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Ways by Necessity

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WAYS BY NECESSITY*

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Upon an unqualified grant by A to B of the center acre of a forty acre tract, there will be certain limitations, termed natural rights,[1] upon the use B may make of that acre, and on the use A may make of the rest of his land. But A may grant to B one or more of these limitations on the use of B's land. Thus he may grant to B the privilege to pollute waters flowing past A's land, or to dig in his land as he may please, regardless of whether subsidence of A's land may follow; on the other hand A may grant to B the privilege to drive across A's land or to lay and maintain a pipe across it. Whereas the latter grants confer privileges upon B to use A's lands, the former are in effect releases of natural rights that limit B's use of his own land. As pointed out by Markby[2] and Terry,[3] these easements, which in effect release natural rights, are indistinguishable from natural rights except as to origin, for easements can arise only by grant or prescription.

In the case of the grant of one acre in a forty acre tract, although there be no express grant to B of a right of way over A's land, B will get a way by necessity.[4] It has been suggested that this is a natural right and not an easement. It is settled that an easement by necessity will arise either by grant or reservation, if, after a conveyance, the grantee has no access except over the lands of the grantor, or where the grantor has other lands to which he can have access only over the land granted, provided there is nothing to the contrary in the transaction.

Should the easement by necessity be treated as one of the normal rights of ownership in land? If the fundamental difference between easements and natural rights lies

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[1] For a good discussion of the nature of natural rights, see an article on Natural Easement by Professor Bigelow in 9 ILL. LAW REV. 541 (1915).

[2] See MARKBY, ELEMENTS OF LAW §426 (5th ed. 1896).

[3] See TERRY, LEADING PRINCIPLES OF ANGLO-AMERICAN LAW §392 (1884).

[4] This is so well settled that it requires no citation of authorities. B will get the way, if he has no access to a highway except through A's land.

in the manner of origin, then we can say that as to origin the easement by necessity differs from natural rights, for it does not arise merely because a subdivision of land has certain natural features, but only when there chances to be lack of access to a public highway. A public highway is an artificial feature. Every time a tract of land is subdivided, natural rights arise from the natural situation and configuration of the soil, but the easement by necessity depends on the extrinsic fact whether or no there is an accessible highway. The easement by necessity has always been treated by the courts as an easement and not as a natural right. It is after all a right in the land of another. Once created it becomes a legal incumbrance on the servient tenement. If it is a natural right, it differs in this respect from other natural rights. Seemingly the courts have quite properly regarded easements by necessity as true easements. It would only tend to confusion to consider them as natural rights.

Historically, the easement by necessity has been treated as a true easement. The maxim of law at the root of the right is ancient. In the common law the doctrine can be traced at least to the time of Edward I, for it was said,[5] "Note that the law is that anyone who grants a thing to someone is understood to grant that without which the thing cannot be or exist." From this maxim and its extended applications seems to have developed the easement by necessity. In 1379 we find a case which holds that if there is a grant of a pond with the fish, the grantee may enter to take the fish with nets and other devices, but he may not cut a ditch and drain the pond for the purpose of getting the fish unless he cannot take them otherwise.[6] In 1523, the Bishop of London brought trespass, alleging he had leased land to the defendant, excepting the trees, and the defendant (seemingly) had taken "swans and shovelers" which nested in such trees, which was the trespass relied upon.[7] The court held the defendant liable and Judge

[5] FITZHERBERT, GRANTS, 41. This maxim is cited in Lord Darcy *v.* Askwith, Hobart 234 (1618), and referred to, *arguendo*, in Reniger *v.* Fogossa, 1 Plowd. 16a (1467). In Liford's Case, 11 Coke Rep. 46b, 52a (1615), what seems to be the Latin version is given as follows, "*Lex est cuicumque aliquis quid concedit, concedere videtur, et id sine quo res ipsa esse non potuit*, and this is a maxim of law."

[6] See FITZHERBERT, BARRE, 237, or Year Book, 2 R. 2.

[7] Y. B. 14 Hen. VIII pl. 1, f. 1 (1523). The action was *quare clausum fregit* and the court had difficulty in determining whether the defendant had broken any close of the plaintiff.

Brook remarked, "and the underwood so excepted he can cut and carry away at his pleasure, as if he except a mine he can come to it." Judge Brundel said, "If the lessor reserve a pond he shall have the fish * * * * If I lease a manor reserving the warren, I shall have the coneys, though the warren is only a liberty, and if one excepts it, he can lawfully come and take them, for the law gives him a means to arrive at the thing; as if I except a hall and stable, I shall have free egress and regress to come to it, so here the bishop can come and take them" (the swans and shovelers). Here is a dictum supporting an easement by necessity to something excepted from a grant, and the judges seemingly refer to the maxim and to the case given above. In 1615 there was an actual decision, in a case similar to the above.[8] Land had been demised, excepting the trees, and the plaintiff had entered. Later the defendant, by authority of the owner of the reversion, entered to view the trees and sold some of them, and for this he was sued in trespass. The court held he was not liable, and said, "when the lessor excepted the trees, and afterwards had an intention to sell them, the law gave him, and them who would buy, power, as incident to the exception, to enter and show the trees to those who would have them; for without sight none would buy, and without entry they could not see them."

The principle that a grant must be construed most strongly against the grantor had already been unsuccessfully urged, for we find in Sheppard's *Touchstone* the following:[9]

> "The exception is always taken most in favor of the feoffee, lessee, etc., and against feoffor, lessor. And yet, as a rule, what will pass by words of a grant, will be excepted by the same words in an exception. And it is another true rule, that when anything is excepted, all things that depending on it, and necessary for obtaining it, are excepted also."

Thus early in the 17th century we find the easement by necessity established in the case of a thing excepted from a grant. At this time perhaps the principle had not yet

[8] Liford's Case, *supra*, n. 5, p. 52a. There is a dictum to like effect in Nicholas *v.* Chamberlain, Cro. Jac. 121 (1607).

[9] SHEPPARD'S TOUCHSTONE, p. 100. More or less complete statements of similar import are to be found in other of the 17th century books. See FINCH'S LAW 63; NOY'S MAXIMS 16; PERKINS, PROFITABLE BOOK §110. Finch cites the cases given in notes 7 and 8.

been extended to the different situation where the grantor owns other lands not mentioned in the grant, to which he has no access except over the lands conveyed. As to the converse, where the way is necessary to the lands granted, and is over lands of the grantor not mentioned in the grant this would fall directly within the maxim above, and on principle should not be treated differently from the exception cases.

In *Clark* v. *Cogge*,[10] decided in 1607, there was a question as to whether the grantee could have a way by necessity over other lands of the grantor, and the court held he could have such a way, "for otherwise he could not have any profit of his land." But the court also said, "If a man has four closes lying together and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet he shall have it, as reserved to him by law." Here we find the principle extended by a confidently stated dictum to the case where the way is claimed for the benefit of land retained by the grantor, which presumably was not mentioned in the grant. But in *Packer* v. *Welsted*,[11] in 1658, we get a square decision on the latter point. The way was claimed for the benefit of land of the grantor not mentioned in the conveyance and it was held the way should be allowed. Chief Justice Glyn said, "But the jurors having found it to be a way of necessity, it seems to me that the way remains, for it is not only a private inconvenience, *but it is also to the prejudice of the public weal, that land should lie fresh and unoccupied*,[12] and so has been the opinion of Lord Rolles, as I hear on the circuit at Winchester." This decision has ever since represented the law. The case was decided during the early part of the period of the influx of equity and natural law,[13] so we find that the rule is based on public policy, which must mean, if anything, that the general social interest favors the occupancy and utilization of the land. Previous cases had merely stated that if a

[10] Cro. Jac. 170 (1607). There is a similar dictum in Beaudely *v.* Brook, Cro. Jac. 189, 190 (1608).

[11] 2 Sid. 39, 111 (1658). A translation will be found in volume 3 of GRAY'S CASES ON PROPERTY (2nd ed.) 347 (1906), and in WARREN'S CASES ON CONVEYANCING 472.

[12] Italics the writer's.

[13] See Roscoe Pound, "The End of Law as Developed in Legal Rules and Doctrines," 27 HARV. L. REV. 195, 213-220 (1914). While this affected the law chiefly through equity, yet the common law judges were not free from the influence of the spirit of the times.

way were not allowed, the owner could get no profit from his land, and it seems clear that the judges of the 13th and 14th centuries would not have understood this notion of public policy, for the idea of nationality had not yet sufficiently developed. The situation presented in the above case was treated just like the old case of a grant with something excepted from it. While the court did not cite any of the previous authorities, counsel in argument did.[14] From this time on the easement by necessity was well established, and no distinction was made between the two types of cases. Both types appear in the mining decisions discussed in the latter part of this paper, in which cases the principles of the easement by necessity have been extended to horizontal states in the strata of the soil.[15] In general, it may be stated that the notion that the easement by necessity is based on public policy has been accepted.[16]

Although the decisions up to this time had not settled the manner in which the easement by necessity arose, since many of the cases involved ways to things excepted from grants, it was to be expected that the theory of implied grant or reservation would eventually be adopted. The definite establishment of this theory seems to have been largely due to the note of Sergeant Williams to *Pomfret* v. *Ricroft*.[17] He argued that it was wrong to plead the way by necessity in general terms, as was not uncommonly done,[18] without specifying the manner whereby the servient land became charged with the burden, stating, "It derives its origin from a grant. For there seems to be no difference where a thing is granted by express words, and where by operation of law it passes as incident to the grant. In the latter case, it would be a superfluous and inoperative clause in the deed to convey the incident by express words of grant, being only *expressio eorum quae tacite insunt.*" He concluded that since the way by necessity arises by implied

[14] Among those cited was the case in Y. B. 14 Hen. VIII, pl. 1 (1523), *supra*, n. 7; Liford's Case, *supra*, n. 5, and Piggot *v.* Sury, Popham 166.

