grant of a right of way to complainants' predecessors as opposed to a mere license, it would seem, that the Court would still have held that a way of necessity arose by implication. See: *Uhl v. Ohio River R. Co.*, 47 W. Va. 59. 34 S. E. 934 (1899).