Reservation of Easements by Implication

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RESERVATION OF EASEMENTS BY IMPLICATION.

In considering the reservation of an easement by implication, it is first necessary to differentiate between an implied reservation and an implied grant. Although there is no express grant of an easement, and easement is frequently construed as arising in connection with a conveyance of land, either for the benefit of the land conveyed as against land retained by the grantor, or against the land conveyed, the former being an implied grant, the latter an implied reservation. Thus where the owner conveys the dominant tenement without expressly granting the easement, there is an implied grant, and where the servient tenement is conveyed, there is an implied reservation. The courts are prone to look with disfavor upon implying reservations of easements, since the grantor cannot derogate from his own grant. The grantor in conveying the land, being familiar with the condition of the land, should expressly reserve to the land retained, any easements which are served by the land conveyed, and further that the grantee has a right to depend on the contract of conveyance. The Kentucky Court of Appeals lines up with this new holding, that since a grantor cannot derogate from his own grant, while a grantee may take the language of the deed most strongly in his favor, the law will imply an easement in favor of a grantee more readily than it will in favor of a grantor. The courts are also much more lenient in construing the requirements for an implied grant than those for an implied reservation. For example, “necessary” has been construed in case of an implied grant, as meaning only “highly desirable” or “convenient” while in implying a reservation, “necessary” is construed as meaning “absolutely necessary” to the benefit of the land retained.

1 II Tiffany, Real Property 1270.
3 Supra.
5 Brown v. Alabaster, 37 Ch. D. (Eng.) 490 (1887).
6 Hildreth v. Goggin, 91 Me. 227 (1898), where the court held that if there was a way out of land, even though by way of the ocean, another way out over land was not necessary, and thus the court would not imply a reservation. Although this construction of the word is too strict and not generally followed, it is a good example of the extreme length to which a court will go to avoid implying a reservation.
The earlier English cases would imply reservations of easements corresponding to pre-existing quasi easements,\(^7\) that is, where the owner of the land had used one part of the land for the benefit of another. The latter cases, however, have repudiated this doctrine. In *Suffield v. Brown*,\(^8\) the Chancellor in refusing to allow the reservation of an easement, said,

"It seems to me to be more reasonable and just to hold that, if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than cut down and limit the operation of a plain grant, by the fiction of an implied reservation."

However, despite this language the court implied that reciprocal easements and easements of necessity could still be impliedly reserved. This strict view was modified in a later case\(^9\) in which the court held they would imply a reservation where the easement reserved was a corporal part, as well as necessary and reciprocal.

The general American rule is essentially the same as the English rule, the courts will not imply the reservation of an easement except in cases of necessity.\(^\) Some jurisdictions say that an easement will be implied by reservation only in cases of strict necessity.\(^1\) However, it is submitted that in several jurisdictions the rule is not so strict, and that a reservation will be implied where it is highly necessary, obvious, and apparent.\(^2\) One court said that to raise an implied reservation of an easement, the existing servitude must be apparent, strictly necessary, and continuous. The rule of "strictly necessary" is not limited to strict necessity but to reasonable necessity, as distinguished from convenience.\(^3\) However, this is not general, and even though the easement may be reasonably necessary, the courts will not impliedly raise it.

The Kentucky courts, although modifying the general rule, tend to only imply reservations when such easements are highly

\(^1\) *Pyer v. Carter*, 1 H. & N. 916 (1857), II Tiffany, Real Prop. 1292.
\(^2\) Supra, note 2.
\(^3\) *Union Lighterage Co. v. London Graving Co.*, 2 Ch. D. 557 (1902).
\(^4\) II Tiffany, Real Property 1293.
\(^7\) *Miller v. Skaggs*, 91 S. E. (W. Va.) 536 (1917).
beneficial to the land, and there is no other reasonable mode of enjoying the dominant tenement. Thus they do not construe the term "necessity" as strictly as the majority of American courts. It is submitted that the term "necessary" in Kentucky is construed as the court in Todman v. Jones, held that they would impliedly reserve all obvious and apparent and continuous easements, being reasonably necessary for the use of the land. In adopting this broad view, the courts have overruled an earlier case in which the court, citing Jones on Easements, said,

"There is no implied reservation of an easement in case one sells a part of his land over which he has previously exercised a burden unless the burden is apparent, continuous, and strictly necessary for the enjoyment of the land retained. A man cannot, after he has absolutely conveyed the land, retain the use of it for any purpose whatever without an express reservation. A reservation of an easement will be implied only in cases of strictest necessity."