[15] For example, a conveyance of the land, reserving the coal and other minerals, or a conveyance of a vein of coal without mention of a right of access to the strata beneath the coal. Both types are thus presented, though no distinction has been made.

[16] Some of the authorities are Dutton *v.* Taylor, 2 Lutw. 1487 (1598); Pinnington *v.* Galland, 8 Exch. 1 (1853); Myers *v.* Dunn, 49 Conn. 71 (1881); Smith *v.* Griffin, 14 Colo. 429, 23 Pac. 905 (1890); Powers *v.* Heffernan, 233 Ill. 597, 84 N. E. 661 (1908); Crotty *v.* Coal Company, 72 W. Va. 68, 78 S. E. 233 (1913). This basis of the rule is now generally recognized.

[17] See Pomfret *v.* Ricroft, 1 Saund. 321, 323, n. 6 (1680).

[18] This was probably due to the idea that the way might be allowed wherever there was a tract of landlocked land, for the reason of public policy would seem to justify such easement in all cases.

grant it ought to be so pleaded. His argument that the implied grant is the same as an express one in general terms, seems to have been overlooked by the Master of Rolls in *Corporation of London* v. *Riggs*,[19] when he held, citing the note, that the scope of the easement was limited by the use to which the dominant land was being put at the time of the grant. This note seems to have been sufficient to cause Lord Ellenborough to hold, in *Bullard* v. *Harrison*,[20] that a general way of necessity does not exist, but that unity of possession must be properly pleaded and proved. This became the settled law both in England and in this country.[21] The easement must arise by implication from a conveyance. It logically follows that if the claimant cannot trace back to a unity of ownership of the servient and dominant tenements, he cannot establish an easement by necessity, for he cannot show the required basis to raise the implication.

However, it is to be noted that the result of the doctrine of the easement of necessity by implied reservation is that though the grantee knew nothing of the dominant tenement at the time of the grant, yet his land will be burdened with an easement; and a covenant of warranty in his deed does not protect him, nor does it prevent the implication of the easement.[22] This seems a violation of the rule that a grantor should not derogate from his own grant, or the rule that the language of the conveyance must be construed most strongly against the grantor. 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 the 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 neces-

[19] L. R. 13 Ch. D. 798 (1879).

[20] 4 M. & S. 387 (1815).

[21] Tracy *v.* Atherton, 35 Vt. 52 (1862); Brice *v.* Randall, 7 Gill & John Md. 349 (1835); see collection of other cases in TIFFANY, REAL PROPERTY (2nd ed.) 1300 (1920).

[22] Vandalia R. R. *v.* Furnas, 182 Ind. 306, 106 N. E. 401 (1914); Powers *v.* Heffernan, *supra*, n. 16; Brigham *v.* Smith, 70 Mass. 297 (1855).

sity appear to be due to an agreement of the parties.[23] It is not strange that judges concluded that the easement by necessity arose because of the presumed intent of the parties. They said, "Although it is called a way of necessity, yet the necessity does not create the way, but merely furnishes evidence as to the real intent of the parties. For the law will not presume that was the intention of the parties, that one should convey land to the other, in such a manner that the grantee could derive no benefit from the conveyance; nor that he should so convey a portion as to deprive himself of the enjoyment of the remainder. The law, under such circumstances, will give effect to the grant according to the presumed intent of the parties."[24] This explanation was doubtless quite satisfactory to the mind of the jurist of the middle of the last century. But statement of the court in *Buss* v. *Dyer*,[25] comes nearer the truth. It said, "The foundation of this rule regarding ways of necessity is said to be a fiction of law, by which a grant or reservation is implied, to meet a special emergency, on grounds of public policy, in order that no land may be left inaccessible for the purpose of cultivation." Confusion has frequently resulted where what is really a fiction is thus referred to as the intent of the parties.[26]

Perhaps reference to the civil law will throw some light on how the problem ought to be regarded. Article 682 of

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[23] Early in the 19th century the common law in England had reached a period of maturity. "In this stage of matured legal system, the watchwords are equality and security * * * * Accordingly as used here, equality includes two things: equality of operation of legal rules, and equality of opportunity to exercise one's faculties and employ one's substance. The idea of security is derived from the strict law but is modified by ideas of the stage of equity or natural law, especially the idea of insisting upon will rather than form as a cause of legal results and the idea of preventing the enrichment of one at the expense of another through form and without will. In consequence security, as used here, includes two things: the idea that everyone is to be secured in his interests against aggression by others, and the idea that others are to be permitted to acquire from him or to extract from him only through his will that they do so or through his breach of rules devised to secure others in like interests * * * * *

"To insure security the maturity of the law insists upon property and contract as fundamental ideas." See Pound, *op. cit.*, n. 13, pp. 220-221.

As is pointed out by Professor Bohlen, this tendency led the courts to refer all possible obligations to the consent of the party on whom imposed. Thus we had assumption of risk, the fellow servant rule and the like, all referred to some implied terms of contract. So it is not strange to find the easement by necessity based on implied contract. See Bohlen, "Voluntary Assumption of Risk," 20 HARV. L. REV. 14, 31-32 (1906).

[24] Collins *v.* Prentice, 15 Conn. 39 & 423 (1842). See also, Nicholas *v.* Luce, 24 Pick. (Mass.) 102 (1834); Carmon *v.* Dick, 170 N. C. 305, 87 S. E. 224 (1915).

[25] 125 Mass. 287, 291 (1878), quoted with approval in Howley *v.* Chafee, 88 Vt. 468, 93 Atl. 120 (1914).

[26] See Corporation of London *v.* Riggs, *supra*, n. 19. Good examples of this may be found in prescription cases in those jurisdictions which hold the presumption of the lost grant is rebuttable. Reid *v.* Garnett, 101 Va. 47, 43 S. E. 182 (1903), is an extreme example.

the French Civil Code[27] provides that any landowner who has no right of access may compel his neighbor to give him access to the highway, except that under Article 684 he must claim the way, if possible, over land which has been divided as a result of a legal transaction. But if one contracts to sell land to another, and it is so located that access cannot be had except over other land of the vendor, then good faith requires that he furnish a way gratuitously. As we have seen, the common law reaches the latter result by the application of the principle that when one grants a thing, he grants the means reasonably to enjoy it. Probably everyone will agree that the law ought to go this far; a real and not a fictional intent may reasonably be implied in such a case. But under the French law, since good faith does not require the vendee to allow the vendor a gratuitous right of way over the lands conveyed for the benefit of other land of the vendor,[28] Article 682 would, seemingly, permit the vendor to have a way only on payment of the damages caused thereby. It will be noted that under the French law any owner who has no right of access may have a way opened, on paying the actual damages; while at common law, if a way of necessity does not exist, a way can be had only by purchase at the price demanded. The French law provides the better solution.

Curiously enough the German Civil Code of 1900 seems to have a provision which makes the German law very similar to the common law. Article 917 provides that a landlocked owner who has no right of access to a highway, may compel adjoining owners to allow him a way on payment of a reasonable rental. Article 918 provides that, if as a result of a conveyance, "the part alienated or the part retained is cut off from the connection with the public road, the owner of the part over which the connection formerly existed must permit a way of necessity. The alienation of one of several

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[27] FRENCH CIVIL CODE (Wright's Translation): Article 682—"The owner of a property which is entirely surrounded by other properties and which has no exit to the public road, or only an insufficient exit for working it for agricultural or industrial purposes, has a right to claim a right of way over his neighbor's property on paying compensation for any damage he may thereby cause."

Article 684—"If the inaccessibility of the land is the result of the property having been divided by sale, exchange, a partition, or any contract, a right of way can only be asked for over the properties affected by such contracts. Nevertheless where a sufficient right of way cannot be given over the properties so divided, Art. 682 shall apply."

See also, MERRICK'S LA. CODE, Arts. 699-702, for similar provisions.

[28] An application of the principle of the Roman Law that each party to a legal transaction do what good faith requires. See 1 COLLINS & CAPITANT, DROIT CIVIL FRANCAIS 758.

pieces of land belonging to the same owner is equivalent to the alienation of a part of the land."[29] In such an instance, there is no need to pay compensation.[30] The German law, then, is like ours as to easements by necessity, permitting, in addition, the owner of landlocked land, not falling within the provisions of Article 918, to have a way on payment of a rental. Instead of enacting the Roman law, the German Code retained a bit of the old Germanic land law.[31]

All of the above systems agree that a gratuitous way must be allowed by the grantor if the land granted has no access to the highway. Both the German law and the common law permit an easement by implied reservation for the benefit of other land of the grantor. At common law, the courts have no means of compelling the sale or lease of the easement as is provided in the civil law codes. There is some justification for implying an easement across the land conveyed by the grantor, for otherwise the grantee and other adjoining owners may be able to compel the grantor to sell at whatever price is offered. Common law judges allowed the easement, assigning as a reason that it is contrary to the public weal that land should not be utilized. The social interest certainly demands that the owner have access to the land, for otherwise it will lie fallow. Such a consideration applies equally to any tract of landlocked land, but there is an excellent reason why courts have limited the doctrine. How is the court to determine where the easment is to be located, and on whom the burden is to fall? If compensation could be required, then the problem might have been solved in the same manner as in the civil law. But our courts cannot be expected to provide for a system of compensation by judicial legislation. This inability, no doubt, explains the present limits of the doctrine. Nevertheless, in spite of this limitation, the courts have been able to find an easement by necessity in almost all of the cases that have arisen. In the case of *Crotty* v. *Coal Company*,[32] for example,

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[29] Wang's Translation.

[30] See SCHUSTER, PRINCIPLES OF THE GERMAN LAW 389.

