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Way Of Necessity - Hancock v. Henderson

Way Of Necessity

Hancock v. Henderson[1]

William Gatton owned a tract of land, which he divided in 1898 by conveying a portion to Eliza Hutchins. The tract conveyed was bounded by the remainder of the Gatton's tract on one side, St. Thomas Creek on another and the land of strangers on the remaining sides. The deed to Eliza Hutchins purported to convey the property, "together with all and every . . . appurtenances and advantages, outlets or roadways, to the same belonging or in any wise appertaining."[2] Through mesne conveyances the complainants are presently the owners of the Hutchins tract, and the respondents are currently the owners of the

1. 236 Md. 98, 202 A.2d 599 (1964).
2. *Id.* at 100.

Gatton tract. There is a roadway across the respondent's property which has been in existence since about 1911, although it has been unused for about fifty years, and was not in existence at the time of the grant. The complainants decided to improve their property, and while endeavoring to clear the roadway, they were ejected by the respondents. The complainants instituted this suit to enjoin the respondents from obstructing or otherwise interfering with the use of the right of way across the respondent's land.

The trial court granted an injunction on the grounds that "the language used in the 'together clause' was sufficient to constitute an express grant of a general easement which subsequently became fixed by usage of the particular roadway."[3] The Maryland Court of Appeals rejected this decision, holding that the failure to establish the existence of the roadway at the time of severance was fatal to the claim of an express grant.[4] The court, however, sustained the injunction on the grounds that the complainants were entitled to a way of necessity, despite the possibility of access over St. Thomas Creek.

A way of necessity is an implied easement of a right of way,[5] founded upon an ancient principle of law:[6] if a man grants something, he at the same time is understood to grant that which is necessary to the existence of the thing granted.[7] Thus a way of necessity arises by implication where *X grants*[8] to *Y* a portion of his property, so situated that the grantee has no means of ingress or egress except over the lands of strangers or over the remaining land of *X*. In such a case, the law will impliedly grant to *Y* a way across the land retained by *X*.[9]

To establish the right to a way of necessity, the claimant must prove that there existed at some point in time a unity of possession

3. *Id.* at 101.

4. *Ibid.*

5. 17A AM. JUR. *Easements* § 58 (1957). A way of necessity should be carefully distinguished from an implied easement arising from a preexisting use or a quasi-easement. The requirements of an implied quasi-easement are these: (1) unity of title and a subsequent conveyance; (2) apparent, visible and obvious servitude at the time of the grant; (3) reasonable necessity; (4) continuous use. See, *e.g.*, Parker v. Bains, 194 S.W.2d 569 (Tex. 1946). A way of necessity is not founded upon a preexisting use or visible servitude, but is a newly created way. Oliver v. Hook, 47 Md. 301, 309 (1877). See also Adams v. Cale, 48 N.J. Super. 119, 137 A.2d 92 (App. Div. 1957).

6. For an excellent discussion of the history and development of the common law concepts of ways of necessity, see Simonton, *Ways By Necessity*, 33 W. VA. L. REV. 64 (1926). This authority has traced the principle of law to the reign of Edward I (1272–1307).

7. *Id.* at 65.

8. This note will be confined to ways of necessity arising by implied grant. Ways of necessity also arise by implied reservation, *i.e.*, where the grantor retains landlocked property. The creation of ways of necessity by implied reservation is an exception to the general rule that a grantor may not derogate from the terms of his own grant. See, *e.g.*, 3 TIFFANY, REAL PROPERTY § 793 (3d ed. 1939); 2 THOMPSON, REAL PROPERTY § 362 (repl. vol. 1961). If one conveys the only portion of his land which touches upon a public road and fails to reserve in the deed any right of way, then he may use the land of the grantee as a way of necessity. McTavish v. Carroll, 7 Md. 352 (1855).

