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reliability⁸⁶ and partiality⁸⁷ This particular problem could be met by the establishment of a uniform standard for experts. Set qualifications exist for admission to practice as a doctor or as a specialist, so why not provide a test to determine the necessary qualifications of psychiatrists for purposes of testimony in cases involving insanity? This precaution coupled with the great weight the jury is likely to give the findings of the state mental department, should offer a logical solution to the *expert* problem. Thus the qualified psychiatrists, no longer shackled by the archaic McNaughton test, could be of great aid to the courts in reaching just results where insanity is a defense in criminal cases.

To complete the picture, it is proposed that the judge may consult with the experts of the state mental department concerning the passing of sentence following the verdict of the jury⁸⁸

ROBERT HALL SMITH

IMPLIED EASEMENTS OF NECESSITY CONTRASTED WITH THOSE BASED ON QUASI-EASEMENTS

Easements may be classified according to their method of creation as prescriptive, express and implied. Implied easements include the easement of necessity and the easement implied from a quasi-easement. These two types are similar and for either to arise, the title to the land must have been in a common owner and he must have conveyed a part of the land by deed in such a way as to create a need for an easement to benefit the land conveyed or the land retained. Also, both types are based fundamentally on implied intention as determined from a construction of the deed. In spite of their similarity, however, implied easements of necessity and implied easements based on quasi-easements are clearly distinguishable, both as to the nature of the implication underlying each and as to the circumstance surrounding the execution of the deed which supports the implication. This essential distinction is of considerable practical importance in

⁸⁶ *Ibid.*

⁸⁷ White, *INSANITY AND THE CRIMINAL LAW* 56-57 (1923).

⁸⁸ Such a provision would be constitutional under *Williams v. New York* 337 U. S. 241, 246 (1949). "But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by the law."

determining whether an implied easement will arise but it is not always recognized by the courts. It is the purpose of this note to compare the two types of implied easements in such a manner as to emphasize the advantage of carefully distinguishing between them, with particular regard for Kentucky cases. It should be recognized that easements of various kinds may be created by implication, but because a great majority of the cases involve easements of way, for purposes of discussion this note is limited in scope, for the most part, to this particular type of easement.

An easement of necessity usually arises where there is a landlocked situation which occurs when the grantor conveys land in such a manner as to render the land conveyed or retained inaccessible except over the land of the grantor or that of a stranger.¹ If the easement is to arise by implication, it must be over the land conveyed or over the land retained because an easement will not be implied over the land of a stranger.² Whether an easement of necessity does arise is primarily a question of intention, which is to be gathered from the instrument and circumstances surrounding its execution.³ If the grantee does not have a means of access to his land, a way will be implied over the grantor's land,⁴ for it is presumed that the parties did not intend to convey land without any means of access.⁵ This implied intent does not usually accord with the actual or real intent of the parties because in most instances it is improbable that they thought of a means of access at the time of the conveyance. Rather the intent is implied because the conveyance made an easement necessary. Necessity is important because public policy favors utilization of land.⁶

Before a way of necessity will be implied, it must be a way of absolute necessity.⁷ If the grantee's land is bounded on three sides by the sea, a way of necessity will not be implied over the grantor's land because navigable waters furnish a means of access even though it is highly inconvenient.⁸ If the grantee has a way over his own land to the highway but it is impassable part of the year, a way of necessity will not be implied across the grantor's land.⁹ The fact that

¹ 3 TIFFANY, REAL PROPERTY 284 (3rd ed. 1939).

² Hamby v. Stepleton, 221 Ala. 536, 130 So. 76 (1930).

³ See Orpin v. Morrison, 230 Mass. 529, — 120 N.E. 183, 184 (1918).

⁴ Standard Elkhorn Coal Co. v. Moore, 217 Ky. 317, 289 S.W. 261 (1926); Morgan v. Morgan, 205 Ky. 545, 266 S.W. 35 (1924); Bentley v. Hampton, 28 Ky. L. Rep. 1083, 91 S.W. 266 (1906).