[31] For the history of this, see KARDING, ARCHIV FUR DIE CIVILISTICHE PRAXIS 407, *et. seq.*

[32] *Supra*, n. 16. It appeared in this case that about 1832 land was conveyed in two tracts, one of 150 acres to Bowker, and the other of 497 acres to Blake. At the time, the 150 acre tract had 30 acres lying below, and separated from the rest by a cliff 100 feet high. There was a road to the 120 acres lying up the mountain side but the 30 acres could not be reached from this because of the cliff. Long after 1832 a new road was opened through the 497 acres, but it did not touch the 30 acres. The latter had been divided among the Woods' heirs, except 4.5 acres, which had been purchased by the plaintiff. The plaintiff had erected a residence and store building and

the court went back from 1905 to a conveyance made in 1832 in order to find the necessary unity of ownership, and then implied an easement by necessity to a public road which was not opened till long after 1832. The fact seems to be that the courts use the implied grant or reservation as a means of determining the land on which the burden shall fall. When the servient land can not be determined in this manner, no easement is allowed.

The manner in which certain questions have been handled by the courts will now be examined. While considerations of public policy lie behind the doctrine, the notion that the easement by necessity arises because of the intent of the parties has frequently had great influence on the result reached, and, as a consequence, this result has not always been in accord with the underlying public policy. An example already referred to is the tendency to treat evidence of the necessity, as evidence bearing on the intent of the parties. Others will appear later.

It is said that an easement by necessity cannot be implied in favor of a grantee from the state or from the government, over other lands of such state or government. It is difficult to see why such a notion should ever have risen unless behind it is some remnant of the prerogative of the sovereign, though this, it seems, is not suggested in the decisions. Aside from dicta there is only one unsatisfactory case where a grant by a state is involved.[33] In that case, the court did give as one ground for its decision, that the way cannot be implied over state lands. It argued that if an easement by necessity once arose it would continue forever, and that the whole state might eventually be covered with a network of such ways if such easements were allowed. However, since there appeared other good grounds for the result reached,[34] this case is but weak authority.

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was using a way to the new road when the defendant, who owned the 497 acres, stopped him and a suit was started. No way could here be implied except by going back to the conveyance of 1832. This the court held might be done, though the way was implied to a road not in existence at the time of the conveyance.

[33] Pearne *v.* Coal Creek M. & M. Co., 90 Tenn. 619 (1891). Texts usually so state the law and cite this one case as authority. See JONES, EASEMENTS §301 (1898). But the court in the above case expresses its ground for decision thus: "It would be ruinous to establish the precedent contended for, since by it every grantee from the earliest history of the state, and those who would succeed to his title would have an implied right of way over all the surrounding and adjacent lands held under junior grants, even to the utmost limits of the state." The language is foolish.

[34] The plaintiff claimed a way to coal under his land (where the coal was about 600 feet down) through a coal mine opened and worked on adjoining lands from which tunnels had been driven almost to plaintiff's boundary. The doctrine as to easements by necessity does not apply to such a case.

In two cases it has been said that the doctrine does not apply to lands granted by the federal government, but in neither case did it appear that there was any necessity at the time the grants were made. In both cases it is apparent that the desire of the claimant was to get the benefit of a private road constructed by the defendant at considerable expense, without paying for the privilege, instead of constructing a private road of his own.[35] But in two other cases the question was squarely raised, and in both it was held that the doctrine is applicable to the public lands of the government.[36] This seems sound. There is no good reason why the doctrine should not apply to state and federal lands.

What degree of necessity must be shown to establish the easement? It has been frequently asserted that there must be a strict necessity and that a reasonable necessity or convenience is not sufficient.[37] The term "reasonable necessity" is generally used in cases where the party has another way which is less convenient than the one claimed because longer, more hilly or over water; for where there is another way, but so limited as to be inadequate to permit the full enjoyment of the land, the easement by necessity has been allowed.[38] This strict necessity notion is probably a product of 19th century juristic thinking. If the necessity is evidence of the parties' intent, then it is reasonable that no intent should be implied, particularly against a grantee, unless the grantor has no other means of access to his land. But as soon as it is sought to consider the matter from the social interest viewpoint, the easement ought to be allowed

[35] United States *v.* Rindge, 208 Fed. 611 (D. C. Cal. 1913); Bully Hill Min. Co. *v.* Bruson, 4 Cal. App. 180, 87 Pac. 237 (1906). In neither of these cases did it appear that the necessity existed at the time of the grant. In both it did appear that the defendant had made a private road, the use of which the plaintiff wished to secure free of charge.

[36] Herrin *v.* Sieben, 46 Mont. 226, 127 Pac. 323 (1912); Snyder *v.* Warford, 11 Mo. 513 (1848). The Missouri case seemingly involved an implied grant, while the Montana case involved an implied reservation. In the latter the government had granted alternate sections of land to a railroad which had granted several sections to the plaintiff. At this time the public had the right to pasture government land. Had there been no way implied in favor of the government, the plaintiff could have excluded all others from the government sections enclosed by his sections. See a similar attempt to get full use of the alternate government sections in Camfield *v.* United States, 167 U. S. 518, 17 Sup. Ct. 864 (1896).

[37] Dee *v.* King, 73 Vt. 375, 50 Atl. 1109 (1901); United States *v.* Rindge, *supra*, n. 35; Hildreth *v.* Googins, 91 Me. 227, 39 Atl. 550 (1898). Many cases can be found which say that strict necessity must be shown, but where a way is really needed the courts always seem to allow it. See the statement of the law in TIFFANY, *op. cit.*, n. 21, 1306-8, which is very cautious, and also the note in 17 L. R. A. (N. S.) 1019 (1909).

[38] Myers *v.* Dunn, *supra*, n. 16; Camp *v.* Whitman, 51 N. J. Eq. 467, 26 Atl. 917 (1893); Feoffees in Ipswich *v.* Proprietors, 174 Mass. 572, 55 N. E. 462 (1899). See also notes in 17 L. R. A. (N. S.) 1019 (1909); 32 L. R. A. (N. S.) 1076 (1911).

whenever it is necessary to enable the owner to have the full enjoyment of the land; it is not essential, if he has an adequate though less convenient means of access; it is essential, where he has a means of access too limited to enable him to enjoy his land fully. A considerable number of cases have accomplished this result in effect by saying that strict necessity is not essential but that a high degree of necessity will be sufficient.[39]

Closely connected with the problem of the degree of necessity required, is the question of the scope or extent of an easement by necessity. Is there a general easement for all purposes, or is the extent of the easement limited by the condition and use of the dominant tenement at the time of the conveyance from which the easement is implied? If the easement is based on social considerations, then it ought to be adequate in scope to enable the dominant owner to have the reasonable enjoyment of his land for all lawful purposes as long as the necessity continues. A way to woodland would be almost valueless after the timber is cleared, and a way for agricultural purposes would not permit mining if minerals were discovered. A social interest that favors a way for agricultural purposes must equally sanction a way for mining and manufacturing purposes. Striking cases have arisen where a particular vein of coal was conveyed in fee, and many years later oil and gas were discovered in the land.[40] The social interest is evident in such cases. So far we have considered only the question whether an easement by necessity may be raised—that is, whether in a particular case the easement exists or does not exist. In determining the scope of the easement, we assume the right to the easement has been established. Nowhere does the confusion arising from the above mentioned fiction of presumed intent appear more plainly than here, most courts apparently observing no difference between the two questions, assuming, as a result, that the "strict necessity" or "high degree of necessity" test applies to the second question as well as to the first. If the domi-

[39] Trump *v.* McDonnell, 120 Ala. 200, 24 So. 353 (1897); Smith *v.* Griffin, *supra*, n. 16; Graines *v.* Lungsford, 120 Ga. 370, 47 S. E. 967 (1904); Schmidt *v.* Quinn, 136 Mass. 575 (1883); Pettingill *v.* Porter, 90 Mass. 1 (1864); Weise *v.* Thein, 279 Mo. 524, 214 S. W. 853 (1919); Crotty *v.* Coal Company, *supra*, n. 16; Uhl *v.* Ohio River R. R., 47 W. Va. 59, 34 S. E. 934 (1899); Goodall *v.* Godfrey, 53 Vt. 219 (1880); Galloway *v.* Bonesteel, 65 Wis. 79, 26 N. W. 262 (1886).

[40] See cases cited *infra*, footnotes 74, 75, 78, 87, 90, and 91.

nant owner is entitled to an easement permitting the full enjoyment of his land, then, it is plain, he is entitled to a general easement with all reasonable incidents. In considering whether a particular thing is a proper incident to the easement, the standard of reasonable convenience ought to be applied. The distinction was well expressed by one court in an opinion in a case involving incidents to the right of access to minerals as follows:[41]

> "There are obvious degrees of necessity for the use of the surface in the conduct of subterranean mining operations, from the absolute necessity of sinking shafts or making other entrances to the minerals, to the practical necessities of business operations, such as the placing of steam engines and machinery at the mouth of the entrances, of constructing ponds of water to supply the engines, of laying and operating rail or tram ways to bring in supplies and to carry out the ore, of storage of minerals on the surface pending sales, of assembling houses, stores, and shops for the use of the miners * * * *."

It may again be noted that Serjeant Williams considered that the way by necessity passes by operation of law, rendering superfluous a way expressly reserved. He understood that the scope of the implied easement and of the easement expressly granted in general language, was just the same. But though the English court cited his note in *Corporation of London* v. *Riggs*,[42] it held that since the easement arises by implied grant, it must be because of the presumed intent of the parties, and they should be taken to have intended a way to the dominant tenement merely for the purposes to which it was being put at the time of the conveyance. Jessel, Master of the Rolls, said:[43]

> "The object of implying the regrant,[44] as is stated by the older judges, was that if you did not give the owner of the reserved close some right of way or other, he could neither use nor occupy the reserved close, nor derive any benefit from it. But what is the extent of the benefit he is to have? Is he entitled to say, I have reserved to myself more than that which enables me to enjoy it as it is at

[41] See Himrod v. Ft. Pitt Min. & Mill Co., 220 Fed. 80, 88 (C. C. A. 8th Circ. 1915).