9. See Zimmerman v. Cockey, 118 Md. 491, 84 Atl. 743 (1912); Oliver v. Hook, 47 Md. 301 (1877). "[I]f a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come to it; and I may cross his land for that purpose without trespass," 2 BLACKSTONE, COMMENTARIES 504 (Lewis ed. 1902).

of the allegedly dominant and servient estates, and a subsequent grant of the dominant estate.[10] Where there has been no unity of possession, there can be no way of necessity, since a way of necessity can arise only out of the land granted or reserved by the grantor, and never out of the land of strangers.[11] This requirement of unity of the dominant and servient estates does not comprehend any time limitation,[12] for the right to a way of necessity attaches immediately upon severance[13] and may lie dormant or inchoate for an indefinite number of years before it is utilized.[14] In the principal case the court looked nearly seventy years into the past to establish the requisite unity of title. The failure of the immediate grantees to assert the right to a way of necessity in no way precludes the remote grantees from asserting this right.[15] Nor is the right extinguished by non-user for the prescriptive period, unless the non-user is accompanied by affirmative acts which evidence an intent to abandon the easement.[16] The right to a way of necessity will pass without any notice thereof to all subsequent grantees of the dominant estate, and all grantees of the servient estate will be subject to the exercise of this right.[17]

The second element of the claimant's burden of proof is the proof of a necessity. A way of necessity is only implied where the right of way is necessary to the beneficial use of the land granted. The necessity must arise upon the severance of the dominant and servient estates;[18] it cannot be created by the subsequent acts of the grantee.[19] Since the existence of a way of necessity is predicated upon the existence of a necessity, the cessation of the necessity extinguishes the right of way.[20]

The courts are not in complete agreement as to the amount of necessity required. Some courts will imply a way of necessity if the way is *reasonably necessary*[21] to the beneficial use of the land granted.

10. Thomas v. Morgan, 113 Okla. 212, 240 P. 735, 43 A.L.R. 934 (1925); Bowles v. Chapman, 180 Tenn. 321, 175 S.W.2d 313 (1943).

11. See Oliver v. Hook, 47 Md. 301, 310 (1877).

12. See, *e.g.*, Feofees of Grammar School in Ipswich v. Proprietors of Jeffrey's Neck Pasture, 174 Mass. 572, 55 N.E. 462 (1899), in which the unity of title had existed 250 years prior to the successful claim of a way of necessity.

13. Crotty v. New River & Pocahontas Consol. Coal Co., 72 W. Va. 68, 78 S.E. 233 (1913).

14. Logan v. Stogdale, 123 Ind. 372, 24 N.E. 135, 8 L.R.A. 58 (1890).

15. Finn v. Williams, 376 Ill. 95, 33 N.E.2d 226, 133 A.L.R. 1390 (1941). The effect of the failure of the immediate grantee to assert the right to a way of necessity is the subject of the annotation. Annot., 133 A.L.R. 1393 (1941).

16. See Adams v. Hodgkins, 109 Me. 361, 84 A. 530, 42 L.R.A. (n.s.) 741 (1912); Knotts v. Summit Park Co., 146 Md. 234, 126 A.2d 280 (1924). As to what constitutes an abandonment, see Goodman v. Brenner, 219 Mich.,55, 188 N.W. 377 (1922), and Bauman v. Wagner, 146 App. Div. 191, 130 N.Y. Supp. 1016 (1911).

17. Blum v. Weston, 102 Cal. 362, 36 Pac. 778 (1894).

18. Feldstein v. Segall, 198 Md. 285, 294, 81 A.2d 610 (1950).

19. See Turner v. South & W. Improvement Co., 118 VA. 720, 88 S.E. 85 (1916), noted in 3 VA. L. REV. 642 (1916), where plaintiff and defendant received their lands from a common grantor and both had access to a public way. Plaintiff subsequently sold part of his land so as to divest himself of his right of way. *Held*, plaintiff was not entitled to a way of necessity across the land of defendant, since plaintiff by his own acts had created the necessity.

20. Waubun Beach Ass'n v. Wilson, 274 Mich. 598, 265 N.W. 474, 103 A.L.R. 990 (1936). Oliver v. Hook, 47 Md. 301 (1877).

21. See Brasington v. Williams, 143 S.C. 223, 141 S.E. 375 (1927). *Cf.* Von Meding v. Strahl, 319 Mich. 598, 30 N.W.2d 363 (1948). *But see* Derifield v. Maynard, 126 W. Va. 754, 30 S.E.2d 10 (1944).