⁵ See Orpin v. Morrison, 230 Mass. 529, — 120 N. E. 183, 184 (1918).

⁶ 3 TIFFANY, *op. cit. supra*, note 1, at 285.

⁷ Howton v. Frearson, 8 T. R. 50, 101 Eng. Rep. 1261 (1798).

⁸ Kingsley v. Gouldsboroug Land Imp. Co., 86 Me. 279, 29 Atl. 1074 (1894).

⁹ Marrs v. Ratliff, 278 Ky. 164, 128 S.W. 2d 604 (1939).

a bluff is exceedingly difficult to cross will not be sufficient to create a way of necessity¹⁰ On the other hand, a way of necessity may be created where the grantee is not landlocked if the cost of constructing a way across his own land is very disproportionate to the value of the land purchased,¹¹ or if it is practically impossible to construct a way¹² These latter cases, which represent a substantial minority view, do not require an absolute physical necessity but rather an actual, real, or "reasonable" necessity¹³

A quasi-easement exists when a person utilizes one part of his land for the benefit of another part. The part benefited is called the quasi-dominant tenement and the part utilized is called the quasi-servient tenement.¹⁴ As long as the land remains in the person subjecting it to such use, an easement does not exist because one cannot have an easement in his own land.¹⁵ If the grantor conveys the dominant estate, an easement may be impliedly granted to the grantee over the grantor's servient estate provided the parties so intended. In order to determine this intent, the circumstances surrounding the execution of the deed and the existing condition of the land must be taken into consideration.¹⁶ If the way across the servient estate is apparent, continuous, and necessary to the enjoyment of the dominant estate, an easement will be implied, for the parties are presumed to convey with reference to the existing condition of the land.¹⁷ The implication giving rise to the intent in an easement based on quasi-easement is the pre-existing condition of the land. Although this may not conform to the parties actual intent, it would seem to be more realistic than the intent implied in an easement of necessity

Since an easement based upon a quasi-easement must be apparent, continuous, and necessary, it may help to examine briefly these requirements. A way is said to be apparent if its existence was indicated by signs which might be seen or known on a careful inspection by a person conversant with the subject.¹⁸ A way will conform to this standard if it is a well defined road or a path.¹⁹ The grantee need not have actual knowledge of it since the characteristics of the way serve to give him constructive notice of the servitude.

As to the continuous character of a way, there is some authority

¹⁰ *Nichols v. Luce*, 24 Pick 102 (Mass. 1834).

¹¹ *Marshall v. Martin*, 107 Conn. 32, 139 Atl. 348 (1927).

¹² *Owens v. Goff*, 285 Ky. 552, 148 S.W. 2d 714 (1941).

¹³ *Brassington v. Williams*, 143 S. C. 223, 141 S.E. 375 (1927).

¹⁴ 3 TIFFANY, *op. cit. supra* note 1, at 255.

¹⁵ See *Irvine v. McCreary*, 108 Ky. 495, 502, 56 S.W. 966, 968 (1900).

¹⁶ *Irvine v. McCreary*, *supra* note 15.

¹⁷ *Powers v. Ward*, 200 Ky. 478, 255 S.W. 105 (1923).

to the effect that a way is not a continuous servitude and will not pass as an easement by implication except as a way of necessity²⁰ The reason given for this view is that a way requires the interference of a person for its operation and therefore is not continuous since it is not constantly exercised. This distinction was taken from the civil law and the only valid reason for its existence is its greater conspicuity. The view generally followed, however, is not to consider the particular kind of easement but to consider whether the easement is apparent and designed to be permanent.²¹