[42] *Supra*, n. 19.

[43] P. 807.

[44] The English theory of re-grant is technical, and this so-called re-grant is treated as if it were a reservation.

the time of the grant? *And if this is the true rule, that he is not to have more than necessity requires, as distinguished from what convenience may require,*[45] it appears to me that the right of way must be limited to that which is necessary at the time of the grant; That is, he is supposed to make a regrant to himself of such a right of way as will enable him to enjoy the reserved thing as it is."

This is supposed to be the law of England,[46] but it has met with little favor in this country, and quite properly so. It will be noted that the Master of the Rolls was considering the second question stated above, and that he assumes that strict necessity must be shown, though he cites no authority to that effect.[47] Furthermore, he treats the fictional intent as if it were real. But even so, his argument is answered by the following extract from a New Hampshire decision:[48]

"* * * * If the parties supposed a way passed as a necessary incident of the grant, how can it be inferred that they intended only a way for a particular purpose, when they knew the land was capable of being used for many purposes? * * * * The necessity is originally coextensive with all lawful uses of which the rear lot is capable, and is not created by the appropriation of the land to those uses."

In the Riggs Case the plaintiff had notice of the situation of the dominant tenement, and it must have been clear that the dominant land would be most useful for purposes other than agricultural. The plaintiff was certainly not deceived. It would be impossible to apply the doctrine of the Riggs Case to land which had never been used for any purpose prior to the time of the grant. Nor can it well be applied where a vein of coal is conveyed in fee simple, and oil and gas are later discovered in the land. The doctrine applied to the latter case would seem to limit the right to drill through the coal to drilling for known liquid minerals such as water. But if we resort again to the social interest basis of the doctrine, we come to the same conclusion the New Hampshire court reached on the theory of the presumed intent of the

[45] Italics ours.

[46] There seems to be no other English decision.

[47] Authorities cited seem to deal with the first question only.

[48] Whittier *v.* Winkley, 62 N. H. 338, 341 (1882). This case and Myers *v.* Dunn, *supra*, n. 16, refused to follow the doctrine of the Riggs Case for reasons stated in the excerpt. Both courts assumed that the easement arose because of the presumed intent of the parties.

parties.[49] The way ought to be one which will permit full enjoyment, and not one which may prevent enjoyment of the land for the purposes for which it is best suited. If we count the mining cases discussed in the latter part of this paper, there is now a formidable body of authority in this country opposed to the Riggs Case, and seemingly but one case in accord.[50] It may therefore be stated that in this country, the scope of the easement by necessity must be such as to enable the dominant owner to enjoy his land for all lawful purposes, so long as the necessity continues.

Is the so-called presumption of intent conclusive, or may it be overcome by showing the real intent of the parties? To put it in terms of public policy, are the interests in favor of allowing the easement strong enough to overcome the contrary expressed intent of the parties? Some presumptions in our law are so strong that they have become conclusive, as, for example, the presumption of a lost grant from adverse user for the requisite period. But it seems the presumption as to an easement by necessity may be overcome by showing the actual contrary intent of the parties. Seemingly the law allows a landowner to cut off all his rights of access to his land, if he so desires.[51] He may do this by releasing all rights to others. And no easement by necessity arises in favor of a grantee, where, by the language in the deed, he represented himself as owning adjoining land over which there was access to a highway, though this recital was false.[52] The same is held where the deed expressly creates a way which is too limited in scope for the full enjoyment of the land.[53] It would seem from the authorities, that any language in the deed which fairly indicates the intent not to have an easement by necessity, will

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[49] In the mining cases, which deal with this second question, most of the courts have also failed to observe that the question is different from the question whether or not a way by necessity exists. Nevertheless they have always managed to reach about the same result that they would have reached had they applied the reasonable necessity test.

[50] See cases cited *infra*, footnotes 74 to 88. See also, Myers *v.* Dunn, *supra*, n. 16; Erie R. R. *v.* Realty Co., 92 Oh. St. 96, 110 N. E. 527 (1915); Pearne *v.* Coal Creek M. & M. Co., *supra*, n. 33; Crotty *v.* Coal Company, *supra*, n. 16; Uhl *v.* Railroad Company, *supra*, n. 39. Higbee Fishing Club *v.* Atlantic City Electric Co., 78 N. J. Eq. 434, 79 Atl. 326 (1911), seems to be the only case in this country which has followed the Riggs Case.

[51] "There is no reason in law or ethics why parties may not convey land without direct means of access if they desire to do so." Orpin *v.* Morrison, 230 Mass. 529, 120 N. E. 183 (1918).

[52] Doten *v.* Bartlett, 107 Me. 351, 78 Atl. 456 (1910).

[53] Haskell *v.* Wright, 23 N. J. Eq. 389 (1873).

prevent its creation,[54] though it is settled that the mere fact there are covenants of warranty in the deed will not have this effect.[55] It is probable that the courts from the first would have denied an easement by necessity in any case where the intent of the parties was expressed to the contrary. The added contractual interest of the parties, or their expressed intent is sufficient to prevail against the social interest, added to the other interests, involved in the case.

Suppose the grantor, on conveying the land, orally represents that he does not desire a way across the land granted; or suppose there is a parol agreement that there shall be no easement across the land granted. May this parol evidence be introduced to negative the easement by necessity where otherwise, under the circumstances, such an easement would be implied? It would seem that if the parties may prevent the creation of the easement by necessity by intent expressly indicated in the conveyance, then a like intent otherwise indicated ought to be equally efficacious, and this evidence ought to be admitted unless it falls within the parol evidence rule. Such parol evidence has been held admissible by what little authority there is.[56] It has been stated that since the easement must be shown by resort to extrinsic evidence, such an "inference shown by parol proof may be rebutted by parol proof showing what was the actual agreement of the parties."[57] This court, obviously, considered the easement as the result of a presumed intent which could be negatived by the evidence. But the author of an interesting note in the Yale Law Journal[58] takes a contrary view, insisting that such evidence should be inadmissible. His argument seems to be based on the assumption that the presumption of the way by necessity is based on the real intent of the parties, and that there is an

[54] Seeley *v.* Bishop, 19 Conn. 128 (1848); Powers *v.* Heffernan, *supra*, n. 16, p. 597; Baldwin Lumber Co. *v.* Todd, 124 La. 543, 50 So. 526 (1909); Myers *v.* Dunn, *supra*, n. 16, p. 71; Bascom *v.* Cannon, 158 Pa. St. 225, 27 Atl. 968 (1893); Uhl *v.* Railroad Company, *supra*, n. 39.

[55] Powers *v.* Heffernan, *supra*, n. 16; Vandalia R. R. *v.* Furnas, *supra*, n. 22; Brigham *v.* Smith, *supra*, n. 22. These decisions are sound for warranty deeds are made without thought as to such a thing as an easement by necessity. The covenant is inserted in the deed as a matter of course and does not indicate an intent that there shall not be the usual implications of law.

[56] Ewert *v.* Burtis, 12 Atl. 893 (N. J. Eq. 1888); Lebus *v.* Boston, 107 Ky. 98, 51 S. W. 609 (1899); Golden *v.* Rupard, 25 Ky. L. Rep. 2125, 80 S. W. 162 (1904). In Orpin *v.* Morrison, *supra*, n. 51, the parole evidence had been admitted at the trial without objection, so the court refused to pass on its admissibility.

[57] Golden *v.* Rupard, *supra*, n. 56.

[58] 29 YALE L. J. 665 (1920).

actual inference of intent from the circumstances, instead of a fiction imposed on the parties by law.

It is submitted that to admit such parol evidence does not violate the parol evidence rule. If the fiction is founded on the social interest heretofore mentioned, then the question is whether such social interest is strong enough to prevail over the real intent of the parties expressed by way of oral agreement. No reason is perceived why the intent of the parties so expressed should not have the same effect as if the language had been inserted in the conveyance.

As a result of the rule that the easement by necessity must arise by implication from a conveyance by a common owner of the two tenements, we have cases holding that mere necessity alone is not sufficient to give rise to such an easement. Most of these are cases in which, as a matter of pleading, the claimant had not alleged the proper conveyance by a common owner.[59] Where the question arose in a case in which it appeared that both parties had derived title through escheat,[60] or where the claimant had acquired title to the dominant tenement under the Statute of Limitations,[61] the claimant was held not entitled to an easement by necessity. The easement is allowed only where title to both tenements is derived from a common owner.[62] Where the title has been so derived, the courts have been liberal in allowing the easement. An easement by necessity has been held to arise on severance of ownership by voluntary conveyance,[63] by partition,[64] by sale under legal proceedings.[65] The easement may also arise on severance by way of devise or by lease. In short the courts have allowed the easement in all cases of severance of ownership, unless it be on severance by reason of eminent domain proceedings.[66] Hence the courts have adopted the notion of implication from a severance of ownership merely as a means of determining the servient tenement, though the public policy upon which

[59] See Bullard *v.* Harrison, *supra*, n. 20; Stewart *v.* Hartman, 46 Ind. 331 (1874); Tracy *v.* Atherton, *supra*, n. 21.

[60] Proctor *v.* Hodgson, 10 Exch. *824 (1855).

[61] Wilkes *v.* Greenway, 6 T. L. R. 449 (1890).

[62] For convenience the term common owner is here used to cover all cases.

[63] This is the usual type of case.

[64] Blum *v.* Weston, 102 Cal. 362, 36 Pac. 778 (1894); Goodall *v.* Godfrey, *supra*, n. 39.

[65] See TIFFANY, *op. cit.*, n. 21, p. 1305.