Others take the position that the way must be *strictly*[22] or *absolutely necessary*.[23] The distinction is plainly one of degree, but the significance of this degree is evident in the principal case. In this case the dominant estate was bounded on one side by St. Thomas Creek, which was assumed to be a nagivable waterway.[24] Since a navigable waterway provides a means of access, the question then becomes whether the presence of such a means of access will bar the creation of a way of necessity. The courts which adhere to the requirement of strict or absolute necessity have taken the view that a way cannot be strictly necessary if access exists over water.[25] Dictum in the Maryland case of *Woelfel v. Tyng*[26] led some authorities to believe that the Maryland courts would adhere to this strict view.[27] In the instant case, however, the court repudiated this view, holding instead that "a way of necessity may exist over the land of the grantor even though the grantee's land borders on a waterway, if the water route is not available or suitable to meet the requirements of the uses to which the property would reasonably be put."[28] This more moderate view has been applied by the courts which require only a reasonable necessity.[29] Applying this view, it is difficult to imagine a land use such that a navigable waterway would provide suitable access and thereby bar the implication of a way of necessity.

The courts are in accord in holding that mere convenience will not provide the basis for a way of necessity.[30] The stricter view seems to be that no amount of inconvenience will satisfy the requirement of necessity, if in fact another way of access exists across the claimant's own property.[31] The courts which require only a reasonable necessity take the position that adequate necessity exists if the degree of inconvenience is such as to impose unreasonable limitations upon

22. Welch v. Shipman, 357 Mo. 838, 210 S.W.2d 1008 (1948); Orr v. Kirk, 100 Cal. App. 2d 678, 224 P.2d 71 (1950).

23. Adams v. Cale, 48 N.J. Super. 119, 137 A.2d 92 (1957). *Compare* Jay v. Michael, 92 Md. 198, 210, 48 Atl. 61 (1900), which held that "the necessity must be imperative and absolute", *with* Zimmerman v. Cockey, 118 Md. 491, 496, 84 Atl. 743 (1912), where it was said that the test is "reasonable access."

24. The navigability of St. Thomas Creek was questionable. Hancock v. Henderson, 236 Md. 98, 103, 202 A.2d 599, 602 (1964).

25. Flood v. Earle, 145 Me. 24, 71 A.2d 92 (1950); Littlefield v. Hubbard, 124 Me. 299, 128 Atl. 285 (1925); Hildreth v. Googins, 91 Me. 227, 39 Atl. 550 (1898). The existence of a navigable waterway barring the creation of ways of necessity is the subject of an annotation in Annot., 38 A.L.R. 1310 (1925).

26. 221 Md. 539, 544, 158 A.2d 311, 313 (1960). The court stated, "[I]t has been held in some cases that a way of necessity cannot be implied over contiguous lands of a grantor, where there is access over navigable waters." The court distinguished the earlier case of Jay v. Michael, 92 Md. 198, 48 Atl. 61 (1900), in which a way by necessity was allowed although the land bordered on a creek. In the *Jay* case, the question of the navigability of the creek and its effect on the creation of a way by necessity was not raised.

27. 28 C.J.S. *Easements* § 36, at 699, n.22 (Supp. 1964); 8 MD. L. ENCYC. *Easements* § 21, at 573 (1960).

28. Hancock v. Henderson, 236 Md. 98, 103, 202 A.2d 599, 602 (1964).

29. Cookston v. Box, 109 Ohio App. 531, 160 N.E.2d 327 (1959).

30. A way of necessity will not be implied, if another route over the claimant's property can be made at reasonable expense, even though the other road may be less convenient, Mullins v. Ray, 232 Md. 596, 194 A.2d 311 (1963). See also cases cited note 21 *supra*.

31. See also 17A AM. JUR. *Easements* § 61 (1957), and cases cited note 22 *supra*.

the use and enjoyment of the land.[32] The test frequently applied to determine whether a reasonable necessity exists is an economic test, *i.e.*, if the expense of utilizing another means of access would be disproportionate to the value of his land, then a reasonable necessity exists.[33]

