Florida Law Review

Volume 18 | Issue 4 Article 14

March 1966

Easements by Necessity: Water Access No Longer a Bar

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Further, it represents the policy choice taken by the Florida Supreme Court on this issue. Whether the law and the policy on which the decision rests are the best suited for Florida's needs is a far more uncertain question.

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EASEMENTS BY NECESSITY: WATER ACCESS NO LONGER A BAR

Redman v. Kidwell, 180 So. 2d 682 (2d D.C.A. Fla. 1965)

The petitioner and the respondent purchased land from a common grantor. The petitioner's land was inaccessible to public roads except over the respondent's land or a navigable river. The petitioner sought a way of necessity over the respondent's land, but failed in the trial court. On appeal, HELD, the petitioner should be given a means of ingress and egress over the respondent's land. The Second District Court of Appeal found that section 704.01 (1) of the Florida Statutes has adopted "a reasonable and practical" common law way by necessity, and access to land by a navigable river is no longer "reasonable and practical."

Two easements by necessity have been created in Florida by statute. Section 704.01 (1) is a codification of the common law way by necessity. Section 704.01 (2) provides relief to landlocked estates, in limited situations, when no common law way by necessity can be granted; it requires (1) that the dominant estate compensate the servient estate and (2) the dominant estate must be located "outside any municipality [and be used] or desired to be used as a dwelling or for agricultural or for timber raising or cutting or [for] stock raising purposes." The court in the principal case did not state which type of easement it granted. It is reasonable to assume that the common law way by necessity was granted because if the court had provided relief under section 704.01 (2), the case would have required a remand to the trial court to determine the value of the easement under a proceeding outlined in the statute.

The test of necessity required by sections 704.01 (1) and 704.01 (2) is the same. The language describing the degree of necessity in both statutes is "reasonable and practical." Section 704.03 of the Florida Statutes defines the words "reasonable and practical," as used in sections 704.01 (1) and 704.01 (2), as without the use of "bridge, ferry, turnpike road, embankment or substantial fill."

Common law easements by necessity have their roots in English common law at least as early as 1379.[1] The development of ways by necessity from 1379 to 1606 is difficult to follow. In *Clarke v. Cogge*, there is a clear statement that a way by necessity should be granted if "he [the landlocked owner] could not have any profits of his land."[2] The *Clarke* court speaks in terms of results: it announced *when* an easement by necessity will be granted, but not *why*. *Packer v. Welstead* provides the answer: "But it is also to the prejudice of the public weal, that land should lie fresh and unoccupied."[3] The English economy was and still is closely tied to land. A way by necessity there, then, is a public policy developed to insure that no land will be taken out of the economic system merely because there is no means of egress and ingress to a given estate.

Certain limits have been placed upon this general public policy of a way by necessity as it is found in this country. The limits arose primarily because the common law way by necessity was given without compensation to the servient estate. The fifth amendment to the United States Constitution provides that no man should be required to give up his land without just compensation. Yet the public policy of keeping land useful in our economy is a strong one. The courts generally solved this conflict in terms of the intent of the parties at the time of the severance of the estate into dominant and servient tenants.[4]

The courts of the nineteenth century became so fascinated with the intent of the parties that the basic public policy was sometimes completely hidden in their opinions:[5]

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1. Fitzherbert, *Grants* 41, cited in Simonton, *Ways by Necessity*, 25 COLUM. L. REV. 571, 572 n.5 (1925).

2. Cro. Jac. 170 (K.B. 1607).

3. 2 Sid. 39 (K.B. 1658).

4. Jann v. Standard Cement Co., 54 Ind. App. 221, 102 N.E. 872 (1913); Doten v. Bartlett, 107 Me. 351, 78 Atl. 456 (1910); Bauman v. Wagner, 146 App. Div. 191, 130 N.Y. Supp. 1016 (4th Dep't 1911). If it was found that the parties intended use of the grantor's lands as access to the grantee's estate, a way by necessity was allowed; if the intent was otherwise, no way was allowed. Perhaps this was another way of saying that the court was not depriving the grantor of a valuable property right without compensation because the grantor had received consideration for the easement in the purchase price.

5. Collins v. Prentice, 15 Conn. 39, 44 (1842).

> And although it is called a way of necessity, yet in strictness, the necessity does not create the way, but merely furnishes evidence as to the real intention of the parties. For the law will not presume, that it 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. . . . The law, under such circumstances, will give effect to the grant according to the presumed intent of the parties.

This statement of total reliance on the intent of the parties becomes almost ludicrous when read in conjunction with the facts of the case. The litigants purchased their *estates at the same auction.* Exactly what purchasers at auctions intend can only be arrived at by judicial fictions. The strength of the public policy, in this opinion, is clearly evident. The court did not want to deprive a man of his property without compensation, but neither did it wish other lands to lie fallow in order to preserve his rights. Therefore, it deprived a man of a valuable property right, based upon the fiction of his intent, so that other lands could be useful in the economy.[6]

Modern decisions have placed more importance upon the degree of necessity that will support the granting of an easement by necessity than the intent of the parties.[7] In terms of the policy behind ways by necessity, the question now is: How productive in our economy will land be if the easement is not granted? The court should also consider whether or not the use to which the land could be put, if the way by necessity were granted, is of great enough importance to our economy to deprive the servient estate owner of a valuable property right without compensation.