[66] Eminent domain cases are not in accord with each other. Much depends on the construction of the particular statute. See Banks *v.* School Directors, 194 Ill. 247, 62 N. E. 604 (1902); and Prowattain *v.* The City of Philadelphia, 17 Phila. (Pa.) 158 (1885), which deny the way; Cleveland Ry. *v.* Smith, 177 Ind. 524, 97 N. E. 164 (1911), allows it.

the doctrine is based would justify an extension to all tracts of landlocked land. It is arguable whether the courts have not gone too far; yet the doctrine has been strongly upheld from early times by the common law. The same result was reached independently by the Germanic law, and was evidently so well intrenched that in drafting the recent Code it was deemed best not to disturb it. Certainly it is clear that it would be inequitable to go further without some means of compensating the servient owner, and it would certainly require an unusual stretch of judicial authority to create such an eminent domain procedure by decision.

In the above discussion, most of the decisions relied upon have been those involving implied reservations, for cases dealing with implied grants can usually be worked out on other grounds. In the reservation cases there are certain conflicting interests which must be considered by the courts; a social interest in the security of transactions, to insure grantee getting what he bargained for, *viz.*, an unincumbered property; on the other side, a social interest in the security of acquisitions; a social interest that all land be capable of being utilized by its owners; and, probably, a social interest in preventing a situation where either the grantee or some other adjoining owner may get an unmerited advantage from the grantor's hard position. Public policy has been used to cover the latter types of social interests, and has been sufficient to turn the scales in favor of the grantor, and might have prevailed in every case but for the difficulty mentioned above in carrying the doctrine further by judicial legislation. Where there is an express waiver by the grantor, this added social interest in the security of transactions has proved sufficient to defeat the easement.

In the portion of the paper to follow, certain types of cases where there has been a severance of estates horizontally, are discussed. These cases involve the principles of easements by necessity, though they have usually not been classed with the other decisions on the subject. This may be due partly to the fact that they involve novel situations, and partly to the fact that some of the courts have insisted that the principles of easements by necessity do not apply, without making clear what other principles do. However, there seems no doubt that these cases do involve easements

by necessity, and that they are among the most important decisions on the subject. In these cases the social considerations make a much stronger appeal than in the surface cases.

During the last generation or two the mining industry has experienced a development and assumed an importance which could hardly have been anticipated during the first half of the century. The most important minerals, coal, iron, oil and gas are found in horizontal strata and to them the western lode mining law has no application. The great activity in a field where previous development had been of relatively minor importance, made necessary the extension of old rules of law and the selection and application of other analogous rules and principles to new situations as they arose. In this the common law exhibited a gratifying elasticity, even within the seemingly rigid and settled field of real property law. As a result, an important body of law is being rapidly developed in many portions of this field, one part of which has interest to us here, namely, that which deals with easements of access to mineral strata after the ownership of such strata has been severed from that of the rest of the land. Where there has been a grant or a reservation, which has severed the ownership of one or more mineral strata in a tract of land, it sometimes happens that no easement of access is mentioned, in which case if such easement exists it must arise by implication; or it sometimes happens that a right of access may be granted or reserved by express language, without details as to the extent of the right to be enjoyed,—in which case there must be resort to implication, if the owner of the minerals is to have an easement of access which is adequate to enable him to have reasonable enjoyment of the minerals. As a practical matter, not merely a right of access, but a right of access of adequate scope, is vital to the owner of the minerals, particularly in the case of such important and widely distributed minerals as oil, gas and coal. Coal cannot be profitably mined unless such modern methods can be used as will enable the operator to compete successfully with his numerous rivals. To deny him this is to deny him the enjoyment of the mineral. Today this usually means that he must have various buildings on the land, a tipple with a railroad switch leading to it, and a lot of safety de-

vices, many of which are required by statute, all of which are burdensome to the land. In the future the number and variety of essential buildings, machines and safety devices are likely to increase rather than decrease. As to oil and gas, unless there is an adequate means of access, the owner may lose a considerable portion of his mineral by drainage through adjoining lands. It may be pointed out that there is a social interest in the mining of essential minerals, which tends more and more to influence the courts. It is to the public interest that these minerals be conserved, hence it is important that they be mined and handled by methods which are economical. There is also further consideration that lower prices can be had by means of increased efficiency in mining.

Suppose A owns land in fee and grants to B a specific vein of coal underneath the surface which underlies the whole tract, without any mention of a right of access. It is evident B should be given a right of access, or his coal may be valueless to him. We can easily deal with this case on the principle that A must be taken to have granted whatever is essential to enable B to enjoy in a reasonable manner the estate granted. Mining is the usual and customary mode of enjoying such an estate. But oil, or another vein of coal may lie underneath B's vein. It is evident A ought to have a right of access to any valuable minerals which may lie underneath B's coal, for otherwise he may not enjoy them unless he can purchase a right of access through B's coal. Furthermore A may not be able to get a water supply for use on the surface unless a well can be sunk through such coal. The right of access if given to B will be by implied grant, but if given to A, will be by implied reservation. A has here granted to B an estate B cannot reach except by passing through A's land, and A still owns land underneath, which he cannot reach except by passing through B's coal. Here is the precise situation which, when it occurs on the surface, gives rise to the easement by necessity. Both A and B now have estates which may be more completely landlocked than would be possible on the surface where there is some possibility of access through the air. It has been noted above that the connecting chain of title may be broken, so that no easement can be implied, by the acquisition of title to one of the estates by adverse pos-

session.[67] But as to mineral strata this is less likely to occur than on the surface. No one can acquire title to B's coal merely by holding A's land adversely to A for the statutory period.[68] It is almost impossible for anyone, after the severance, to acquire title to B's coal by adverse holding.[69] But it is at least arguable that if someone acquires title to the surface by adverse possession, B may deny him access to the strata underneath the coal on the ground that the new owner does hold under or through A. But this liability to have the easement of access cut off has not caused serious difficulty on the surface, and would be much less likely to cause difficulty as to these mineral strata.[70] It is submitted that in adjusting the numerous problems that arise in connection with easements of access, the whole matter can be worked out satisfactorily on the principles of easements by necessity. There is no other category known to the common law which fits the situation with any degree of accuracy. Since the common law has as far as possible simulated underground estates to estates on the surface, there seems no reason for making an exception here. Either we must resort to the principles of easements by necessity or we must create some new category.[71]

When there has been a severance of mineral strata, with no right of access expressly mentioned, either to that severed, or to the strata below, or where there is a right of access granted or reserved in general language, two questions arise which are similar to those which have arisen as to surface easements by necessity. First, there is the problem whether an easement of access can be implied at all, where no such right is expressly mentioned, that is, whether there is present the requisite high degree of necessity, or, as some courts say, the requisite strict necessity. Second, assuming an easement by necessity will be implied under the circumstances and that its location is determined, what

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[67] See Wilkes *v.* Greenway, *supra*, n. 61, which seems to be the only case.

[68] See 2 C. J. 71; 6 Ann. Cas. 140, 142 (1907), where cases are cited. A leading case is Wallace *v.* Elm Coal Co., 58 W. Va. 449, 52 S. E. 485 (1905).

[69] See 6 Ann. Cas. 141, note (1905); Ann. Cas. 1912D, 1199, note. The authorities cited contain little more than dicta, though it is stated as law, that one holding the surface adversely may acquire adverse possession of the minerals by opening mines.

[70] This defect in the law is of little moment since cases practically never arise where no easement can be allowed.

[71] When text writers have mentioned the matter at all, they have classed such rights as easements by necessity. MACSWEENEY, THE LAW OF MINES (5th ed.) 294 (1922); LINDLEY, MINES (3rd ed.) §813 (1914); JONES, *op. cit.*, n. 33 §813, GODDARD, EASEMENTS (6th ed.) 37 (1914); REEVES, REAL PROPERTY 284 (1909); TIFFANY, *op. cit.*, n. 21, p. 1296.

is its scope or extent? Is there an easement such as would be reasonably adequate as of the time and place of the conveyance, or is there an easement adequate for all purposes for which the dominant estate may lawfully be used? This second question is like the one discussed previously in connection with *Corporation of London* v. *Riggs*. In case of underground minerals, the only way of enjoying the dominant estate is by mining, and when the minerals are exhausted, peculiarly enough, the fee simple estate in the mineral stratum is held to terminate.[72] In practice the second situation always involves the question whether the dominant owner is entitled to mine by reasonable modern methods, or whether he is restricted to the methods in vogue at the time and place of the severance of ownership.

The second question arises in the same form, both in the case of the easement by necessity and in the case where there is a right of access expressly granted or reserved in general language, for in the latter case the grant or reservation confers only what would be implied were it omitted. In either case the right of access is treated as if it were expressly granted. If the doctrine of the Riggs Case were applied, a different rule would prevail in cases involving easements by necessity, and presumably the dominant owner would be restricted to methods of mining in vogue at the time of the conveyance. This would mean that the easements of access in such cases would frequently prove valueless. The results of such a doctrine would be particularly absurd here. The desirability of its application has, apparently, never been seriously considered in these cases.

As will appear below, a considerable number of cases have arisen involving rights of access to mineral strata. While the courts have agreed that where no right of access

[72] Courts held that horizontal strata might be granted in fee simple. Then they assumed that this fee simple was just like a fee simple estate in land generally, and hence when a vein of coal was granted to *B* and his heirs, that *B* got a fee simple title to the space that contained the coal with all that such space contained. It is clear in such case the parties intended to convey the coal and not space with its contents. The grantee was intended to have full title to the coal with the right to remove it whenever he chose to do so, but when the merchantable coal was once exhausted, then his estate would be terminated for the subject matter would be gone. Instead of this simple solution, the courts strongly affirmed the rule that the grantee got an absolute fee in both the coal and the space that contained it. As a result cases have arisen in some states in which courts have been compelled to recognize that the parties could not possibly have intended the absolute conveyance of the space, so such courts have held that the estate of the grantee terminates on exhaustion of the merchantable coal. This has the effect of creating of new type of terminable fee simple—one in which the termination is implied, and one in which the possibility of reverter passes with the land on the alienation of the same. For a discussion of the matter with citation of the authorities see an article in 27 W. VA. L. QUAR. 332 (1921).

is expressly granted or reserved, a right of access will be implied,[73] they have shown considerable reluctance to name this implied right.

