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Easements--The Doctrine of Implied Grant on Quasi-Easements

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means, and reckless of the rights of the true owner, appropriates the
property to his own use, the law will presume he did it intentionally
and wilfully." Also in Central Coal and Coke Co. v. Penny, 173 Fed.
340 (1909), "An intentional or reckless omission to ascertain the bound-
daries of land of his victim for the purpose of maintaining ignorance
regarding them, or in reckless disregard of them, is as fatal to the
claim of a trespasser to limit the recovery of damages against him to
the lower measure, as is the intentional or wilful trespass or taking."

While a good many cases go as far as the Harlan Coal Co. case in
stretching the innocent trespasser class, a large number of cases have
followed a narrower doctrine, such as that followed in Griffith v. Clark
Mfg. Co., supra, and Central Coal and Coke Co. v. Penny, supra, above,
and this seems to be the better rule. There should not only be an hon-
est belief that he is acting within his rights, but also a reasonable
foundation for such belief under the circumstances.

JOSEPH D. WEBB.

EASEMENTS—THE DOCTRINE OF IMPLIED GRANT ON QUASI-EASE-
MENTS.—The subject of creating easements by implication by refer-
ence to a previous use is properly divided into two separate and dis-
tinct divisions, e. g., "implied grant," and "implied reservation" of an
easeement corresponding to a pre-existing quasi-easeement. Tiffany,
Outlines of Real Property, § 274 (1929). For the purpose of this note
we shall confine ourselves solely to the former division, that is, the
doctrine of "implied grant" of an easement corresponding to a pre-
existing quasi-easeement, which means, as used in this comment, the
creation of an easement by the conveyance of land for the benefit of
the land conveyed, as against land retained by the grantor. 2 Tiffany,
Real Prop. (2d ed. 1920), 1270.

Before going further it is necessary to define the term "quasi-ease-
ment" in order to determine when the doctrine of implied grant is
applicable. It has been asserted by eminent authorities that a "quasi
easeement" is the utilization of a part of an entire tract of land, or a
portion of two or more adjoining parcels, for the benefit of the other
land, where the entire tract or adjoining parcels are owned by one and
the same person. The reason being that one cannot have an easement
in his own land. Saundeys v. Oliff, Moore 467 (1597); 2 Tiffany, Real
Property (2d ed. 1920), 1272. But that does not explain why it is
called a "quasi-easeement." Tiffany, supra, says that it is not called
such because it creates any sort of legal relation, but because such an
expression is a convenient one, and expresses fairly well the meaning
of the term.

That portion of the land which receives the benefit has been desig-
nated by judicial opinions and text writers as the "quasi-dominant
tenement," and that part upon which the burden rests is referred to
as the "quasi-servient tenement." 2 Tiffany, Real Prop. (2d ed. 1920),
1272; and cases cited.

The specific question to be discussed in this note arises out of the
severance of the estate by which the grantee gets that portion above called the "quasi-dominant tenement." Whether or not such grantee obtains an easement as against the grantor by the doctrine of "implied grant" constitutes the specific question.

As the basis of this paper a recent Kentucky decision has been chosen. There, X, the land owner, used a roadway over one portion of his land for the benefit of the remainder. The roadway in some places was cut down to a depth of seven or eight feet, and that such way was constantly used was apparent even to a casual observer. It was also shown that the roadway was reasonably necessary for the use and enjoyment of the quasi-dominant tenement. The court in deciding a controversy between the grantees of the quasi-dominant and quasi-servient tenement, respectively, adopted the following rule.

"Where a quasi-easement exists, which is apparent and continuous, and the owner of the land conveys the quasi-dominant tenement to A, and later conveys the quasi-servient tenement to B, who has notice of the existence of the easement, if not notice of its use, and such easement is reasonably necessary for the enjoyment of A's tract, B cannot prevent A from enjoying such easement." Hedges v. Stucker, 237 Ky. 351, 35 S. W. (2d) 539 (1931).