Regardless of the degree of necessity required, it is held that the necessity *per se* does not create the right, but is merely a circumstance from which the intent of the parties to the grant may be inferred.[34] As previously noted a way of necessity is an implied easement. It is implied by the courts to effectuate what is presumed to be the intent of the parties — that they did not intend to render the property inaccessible, and therefore, intended to convey a right of way.[35] If a contrary intent of the parties is expressed, it would seem that the presumption of intent could not be raised.[36] Cases can be found, however, where the presumption prevails notwithstanding an apparent absence of intent[37] or an expressed contrary intent. In the Maryland case of *Condry v. Laurie*[38] a remote grantee conveyed the property, together with an express license for ingress and egress across the land of a stranger to the original grant. The granting of a license was construed by the dissent to be evidence of an intent not to grant a way of necessity. The majority was of the opinion that a way of necessity should be implied, because "the doctrine is based upon *public policy*, which is favorable to the full utilization of the land and the presumption that the parties do not intend to render the land unfit for occupancy."[39] If we acknowledge the view of the dissent, that the granting of a license constituted an expression of intent, then it is evident that the court was relying not upon the presumed intent of the parties, but solely upon the public policy involved.

A number of authorities have recognized that the doctrine of ways of necessity is based upon public policy,[40] but the majority of

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32. See Greenwalt v. McCardell, 178 Md. 132, 12 A.2d 522 (1940); Mullins v. Ray, 232 Md. 596, 194 A.2d 311 (1963).

33. See, *e.g.*, Condry v. Laurie, 184 Md. 317, 41 A.2d 66 (1945), noted in 9 MD. L. REV. 84 (1948).

34. Fox v. Paul, 158 Md. 379, 148 Atl. 809, 68 A.L.R. 520 (1930); Tratar v. Rausch, 154 Ohio St. 286, 95 N.E.2d 685 (1950).

35. See Greenwalt v. McCardell, 178 Md. 132, 12 A.2d 522 (1940).

36. See, *e.g.*, Orpin v. Morrison, 230 Mass. 590, 120 N.E. 183 (1918), which affirms that a way of necessity will not be implied where it is shown that the parties did not intend such a way.

37. Crotty v. New River & Pocahontas Consol. Coal Co., 72 W. Va. 68, 78 S.E. 233 (1913), where the court looked to a conveyance made in 1832 to establish the requisite unity of ownership, and then found that it was within the intent of the parties to grant a right of way to a public highway which was not even in existence at the time of the grant in 1832. Clearly it would have been impossible for the parties to have intended such a grant.

38. 184 Md. 317, 41 A.2d 66 (1945), noted in 9 MD. L. REV. 84 (1948).

39. *Id.* at 321, 41 A.2d at 69.

40. Stein v. Darby, 126 So. 2d 313, 319 (Fla. 1961). "Stripped of legal legerdemain, it seems clear that in the final analysis the common law doctrine (of ways of necessity) is based upon public policy, which is favorable to the full utilization of the natural resources and against the possible loss of utility in the case of landlocked property." RESTATEMENT, PROPERTY *Servitudes* chap. 38, § 476, at 2983 (1944), is in accord with the view that "the inference as to intention . . . is influenced largely by considerations of public policy in favor of land utilization."

decisions still purport to rely upon the presumed intent of the parties.[41] One authority has criticized the presumed intent theory on the grounds that it is the fictional result of the juristic thinking of the 19th century.[42] He argues that the intent should be immaterial unless it is expressed, and that the way of necessity arises "because the courts are influenced by the social interests involved."[43]

The decision in the principal case, that a navigable waterway is not a bar to a way of necessity, is plainly consonant with the public policy theory. The court in fact restated the view articulated in *Condry v. Laurie.* It is not unequivocally clear, however, that the court has abandoned the presumed intent theory. In view of the apparent inconsistencies and in the interest of legal realism, it is hoped that the court will completely abandon the presumed intent theory and base future decisions solely upon the considerations of public policy.[44]

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41. Compare for example the number of cases cited in support of the presumed intent theory as opposed to the public policy theory, in 28 C.J.S. *Easements* § 35, at 696 n.93 (1941). Similarly the same disparity of authority can be seen in 2 THOMPSON, REAL PROPERTY § 364, 430 n.52 (1961).

42. Simonton, *Ways By Necessity,* 33 W. VA. L. REV. 64, 99 (1926).

43. *Ibid.*

44. For a case note discussing the case of Condry v. Laurie, 184 Md. 317, 41 A.2d 66 (1945), noted in 9 MD. L. REV. 84 (1948), and arriving at conclusions not unlike those contained herein, see 31 CORNELL L.Q. 516 (1946).