The first case involving the question seems to have arisen in an inferior court in Ohio in 1885.[74] A landowner had granted a vein of coal in fee simple without reserving any right of access to the strata underneath, and the owner of the coal sought to enjoin the drilling of oil and gas wells through his coal. The injunction was granted on the ground that there was no way of necessity. This is the only case of the sort in which the right has been denied. In this case, as well as in most of the following cases, there was, at the time of the severance of ownership, no thought of any other mineral being subsequently discovered underneath the coal.

Six years later the question again arose. On a motion for a temporary injunction to restrain the drilling of oil and gas wells through complainant's coal, relief was denied by the federal court for the Eastern District of Pennsylvania[75] on the ground that the complainant had failed to show any immediate danger of injury to his mine. Here, too, there had been a conveyance of the coal without the reservation of a right of access. It was urged that gas might leak from the wells and make mining hazardous. This argument has been made in every subsequent case, and, while the courts seemingly had no doubt that the right of access ought to be allowed, they were troubled as to this threatened danger. However, experience has proved the danger negligible.[76] It seems that though thousands of wells have been drilled through coal, there is no case of injury from such leakage.[77] It is quite possible to protect the coal to insure safety.

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[73] The doctrine as to easements by necessity would not permit A to go through B's coal unless there was reasonable cause to believe there might be something of value underneath to justify such action. Fortunately human nature is such that a man does not try to explore the depths unless he has some cause to believe there is a reasonable chance of finding valuable minerals.

[74] Jefferson Iron Works *v.* Gill Bros., 9 Oh. Dec. 481 (1885).

[75] Rend *v.* Venture Oil Co., 48 Fed. 248 (C. C. Pa. 1891). The court here had no doubt the right of access ought to be allowed.

[76] In more recent cases the court provides in its decree that certain precautions be taken by the one drilling for oil, in order to prevent leakage. But oil and gas operators do not object to taking precautions, for it is to their advantage to do so, both on account of the gas they may save and on account of the heavy damages which may result if leakage occurs.

[77] In Chartiers Block Coal Co. *v.* Mellon, 152 Pa. St. 286, 25 Atl. 597 (1893), the judge in a concurring opinion referred to some estimates, to the effect that at that early date some thirty thousand wells had been drilled through coal in this one state, and not only was there no record of any damage, but no case like this had before reached the courts, though operations had extended over a period of thirty years.

The leading case was decided in Pennsylvania in 1893.[78] In this case one McKeon, who owned some land, conveyed all the coal under it to one McCully, who in turn conveyed it to the Chartiers Block Coal Company in 1881. Though there was no reservation of access to the strata beneath the coal, the owner in 1891 leased the land for oil and gas to the defendant, who began to drill a number of wells. A bill to restrain such drilling was denied, the court holding that there was a way by necessity and that the defendant was entitled to the benefit of it with due regard to the complainant's rights. The complainant took the case to the Supreme Court, where it took an extraordinary turn. Chief Justice Paxton proceeded to discuss the case from a highly ethical standpoint, pointing out that the social interests of society made this a question of quasi-public character rather than a contest between two insignificant parties, and then concluded that there ought to be a right of access of some sort. He saw an analogy between the right in question and the surface way of necessity, but felt that the doctrine of a surface right of way could not be applied to the case at bar. He thought, however, that it was a "legislative rather than a judicial question * * * * its wisdom will enable it to dispose of this somewhat difficult question in such manner as to protect the rights of the surface owner and yet do no violence to the rights of others to whom he has sold one or more of the underlying strata * * * * ;"[79] but nevertheless held that the decree of the lower court was not to be disturbed.

The only admirable thing about the decision was that it permitted the decree to stand. Justice Williams (two other justices agreeing) filed a concurring opinion, wherein he held that though there was no way by necessity, there were reciprocal servitudes of support and of access. That is, because of their order and arrangement, the various layers of the earth's crust owe to each other the reciprocal obligations of access and support. "The lower can only be reached through the upper. The upper can only be supported by the lower * * * * they rest on the same foundation."[80] And the judge suggested that servitude of access can be enforced

[78] Chartiers Block Coal Co. *v.* Mellon, *supra*, n. 77.
[79] Pp. 298-299.
[80] Pp. 300-301.

just as easily and with the same propriety as the servitude for support.

All the justices were agreed that the right of access should be allowed, but were far from clear as to the principles upon which it ought to be based. The so-called reciprocal easements of Justice Williams are not only not reciprocal, but also one of them is not an easement. It cannot be said that the right of subjacent support is an easement instead of a natural right.[81] Nor can it be established that the right of access here is a natural right and not an easement. One way to test the matter would be to consider whether either would violate a covenant against incumbrances. Clearly the right of access would violate such a covenant, while the right of support, being an incident to the ownership, would not. Reciprocal easements are mutual, joint or cross easements. Where an owner has erected two houses in such a way that they require support from each other, or from the soil on which they are respectively erected, and then the ownership of the two is severed, there arises what are called reciprocal easements of support.[82] Such easements may arise either by implied grant or implied reservation. If the two rights referred to by Justice Williams are reciprocal, then it would seem both must arise or neither can arise. If so, then in order to have the right of subjacent support there must be a reciprocal easement of access. If B owns a vein of coal to which he has adequate means of access through adjoining lands, must we allow him an easement of access regardless of necessity, or deny the surface owner the right of support by B's estate? If B's coal does not underlie all of A's land, so that A has adequate access to the strata beneath, without passing through B's coal, must we nevertheless allow A the right to pass through B's coal, or deny B the right of subjacent support? The Pennsylvania court has quite properly held in other cases that there is no right of access by implication, where the owner of the mineral already has adequate means of access through his

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[81] Professor Gray in his CASES ON PROPERTY, Vol. I, classed natural rights as rights in the property of another. This was common in the older books. See 2 WASHBURN, REAL PROPERTY (3rd ed.) c. 1 §3 (1868). He treats such rights under the heading "Hereditaments Purely Incorporeal."

[82] Richards *v.* Rose, 9 Exch. 218 (1853); Turnstall *v.* Christian, 80 Va. 1 (1885); Powers *v.* Heffernan, *supra*, n. 16; Everett *v.* Edwards, 149 Mass. 588, 22 N. E. 52 (1889); Brooks *v.* Curtis, 50 N. Y. 639 (1872); TIFFANY, *op. cit.*, n. 21, p. 1294; REEVES, *op. cit.*, n. 71, p. 176.

own land.[83] Plainly the right of subjacent support is a natural right and has always been allowed without any connection with the right of access. Justice Williams evidently used the term "reciprocal easement" as a solving phrase. Furthermore he does not escape the easement by necessity, for probably reciprocal easements may properly be classed as easements by necessity.[84]

In 1911 a similar case arose once more in Ohio.[85] The owner of oil and gas sought to restrain the surface owner from interfering with the right to drill for oil and gas. Complainant derived its title through a coal company, which had owned the land, but had previously conveyed the surface to the defendant, without reservation of access to the oil and gas. The lower court granted the injunction and this was affirmed without opinion by the supreme court of Ohio. The lower court probably held there was a way by necessity, but its opinion shows confusion of ideas, which is probably largely due to Justice William's language in the Chartiers Block Coal Company Case.[86]

In *Telford* v. *Jennings Producing Company*,[87] the Circuit Court of Appeals for the 7th Circuit held that damages should be allowed for breach of a contract by which the complainant was to secure for the defendant an oil and gas lease on a certain tract of land in Illinois, the defense being that the coal under fifty acres of the land had previously been conveyed without reserving a right of access to the oil and gas. The court held that such right of access would be implied, and that therefore there was no defect shown in the performance tendered by the complainant to the defendant.

In *Kemmerer* v. *Midland Oil and Drilling Company*,[88] it was held that where one had made an agricultural lease for five years, he might thereafter make an oil and gas lease of the same land, giving to the oil and gas lessee the right to enter

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[83] Friedline *v.* Hoffman, 271 Pa. St. 530, 115 Atl. 845 (1922); Titus *v.* Poland Coal Co., 263 Pa. St. 24. 106 Atl. 90 (1919).

[84] It is interesting to note that while the Pennsylvania court was sure the doctrine as to easements by necessity could not apply to this case. Tiffany classes these reciprocal easements as easements by necessity, and probably rightly so. See TIFFANY, *op. cit.*, n. 21, pp. 1295-7.

[85] Oil Co. *v.* Curtiss, 34 Oh. C. C. 106 (1911). Affirmed without opinion, 88 Oh. St. 594 (1913).

[86] P. 109. This court had been badly confused by reading the opinion in Chartiers Block Coal Co. Case, *supra*, n. 77.

[87] 203 Fed. 456 (C. C. A. 7th Cir. 1913).

[88] 229 Fed. 872 (C. C. A. 8th Cir. 1915). Suit was started in the state court but was removed to the Federal Court, where the preliminary injunction granted by the state court was dissolved. An appeal was taken from this order. This is probably the first case that arose in which it appeared the parties must have been aware of the possible existence of the oil and gas at the time of the transaction.

and drill. In such a case the owner of the land would have to wait only five years for the lease to terminate, and had the right of access been claimed by implication to solid minerals under such circumstances, doubtless it would have been denied, for there would be no great necessity apparent. But in the case of oil and gas, the necessity does exist if there are other developments in the vicinity. If the lessor has to wait five years, his neighbors may get most of his oil and gas, particularly where the tract is small, as was the case here. The court in this case followed the Chartiers Block Coal Company Case. There was a long dissenting opinion by Justice Sanborn, the arguments of which would apply almost equally well to any of the cases under discussion here.

In *Roma Oil Company* v. *Long*,[89] where there was an agricultural lease of school lands followed by an oil and gas lease, the Oklahoma court followed the Kemmerer Case.