Ways of necessity are generally cases where the grantor has conveyed the land all around the parcel which he retains, and is thus land-locked, the only way out being over the land of strangers. In such cases the general rule in England is that the courts will imply a way out over the land granted, as being a way of necessity.

In America, the majority of jurisdictions line up with the English view as to ways of necessity, holding that where there is a conveyance of land so as to cut off the grantor from access to that conveyed there arises a presumption of a right of way across the portion granted. Necessary in these cases usually means the same as in the other kind of easements, not strictly necessary, but reasonably necessary to the enjoyment of the land, and such a way will be implied as long as the necessity

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15 202 S. W. (Ky.) 662 (1918).
16 Tebus v. Boston, 51 S. W. (Ky.) 609 (1899). Although these cases are, in fact, concerned with ways out of land, in opinions the courts rendered dicta to the effect that they would imply an easement by reservation, provided these conditions existed.
17 II Tiff. Real Prop. 1298.
18 Hickman v. Golecaday, 149 N. E. (Ind.) 375 (1925); Wiese v. Thien, 214 S. W. (Mo.) 853; Moore v. White, 124 N. W. (Mich.) 62 (1909), holding that a way over another man's land may be impliedly granted as well as reserved.
exists. Since the courts will imply a reservation of a way of necessity, it is immaterial as to which was first disposed of by the common owner, the dominant or the servient tenement.

In Kentucky "ways of necessity" may be impliedly reserved, although the deed is silent on that matter. Thus where the grantor had conveyed land and expressly reserved a graveyard therefrom, to which there was a road, from the public highway, over the land granted, the land conveyed entirely surrounding it. The grantee refused to allow the grantor to use it. The court in deciding that the grantor had impliedly reserved the roadway, said,

"Leading from grave-yard to public road was a well-defined way, which had been in long and continuous use in going to and from the grave-yard. Not only this, but the way from the grave-yard across the land of the grantee is indisputably necessary. Under these circumstances, we will imply a reservation, although the deed is silent on the matter."

However, it seems that "indispensably necessary" is the test for determining reservation of an easement by implication, since where the grantor sought to go over a portion of land granted, which was more convenient, the other way being less accessible, the court would not allow the implication of the reservation, on the theory that it was not strictly necessary. The law will also imply a reservation, where the easement is apparent and the necessity still existing. Thus a court will imply a reservation of an easement, where such an easement is visible, apparent, and indispensably necessary. However, a parol agreement to the contrary, will defeat such an implication.

The general rule of implied reservations is, however, deviated from in the case of reciprocal easements; the English rule being that when buildings are erected together by the same owner, in such a way as to obviously require mutual support, and he thereafter conveys one of them, the grantee is regarded as impliedly giving the grantor a right of support, for the house

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20 Meredith v. Frank, 47 N. E. (Ohio) 656 (1897).
21 II Tiff. Real Prop. 1299.
22 Stamper v. McNabb, 189 S. W. (Ky.) 215 (1916); also Irvine v. McCready, 56 S. W. (Ky.) 966 (1900).
25 Lebus v. Boston, supra.
retained by him in consideration of support impliedly granted for the house sold. The only instance of reciprocal easements being that one stated above.

The rule in America is the same as stated above where one builds houses separated by a partition wall and the houses are afterwards conveyed to different parties the division line running longitudinally through the wall, each house is entitled to an easement of support from the wall.

There is, in Kentucky, a diversion in one case from the general rule. The court held that where two parties, own an adjoining party wall, one may, by due notice to the other and using reasonable care to sustain the wall, remove it from support. If the party has followed the above stated qualifications, even though the other’s building would fall, the person removing the support would not be liable. However, in a later case where there was a party wall, the fact that one could not take away the support or alter the wall so as to effect the other party, the court did not speak of reciprocal easements, but based the decision on implied agreement, which had the same effect as a reciprocal easement. Thus there are no reciprocal easements in Kentucky, and there can be no implied reservation thereof, although it might be argued that such an implied agreement, is in fact a reciprocal easement, it seems that such construction is too general.

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26 II Tiff. Real Prop. 1294.
27 Supra, note 26.
28 Clemens v. Speed, 19 S. W. (Ky.) 660 (1892).
29 Bright v. J. Bacon & Sons, 116 S. W. 268 (Ky.) (1909).