An easement is necessary if it is reasonably necessary to the enjoyment of the land conveyed,²² or highly convenient,²³ or clearly necessary to its beneficial use.²⁴ In one case, the grantee purchased a lot which bordered on a street and there was also an alley, leading from another street, over the grantor's land to the rear of the lot. The grantor closed the alley, but the court held that the grantee had an implied easement over the alley based on a quasi-easement since it was reasonably necessary to the enjoyment of the land.²⁵ In another case, the grantor conveyed a lot which was directly behind three lots owned by the grantee and these lots bordered on a street. The grantor had used a way across his own land to reach the lot conveyed, and it was held that the grantee had an easement over this same road by implied grant since it was reasonably necessary to the enjoyment of the land even though the grantee had a way to the street over his own land.²⁶ If a pathway is reasonably necessary to the land conveyed, an easement will be implied over the grantor's land although the grantee could have constructed a way out over his own land.²⁷

While a way will be implied in favor of the grantee if it is reasonably necessary, a way will not be implied in favor of the grantor unless it is strictly necessary.²⁸ Courts are reluctant to imply a reservation since it would be inconsistent with the conveyance. The grantor purports to convey all the land described in the conveyance and if he is permitted to have an easement across the grantee's land he will be

²⁰ *Syers v. Dodd*, 120 Cal. App. 444, 8 P. 2d 157 (1932).

¹⁹ *Hedges v. Stucker*, 237 Ky. 351, 35 S.W. 2d 539 (1931); *Powers v. Ward*, 200 Ky. 478, 255 S.W. 105 (1923).

²¹ *Hoffman v. Shoemaker*, 69 W. Va. 233, 71 S.E. 198 (1911).

²² *Baker v. Rice*, 56 Ohio St. 463, 47 N.E. 653 (1897).

²³ *Irvine v. McCreary*, 108 Ky. 495, 56 S.W. 966 (1900).

²⁴ *Fels v. Arends*, 328 Ill. 38, 159 N.E. 244 (1927).

²⁵ *Stevens v. Orr*, 69 Me. 323 (1879).

²⁶ *Irvine v. McCreary*, 108 Ky. 495, 56 S.W. 966 (1900).

²⁷ *Powers v. Ward*, 200 Ky. 478, 255 S.W. 105 (1923).

²⁸ *Hedges v. Stucker*, 237 Ky. 351, 35 S.W. 2d 539 (1931).

²⁹ *Dabney v. Child*, 95 Miss. 585, 48 So. 897 (1909); *Meredith v. Frank*, 56 Ohio St. 479, 47 N.E. 656 (1897).

derogating from his own grant. Since the degree of necessity required for a grant and a reservation is different, it must be determined at the outset whether it is a grant or a reservation. An implied reservation based on a quasi-easement generally requires the same degree of necessity as a way of necessity. The implied reservation does have a practical advantage in that the existing roadway will serve as a means of location while in a way of necessity the way will be located where it will cause the least damage to the grantee's land. A way based on a quasi-easement is impliedly reserved where the grantor conveys a tract of land so as to render the land retained inaccessible except over the grantee's land. In the case of *Meredith v Frank*,²⁹ the grantor owned a tract of land bordering a highway and used a roadway across the land to reach his house which was a considerable distance from the highway. He conveyed the tract contiguous to the highway, and the grantee refused to let him use the roadway. The court held that since the grantor could not reach the highway over his own land, the grantor had a way corresponding to the pre-existing use over the grantee's land since it was strictly necessary.

However, there is some recent authority that only a reasonable necessity is required for an implied reservation based on a quasi-easement.³⁰ This view applies the same doctrine to the grantor and the grantee and is reached by eliminating the distinctions based on implied reservations and implied grants. This eliminates the need for making distinctions as to the requisite degrees of necessity since the result will be the same whether the implication is by grant or reservation. This view has the advantage of being more simple and more plausible because the intent in a quasi-easement is implied from the existing conditions of the land and there is no valid reason why conditions that will imply a grant should not also imply a reservation.