Two Pennsylvania cases have treated the Chartiers Block Coal Company Case as establishing the law that where no right of access is reserved to lower strata, on conveyance of a vein of coal, the right will be implied. One of these arose in the Superior Court[90] and on its facts was similar to the Chartiers Block Coal Company Case.

In the other,[91] the plaintiff owned a brewery and in 1888 drove an artesian well to get a water supply. The defendant owned the coal under the land. When the ownership of the coal was severed does not appear, but it seems that it was before the well was drilled. The miners of the defendant broke the pipe and thus destroyed the well. The plaintiff sued in assumpsit for damages, basing his action on the negligence of the miners. There was verdict and judgment for the plaintiff, and the defendant appealed. The Supreme Court, treating the law as settled by the Chartiers Block Coal Company Case, held that the plaintiff had a right to drive the well through the defendant's coal. In addition to the above authorities, there are a few other cases which contain at least dicta in accord.[92]

With one exception, all of the above cases involve rights of access to oil and gas where the ownership of the coal has

[89] 98 Okla. 267, 173 Pac. 957 (1918).
[90] Philips G. & O. Co. *v.* Manor Gas Co., 68 Pa. Super Ct. 372 (1917).
[91] Pa. Cent. Brwg. Co. *v.* Lehigh V. Co., 250 Pa. St. 300, 95 Atl. 471 (1915).
[92] See Donnell *v.* Otis, 230 S. W. 864 (Tex. Civ. App. 1921); Gill *v.* Fletcher, 74 Oh. St. 295, 78 N. E. 433 (1906); Baker *v.* Pittsburg R. R., 219 Pa. St. 398, 68 Atl. 1014 (1908); see also, Pearne *v.* Coal Creek N. & M. Co., *supra*, n. 33.

been severed, or where there has been a lease of the surface of the land. In most of the cases the presence of oil and gas in the land was not known at the time the ownership of the coal was severed. But such knowledge was present in the two cases involving leases of the surface; and in the artesian well case the presence of percolating waters was known. Whether or not the necessity is known to the parties is immaterial.

The view expressed in the Chartiers Coal Case that the right of access is a natural right, although opposed by the text writers, finds support in a note in the Harvard Law Review.[93] It is there asserted that the right of access must be allowed, not because of a grant, real or implied, "but for the same reasons that riparian rights and rights of support exist. Like them it is a natural right and must be treated as always having existed." It is also suggested that "there can be but one way of necessity—a restriction that would be curious to apply to oil wells."

There is no authority for the "natural rights" position, outside of the curious arguments of the judges noted above. The doctrine as to easements by necessity fits the situation precisely and it seems undesirable to create a new sort of natural right, different from all other natural rights, merely because one disapproves of the basis of our doctrine of easement by necessity. This would be a strange natural right, since it would be a right in the land of another, and would violate a covenant against incumbrances in a deed of the servient tenement. It it submitted that it is better to handle the situation wherever it arises by applying the principles of easements by necessity, than to increase the confusion in the law by the creation of a new right which will defy classification. The doctrine as to easements by necessity will furnish a satisfactory solution for all cases that are likely to arise. Furthermore, it is submitted, the courts have done very well in working out easements by necessity as they have, and the difficulty is that legislation has not aided.

The statement that there can be but one way by necessity is a generalization which has no real basis in the law. Apparently it is based on the fact that in the cases which have arisen on the surface, only one way happened to be neces-

[93] See 7 HARV. L. REV. 47 (1893).

sary. Hence some have concluded there can be but one such way, notwithstanding such conclusion is in conflict with the reasons given for allowing ways by necessity. If an impassable cliff divided the dominant tenement so that a way was necessary to each portion, certainly a way would be allowed to each portion.[94] In oil and gas cases a certain number of wells are necessary to enable the owner to secure the oil and gas, and so a reasonable number of wells are permitted,—enough to enable him to have the reasonable enjoyment of his mineral. The same would be true if a tract of coal was so large that it could not be mined profitably from one shaft. There is no rule of law to the effect that there can be but one easement by necessity.

In the above line of cases the right of access is clearly recognized and enforced, though the cases are not clear as to the basis of such right. But there is another line of cases, involving solid minerals, in which no such uncertainty exists. In these the right of access is held to be an easement by necessity. Most of these cases involve both the question as to whether there is an easement by necessity, and the question as to the extent or scope of the easement. Usually the two questions are not clearly distinguished. But in some of them, since there is a right of access expressly given in more or less general language, only the second question is involved. For example, suppose A grants land to B, reserving the coal thereunder with "a right to enter and remove the same." Suppose this grant is made in 1880, and in 1923 A desires to sink a shaft, build a tipple connected with the railroad by a switch, erect certain buildings necessary to a modern coal mine, and install a number of ventilators and other safety devices required by statutes, all of which statutes have been passed since 1880. Has he the right to do all these things? The question is not whether there is a right of access, for that is expressly reserved, but whether A has the right by implication to open and operate a modern coal mine, with all reasonably essential appliances. In such cases the surface owner insists that the language of the reservation must be strictly construed, and that the right contemplated by the parties is such a

[94] In Crotty *v.* Coal Company, *supra*, n. 16, there was a road to one part of the land, yet a way by necessity was allowed to another part. See also Wiese *v.* Thein, 279 Mo. 524, 214 S. W. 853 (1919).

right as would have been reasonable as of the time of the conveyance,—a variation of the doctrine of the Riggs Case. If such is the extent of the right, then A is deprived of the enjoyment of the coal just as certainly as if he had reserved no right, and a way were denied him. But it should be noted that the question which arises here is the same as that which arises where the right of access is implied as an easement by necessity. No distinction can be made between the two cases insofar as implication of incidents to the rights of access is concerned. In the cases involving oil and gas, above, the courts assumed the second question as a rule, since it is absurd to argue that the oil and gas can be mined from any considerable area through one well.

The leading case involving an easement to solid minerals is *Marvin* v. *Brewster Iron Mining Company*.[95] Here there had been a conveyance of land in 1837 with a reservation in the following language: "Reserving always all mineral ores thereon now known, or that may hereafter be known, *with the privilege of going to and from all beds of ore*[96] that may hereafter be worked on the most convenient route to and from." The defendant, who owned the minerals, began active mining in 1864 and the plaintiff brought suit to restrain him and to recover damages. The case, among other things, involved the right of the defendant to have a dump heap on the land and to maintain a tramway and steam engine on the premises. The argument of the plaintiff is curious, but with some variation the same argument has been urged in some of the later cases. It is that the general right of access, which was acquired as an incident to the grant, is here limited by the special privilege, namely, "the privilege of going to and from all beds of ore * * * * on the most convenient route," and that this special privilege being thus expressly reserved excludes all implications. In other words the plaintiff argues there would be an easement by necessity had the deed been silent on the subject, but since this privilege was expressly reserved, there can be no other rights implied. But the court held that a reservation of the minerals implies a right to work them, and that this is an easement by necessity. It held that the express language referred to merely enlarged the implied right, in that it al-

[95] 55 N. Y. 538 (1874).
[96] Italics ours.

lowed the most convenient route to and from the minerals, while the easement by necessity alone would permit only a reasonable route. But when the court came to consider the second question it said:[97]

> "The defendant may not claim, as incident to the grant to it, that which is convenient. It may have only that which is necessary, but have that in a convenient way."

It was then held that the defendant had not the right to pile refuse on the land as he had been doing, because this was only convenient and not necessary. As to the tramway and engine the court concluded that there was sufficient evidence to sustain a finding they were necessary, but said:[98]

> " * * * * * And yet it will also be seen, that the findings of fact and the request and refusals to find, fail to apply with strictness to the acts and doings of the parties upon these premises—the legal test which will exactly and correctly determine their relative rights and duties. That is the test of necessity. As to each of the acts of the defendant complained of, it should have been found as a matter of fact, whether or not it was necessary to be done for the reasonably profitable enjoyment of its property in the minerals."

The decree of the court below was accordingly reversed because that court had not expressly found this necessity as to each incident in question. Thus the case first holds that there is an easement by necessity, and then considers what incidents claimed are to be implied. In an easement there are certain things which must be implied as incidental thereto, or the easement cannot fulfill the purposes of its existence. These are probably what Gale[99] meant by "secondary easements." But in order to imply an incident to an easement by necessity, must we apply the same degree of necessity as when determining whether the easement itself will be implied? Or is an easement by necessity like any other easement in this respect, so that the incidents are to be determined by considering whether they are reason-

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[97] P. 553.
[98] P. 565.
[99] GALE, EASEMENTS (9th ed.) pp. 437-442 (1916). It may be doubted whether this term "secondary easements" is a good one. If an easement is granted in general terms, there are certain incidents which must be implied. If there is a way to land for all purposes then the incidents must be determined by reference to this scope. If the way is to coal for the purpose of mining and removing it, then it ought to be tested by whether the mining is by reasonable methods.

ably necessary? The latter is the proper test, though the court above failed to see this. However, it managed to reach about the same result by saying that these incidents must be "necessary for the reasonably profitable enjoyment of its property in the minerals." Whether or not a tramway, an engine, or a dump heap should be permitted on the premises are matters which concern the practical business of mining coal. If the defendant may use modern methods, then whether a thing is reasonably necessary to the practical operation of the mine at the present time so that it may be made a profitable business, is certainly the proper standard.