The principal case is the first Florida case to squarely face the question whether access to land by water should obviate a way by necessity. The first case that involved this problem in modern terms

6. Yet even the fiction of intent cannot help a grantee of an estate surrounded by lands with which the estate has no common grantor. In this situation, there is nothing to which intent, fictitious or otherwise, may attach. No court has felt it could allow an easement in this situation. It has been suggested that if a court could find some way to compensate the servient estate holder, it might well grant the way, but to do so without some legislation goes too far for a court. Joyner v. Andrews, 137 So. 2d 870 (2d D.C.A. Fla. 1962); TIFFANY, REAL PROPERTY §543 (abr. ed. 1940); Simonton, *Ways by Necessity*, 25 COLUM. L. REV. 571 (1925).

7. Walkup v. Becker, 161 So. 2d 893 (1st D.C.A. Fla. 1964); Glass v. Barnett, 70 N.E.2d 105 (Ct. App. Ohio 1946); Tucker v. Nuding, 92 Ore. 319, 180 Pac. 903 (1919). Although the case dealt with powers of appointment over land, note this modern expression of dissatisfaction with constructive intent: "I shall not indulge in any elaborate discussion of the rules of construction in an attempt to discover the assumed intent of the testatrix. . . . Rather, I believe the result must be arrived at by deciding whether it [the result] is a desirable policy. . . ." Equitable Trust Co. v. James, 29 Del. Ch. 166, 47 A.2d 303 (Ct. Ch. 1946).

was *Feofees of Grammar School in Ipswich v. Proprietors of Jeffery's Neck Pasture.*[8] There the court found the land in question was accessible *to people and their needs* by a river and steamboat, but not to livestock. The court held that a way of necessity should be granted so that livestock could be moved to and from the pasture by land. The basic public policy can easily be seen operating in *Ipswich.* Raising livestock is not practical on land accessible only by water, and raising livestock is of great enough public importance to subvert the rights of a bordering landowner.

The courts of other jurisdictions have reached varying results by similar policy reasoning. A cottage always in the past reached by water could not maintain an easement by necessity;[9] a parcel of land purchased to develop a steamer resort failed to create a way by necessity;[10] subdivisions bordering tributaries to the Great Lakes were given easements by necessity.[11] In each of the above opinions, the courts recognized that in the proper case, access by water to the dominate estate would not obviate an easement by necessity.[12]

In the principal case, the court recognized the modern trend, beginning in *Ipswich,* that access to land by water will not necessarily bar a way by necessity. The court reasoned that the public policy behind ways of necessity must be related to the times in which it operates. The court felt society no longer considered that land accessible only by water lacked the degree of necessity required to maintain an easement by necessity.

No case has been found before the principal case, however, in which a court had before it two methods of granting a way by necessity. In its opinion, the court ignored the intended use of the dominant estate. In his brief, the respondent admitted that the petitioner intended to use the land for dwelling purposes outside any municipality.[13] Such a use is within the contemplation of section 704.01 (2). Therefore, given the requisite degree of necessity, the court could have awarded a common law easement or an easement under section 704.01 (2).

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8. 174 Mass. 572, 55 N.E. 462 (1899).

9. Elliot v. Ferguson, 177 A.2d 387 (N.H. 1962).

10. Bauman v. Wagner, 146 App. Div. 191, 130 N.Y. Supp. 1016 (4th Dep't 1911).

11. Cookston v. Box, 160 N.E.2d 327 (Ohio 1959).

12. The utility of the dominate estate in these opinions was seriously impaired because the only access to the estate was over water. In terms of the policy behind ways of necessity, the decisions turned equally upon the impairment of the dominate estate and a net benefit to society, in excess of the loss suffered by the servient estate, should the way be granted.

13. Brief for Appellee, (app. p. 2), Redman v. Kidwell, 180 So. 2d 682 (2d. D.C.A. Fla. 1965).

The qualification of the public policy behind easements by necessity is that no man should be deprived of his property without just compensation. The respondent received his estate from the common grantor twenty-three years before the petitioner.[14] Under these circumstances, the intent of the parties could only be arrived at by judicial fictions. In Florida, the public policy of ways of necessity can be satisfied without the use of fictions. The court should have required a showing that the intent of the litigating parties and their common grantor *in fact* reflected that the servient estate was purchased subject to the easement. If not, relief should have been granted under section 704.01 (2). Florida courts now have at their disposal the power to give relief to landlocked estates *and* to compensate servient estates in proper cases. They should use it.[15]

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14. Brief for Appellee, *supra* note 13, at 9.

15. *Caveat*: The hypothesis of this comment depends upon a declaration by the Florida Supreme Court that the proceeding in FLA. STAT. §704.01 (2) (1965), to determine the value of an easement granted under this statute, is constitutional. The nature of the proceeding is that of an eminent domain proceeding. There is a very serious constitutional question whether a private individual should be allowed to exercise such power; however, such a question is beyond the scope of this comment.