From the analysis made, it is clear that the two classifications of implied easement are distinguishable. A quasi-easement must be apparent, continuous, and necessary. These elements are not present in an easement of necessity. Both are based on an implication as to intention stemming from the circumstances existing at the time of the conveyance, but the implication underlying each is different. In the quasi-easement the implied intent is that the land was conveyed subject to the existing servitudes of which the parties are aware. In the easement of necessity the implication is that the parties intended

²⁹ *Supra* note 28.

³⁰ *Powers v. Heffernan*, 233 Ill. 597, 84 N.E. 661 (1908); *Krueger v. Beechan*, 61 N.E. 2d 65 (Ind. App., 1945); *Greenwalt v. McCardell*, 178 Md. 132, 12 A. 2d (1940).

to create an easement because the conveyance made one necessary. The most difficult problem is the degree of necessity requisite for each. Not only is it imperative to determine at the outset whether it is an easement of necessity or a quasi-easement, but as to the easement based on a quasi-easement itself, a distinction must be made between a grant and a reservation. The various consequences of these distinctions will be illustrated by applying them to a hypothetical fact situation.

Suppose A owns land which is divided into tract 1 and tract 2 and tract 1 borders a highway. A has not established a way across tract 1 to tract 2, nor is there any outlet from tract 2 to the highway. If A conveys tract 2 to X, X will have a way of necessity over tract 1 to the highway by implied grant. If A conveys tract 1 to X and retains tract 2, A will have a way of necessity over tract 1. The result is the same since the degree of necessity is the same. But if it be assumed that there is a well defined roadway across tract 1 to tract 2 and a way over tract 2 to another highway which is impassible part of the year, a different result is reached for if A conveys tract 1 to X and retains tract 2, A will not have a way of necessity over tract 1 because he has a way out over his own land although it is highly inconvenient. Nor will A have an easement based on a quasi-easement over tract 1 because an implied reservation must be strictly necessary. In those jurisdictions which will imply a reservation based on a quasi-easement if it is reasonably necessary, A would have a way over tract 1. Further, if A conveys tract 2 to X and retains tract 1, X will not have a way of necessity over tract 1 because it is not a strict necessity but X will have a way based on a quasi-easement over tract 1 since it is reasonably necessary.

In Kentucky, the cases involving easements of necessity are few in number and whether Kentucky requires an absolute necessity or something less cannot be determined categorically from the cases. If the grantor conveys land which is entirely surrounded by land of the grantor's or that of a stranger, the cases hold that the grantee has a way of necessity.³¹ In the cases cited, the court did not say that it must be an absolute necessity but that is the only implication since the cases involve landlocked situations. In *Hall v McLeod*³² the court, in its dictum, used the phrase "indispensibly necessary" rather than "absolutely necessary".

It is clear that if a way is apparent, continuous, and reasonably

³¹ *Morgan v. Morgan*, 205 Ky. 545, 266 S.W. 35 (1934); *Bently v. Hampton*, 28 Ky. L. Rep. 1083, 91 S.W. 266 (1906).

³² 59 Ky. 98, 100 (1859).

necessary to the enjoyment of the land conveyed, an easement based on a quasi-easement will pass by implied grant to the grantee.³³ A reasonable necessity has always been required for an implied grant based on a quasi-easement in Kentucky. While implied grants require only a reasonable necessity it is not clear what degree of necessity is required to imply a reservation. In *Stamper v McNabb*,³⁴ the grantor conveyed a tract of land but reserved a graveyard which was entirely surrounded by the land conveyed. There was a well-defined roadway leading from the graveyard to a highway. The grantee obstructed this way and the grantor sought a reformation of the deed. The court said there was not any need for reformation since the way was well defined, continuous, and indispensably necessary, and thus the grantor had a way by implied reservation. In *Conrad v Smith*,³⁵ the grantor owned a tract of land bounded by two highways. The grantor resided on tract 2 and used a roadway across tract 1 to reach the highway. There was a roadway leading from tract 2 to another highway which was by no means a good road. He conveyed tract 1 and grantee refused to let him use the way. The court refused to allow the grantor to have a way across tract 1 since an implied reservation based on a quasi-easement must be strictly necessary.