In *Hooper* v. *Dora Coal Mining Company*,[100] the court overruled a demurrer to a bill to enjoin the defendant from dumping refuse on the plaintiff's land, and from taking coal from underneath adjoining lands through the plaintiff's land. The court held the bill alleged a good case, since the defendant at least had no right to dump rubbish taken from other land on to the plaintiff's land. But the court used the following interesting language:[101]

> " * * * * The bill does not inform us whether the right of defendant to mine is by reservation in a deed to the surface, or by a grant of the minerals, the grantor reserving to himself the surface; but this is immaterial—the relative rights and duties of the parties are the same. It is well settled, that where one person is the owner of the surface, and another of the subjacent minerals, the surface is subservient to the mining right as to the occupation and use of so much as may be reasonably necessary for the beneficial and profitable working of the mines. A reservation or grant of the minerals, severed from the ownership of the surface, carries with it the right to penetrate through the surface to the minerals, for the purpose of mining and removing them. This includes the adoption and use of such machinery, methods, appliances and instrumentalities as may be reasonably necessary, and are ordinarily used in such business; and it may be, for the storage of minerals in the first marketable state until they can be transported with due diligence."

The above court clearly supported the right of access as a way by necessity, where not expressly reserved. The

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[100] 95 Ala. 235 (1891).

[101] P. 238. As to the incidents, the court plainly holds, there may be those which are reasonably necessary for the beneficial and profitable working of the mines.

principle stated as to the extent of the right of access is the principle which is applied at the present time. The strict necessity test of the Marvin Case has been discarded. The above case follows *Williams* v. *Gibson,* which is discussed below.

In *Baker* v. *Pittsburgh Railroad,*[102] the land was conveyed reserving "all of the coal lying under the same, with all mining rights and privileges appurtenant thereto." Since this gave no right of access by express words, the court held such a right would be implied.

In *Himrod* v. *Fort Pitt Mining & Milling Company,*[103] it was held that, under a conveyance which gave a right to the use of a tunnel for use in mining adjoining claims, the right to pile refuse on the land would be implied under the circumstances. But the court noted the distinction between implying the easement and implying rights incidental to the easement.[104]

In *Porter* v. *Mack Manufacturing Company,*[105] it appeared the land had been conveyed by the grantors, "reserving to themselves all the clay, fire-clay, coal, stone and minerals of whatever kind underlying the above tract of land, *with the right to mine and remove the same.*" The owner of the minerals sought to enjoin interference with the construction of a tramway. The injunction was allowed. The court, basing its holding on the fact that the right of access was expressly reserved, seemed of the opinion that the same result would have been reached had it been implied as an easement by necessity. This is certainly sound, for it can make no difference whether the easement is implied or is expressed in general language.

The next case involved a somewhat different situation.[106] There had been a grant of the coal and other minerals, under the land, "and also all timber and water upon same, necessary for the development, working and mining of said coal and other minerals, and the preparation of the same for market and the removal of the same; and also the right of way, and the right to build roads of any description over

[102] *Supra,* n. 92.

[103] *Supra,* n. 41. Further facts will be found in a previous appeal in 202 Fed. 724 (C. C. A. 8th Cir. 1913).

[104] See *supra,* n. 41. The term "practical necessities of business operations" expresses the matter well.

[105] 65 W. Va. 636, 64 S. E. 853 (1909).

[106] Williams *v.* Gibson, 84 Ala. 228, 4 So. 350 (1887).

the same, necessary for the convenient transportation of said coal and other minerals from the land, and the conveying and transporting, to and from said land, all minerals and implements that may be of use in mining and removal of said coal and other minerals or the preparation of the same for the market." The owner of the mine had constructed on the land five miners' houses; four other log cabins; an air shaft and ventilator; a power-house, a blacksmith shop; and a storehouse where a stock of goods were kept for the use of the miners. It was contended that, since the special grant included the timber and water and the rights of way, under the maxim *expressio unius est exclusio alterius,* no other rights could be implied. This is the same argument made in the Marvin Case. But the court said that "one who has the exclusive right to mine coal upon a tract of land has the right of possession even as against the owner of the soil, so far as is reasonably necessary to carry on his mining operations." As to the various buildings, it said that whether these are reasonably necessary for the profitable and beneficial working of the mines was a question of fact and that even the houses and store might be reasonably necessary, if the location was one where there were not such conveniences.

Where there was a reservation of minerals with "the right of mining and removing at pleasure coal and other minerals from under the surface of the land; also, the right and privilege of sinking, if need be, air-shafts for the purpose of working, mining, or removing the same," the court held the fact there was an express provision for a separate air-shaft did not indicate an intention to exclude the incidental and implied powers necessary to reasonable enjoyment of the minerals, and that this express liberty is an enlargement of the powers, not a restriction of them.[107]

In *Oberly* v. *Frick Coal Company,*[108] there had been a grant of coal "together with the free and uninterrupted right of way under said land at such points and in such manner as may be necessary and proper for the purpose of digging, mining, draining, ventilating and carrying away said coal, hereby waiving all damages arising therefrom or from the removal of all of said coal, together with the privilege of

[107] Wardell v. Watson 93 Mo. 107, 5 S. W. 605 (1878).
[108] 262 Pa. St. 83, 104 Atl. 864 (1918).

mining and removing through said described premises other coal belonging to said parties of the second part, * * * * or which may be hereafter acquired." Part of the coal had been removed and the supports taken out. A lot of explosive gas gathered in a place where it could not be removed by the ventilating fans and the defendant entered on the land over this gas for the purpose of sinking a ten inch pipe 520 feet to the gas accumulation below. The surface owner sought an injunction. The injunction was denied on the ground that the removal of the gas was a necessary incident to the mining of the coal, in order that such mining might be carried on safely, and one of the implied rights incidental to every grant of minerals. If so, then this right was implied in addition to the broad privileges of access contained in the grant. There are other cases to the same effect.[109]

Thus it appears that where there is a right of access by necessity, or where the right is reserved in general language, there will be implied as incident thereto whatever is reasonably necessary to enable the owner of the minerals to mine them with advantage according to the methods of the time. These implications will be made unless express language negatives them. Even though special language authorize more acts than would be implied by law such language will be construed to increase the privileges which the party would otherwise have by implication. A leading English text[110] is in accord with this, though it cites only *Cardigan* v. *Armitage*,[111] which seems to contain only strong dicta. The soundness of the doctrine cannot be questioned. In the modern world strong social interests favor the working of minerals in an economical manner, and such social interests exert an increasingly strong pressure on the courts.

Most of the above cases involve implied reservations of the easement by necessity, but the law is settled that implied reservations will be treated like implied grants. Most of the authorities above so hold, some of them going back

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[109] Other cases which might be cited are Ingle *v.* Bottoms, 160 Ind. 78, 66 N. E. 160 (1902); Consolidated Coal Co. *v.* Savitz, 57 Ill. App. 659 (1894); Strunk *v.* Morris Run Coal M. Co., 271 Pa. St. 148, 114 Atl. 519 (1921).

[110] BAINBRIDGE, MINES (1st Am. ed.) 42 (1871).

[111] 2 B. & C. 197, 3 D. & R. 414 (1823).

to an early date.[112] This seems sound, for after an easement is created, it should be treated like any other easement of access.

It is evident that the principle that a grant is to be construed most strongly against the grantor has little or no application to easements by necessity. The intent of the parties is immaterial, unless expressed in some way. The so-called presumed intent is pure fiction; the easement arises by operation of law, and it arises because the courts are influenced by the social interests involved.[113]

That the doctrine is based on social interests seems clear. Throughout the development of the doctrine, these interests have played a prominent part. And, today, owing to the greater concern of the public in the mining and conservation of our more important minerals, these interests are operating with increasing strength.

As pointed out above, the basis of doctrine was not given at first, but soon it was said to be founded on public policy. During the 19th century, when there was a strong tendency to refer everything to contract, it was held that the easement by necessity was the result of the intent of the parties. Although this was a fiction, it resulted in the doctrine that the easement can be allowed only where the title to both tenements can be traced to a severance of ownership by a common owner. The courts, while speaking of the intent of the parties, were in fact using a device to extend the doctrine as far as it equitably could go. Most of the objection voiced has been based on the belief that the doctrine was carried farther than was equitable.

In the mining cases we find the same doctrine being applied to horizontal estates in land. We find similar social

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[112] 2 Rol. Abr. 60, pl. 17; Clarke *v.* Cogge, Cro. Jac. 170 (1607); Jorden *v.* Atwood, Owen 121 (1585).

"An exception is always taken most in favor of the feoffee, lessee, etc., and against the feoffor, lessor. And yet it is a rule that what will pass by words in a grant, will be excepted by the same words in an exception. And it is another true rule, that when anything is excepted, all things that are depending on it, and necessary for the obtaining of it, are excepted also: as if a lessor except the trees, he may bring his chapman to view them if he desire to sell them; and he, or the vendee, may cut them and take them away." SHEPPARD'S TOUCHSTONE, p. 100.

[113] The difficulty in applying the doctrine of implied grant or the re-grant, where the grantee did not execute the conveyance was noted and commented on in Pomfret *v.* Ricroft, *supra*, n. 17, p. 326 6 (s). It is stated that in such a case a way could only arise as an incident given by law. In this country the conveyance is usually by deed poll. This raises a technical difficulty which is probably impossible to surmount on strict common law principles, but our courts have usually disregarded the technical difficulty. This is quite proper since they are engaged in the practical operation of the legal system. If we look at the matter from the standpoint of the interest of society, and raise the right because it is in accord therewith, we need have no difficulty as to whether or not there can be a grant or a re-grant.

interests at play, making if anything, a stronger appeal than in the surface cases. No court has hesitated to extend the doctrine as far as is essential to permit reasonable enjoyment of minerals.

The objection is often made that the reasons of policy on which the doctrine is based would justify its extension to all cases of landlocked land; yet the courts have not gone so far. The reason for this is that the courts have carried the doctrine as far as they could by means of judicial decision. Yet, as so applied, there have been very few cases where the owner of landlocked land has been unable to get an easement by necessity. Most of the cases of the sort have arisen on questions of pleading—the real facts have not appeared.[114] On the whole, it is submitted the courts have done a good piece of work in developing easements by necessity as they have without legislative assistance.

[114] See cases cited *supra*, footnotes 59-61. There are only one or two cases in which the court was unable to allow the easement. Most of the cases turn on the pleadings.