In the recent case of *Knight v Shell*,³⁶ the grantor owned a tract of land bordered by two highways, No. 55 on the east and No. 37 on the south. There was a roadway leading from No. 55 which the grantor used as a means of access to some barns located near the highway. The grantor conveyed three-quarters of an acre to Shell and the roadway passed through this tract. Subsequently, the remaining land was conveyed to Knight, and Shell refused to let him use the roadway. Knight constructed a road fifty feet south of the way in question at a cost of \$116. Knight now claims a right to use the way alleging it is an easement by implication. The court concluded that the way was apparent and continuous but not reasonably necessary to the enjoyment of Knight's land, for a reasonable necessity does not exist where the cost of construction was not disproportionate to the value of the land. It was also pointed out that the land bordering highway No. 55 was level and there were two farm gates opening on the highway which afforded an easy means of access.

³³ *Delong v. Cline*, 302 Ky. 358, 194 S.W. 2d 631 (1946); *Hutcherson v. Roland*, 247 Ky. 373, 57 S.W. 2d 40 (1933); *Hedges v. Stucker* 237 Ky. 351, 35 S.W. 2d 539 (1931); *Powers v. Ward*, 200 Ky. 478, 255 S.W. 105 (1932); *Irvine v. McCreary*, 108 Ky. 495, 56 S.W. 966 (1900).

³⁴ 172 Ky. 253, 185 S.W. 216 (1916).

³⁵ 203 Ky. 171, 261 S.W. 1103 (1924).

³⁶ 313 Ky. 852, 233 S.W. 2d 973 (1950).

From the language used in this decision it appears that Kentucky might now require only a reasonable necessity for an implied reservation of an easement based on a quasi-easement. However, the court in the opinion did say that "circumstances which may imply an easement in favor of the grantee may not be sufficient to imply one in favor of the grantor"³⁷ which indicates that a reservation requires a higher degree of necessity than an implied grant. It is a reasonable conclusion that Kentucky is actually applying the same doctrine to the grantor and grantee, and at the same time paying homage to a common law rule of construction that a grant will be construed more strongly against the grantor than the grantee, since it is doubtful that an easement would have been implied even in favor of the grantee on these facts.

While the Kentucky court has not always carefully distinguished the two kinds of implied easements, they have reached the right result in most cases. However, this failure to properly classify the type of easement has led to considerable confusion since it cannot be readily ascertained with which type of easement the court is dealing without a careful analysis of the case.

ERNEST W RIVERS

EVICITION UNDER A COVENANT OF GENERAL WARRANTY IN KENTUCKY

A covenant of general warranty is a covenant in a deed conveying land warranting that the grantee will receive such title as the deed purports to convey, and in legal effect, it is a covenant that the grantee and those who claim under him will not be evicted from the land by someone who has a paramount right or title which was in existence at the time of conveyance.¹ There is no breach of this covenant until there has been an eviction under such a paramount right or title.²

An actual eviction is a dispossession or ouster of the covenantee from the property. This may be under compulsion of law or physical force or, generally, it may be a voluntary moving in the face of an asserted valid paramount claim.³ A *constructive* eviction is also

³⁷ *Id.* at 855, 233 S.W. 2d at 975.

³⁸ For further confusion on the point, see *Swinney v. Haynes*, 236 S.W. 2d 705 (Ky., 1951).

¹ 4 TIFFANY, REAL PROPERTY sec. 1010, *et. seq.* (3rd ed. 1939); 172 A.L.R. 20.

² 4 TIFFANY, *op. cit. supra*, note 1, secs. 1013 and 1014.

³ RAWLE, COVENANTS FOR TITLE 256 (2nd ed. 1854); 4 TIFFANY, *op. cit. supra*, note 1, sec. 1013.