This rule presents two exceedingly important questions to be considered hereafter:

1. Did the conveyance to A create an easement as corresponding to the pre-existing "quasi-easement"?

2. If so, did the subsequent conveyance to B terminate or destroy such easement?

The distinction between these two questions was apparently overlooked by the court and they considered them both as one. However, upon an examination of that case it is clear that both questions are materially involved. Let us now concern ourselves with the first proposition, that is, did A, by the grant to him, obtain an easement as corresponding to the quasi-easement”? It has been stated that “a grant of any principal thing shall be taken to carry with it all which is necessary to the beneficial enjoyment of the thing granted, which it is in the power of the grantor to convey.” New Ipswich Factory v. Batchelder, 3 N. H. 190 (1825); Johnson v. Jordan, 2 Met. 234 (Mass. 1841). This statement is weakened considerably by the assertion in 2 Tiffany, Real Prop. (2d ed. 1920) § 363 (b) where he says: "If the owner of land, one part of which is subject to a quasi-easement in favor of another, conveys the quasi-dominant tenement, an easement corresponding to such quasi-easement is ordinarily regarded as thereby vested in the grantee of the land, provided, the quasi-easement is of an 'apparent, continuous, and necessary character.'" But more, the learned author goes further and indicates that the presence or absence of any or all of these characteristics should not be conclusive, but that the question of whether an easement has passed should be determined from the "intention" of the parties to the conveyance. This rule is advocated in 19 C. J. 102 (D) a, and cases there cited; Worthington v.
Thus, the true rule being one of construction, the presence of the characteristics above mentioned, viz., apparent, continuous, and necessary, should constitute weighty evidence that the parties intended such easement to pass, but such evidence may be overthrown by showing a contrary intention, such as a verbal agreement at the time of conveyance that such easement was not to pass. *Evert v. Burtis*, 12 Atl. 893 (N. J. 1888). The basic case, *Hedges v. Stucker*, supra, made no mention of the "intention" of the parties, but rather the court was content to let the above principles or characteristics operate as conclusive rules of law, and only referred to them in a cursory manner, without commenting upon any or either of them. Nor has any of the Kentucky decisions, which have been read in connection with the preparation of this note, placed the test upon the intention of the parties expressly so, but in all of them it is believed that the ultimate decision was effected more or less by the unconscious consideration of the intention of the parties. It would be well should the Kentucky Court of Appeals adopt this rule and expressly set it forth and apply it to future cases of a similar nature.

This being a rule of construction, it is more freely invoked in cases involving the question of implied grant than in cases of implied reservation. The distinction is based upon the logical reason that one cannot derogate from his own grant. *Wells v. Garbutt*, 132 N. Y. 430, 30 N. E. 978 (1892); *Ray v. Hazeldine*, 2 Ch. 17 (1904); 19 C. J. 113 (2), and cases there cited. This is no doubt the majority view and Kentucky is in accord with it. *Lebus v. Boston*, 21 Ky. L. Rep. 411, 51 S. W. 609 (1899), 47 L. R. A. 79; *McGurn v. Louisville, etc., R. Co.*, 177 Ky. 835, 98 S. W. 222 (1917). However, this distinction is inapplicable in cases of "reciprocal easements." *Henry v. Koch*, 80 Ky. 391 (1882). But see *Clemens v. Speed*, 92 Ky. 284 (1892). As to the character and nature of reciprocal easements see 2 Tiffany, Real Prop. (2d ed. 1920) § 363, note 68. In *Wheeldon v. Burrows*, 12 Ch. Div. 31 (1878), it was stated that "the general rule is beyond doubt, that if a grantor upon a conveyance of part of his property intends to reserve any right over the tenement granted, he must do so by an express reservation in the grant."

Now let us examine the characteristics above mentioned and determine just what weight if any we shall give to each. It should be our purpose to place upon each of those terms a connotation that will accord with logic and which will admit of a practical use, and to do this we must blend these terms with the rule above referred to on "intention." Considering them in the order mentioned first examine the word "apparent." This word should not be given a dictionary construction, but as some courts have done, an easement should be treated as apparent when its existence is open and visible to the extent that it is known or should have been known to one reasonably familiar with the premises on an inspection of them. *Butterworth v. Crawford*, 46 N. Y. 349 (1871); 2 Tiffany, Real Prop. (2d ed. 1920), 1278. From this...
interpretation it is clear that the person buying the servient tenement is charged with knowledge of the easement, without being actually informed of its existence, provided such easement is open and visible to the extent above set out. In Hedges v. Stucker, supra, the easement claimed was of such a nature that it clearly falls within the definition of "apparent," therefore, we can say that Kentucky is in accord with the rule above laid down, which in my opinion is the proper one.

"Necessary" is next in order, and its meaning under the doctrine of "implied grant" must not be confused with its more strict interpretation in cases of "implied reservation," it meaning in the latter sense that there can be no other reasonable mode of enjoying the dominant tenement without the easement, or to put it briefly, that such easement must be absolutely necessary. Lebus v. Boston, 107 Ky. 987, 51 S. W. 609, 52 S. W. 956, 47 L. R. A. 79 (1899); McGurn v. Louisville, etc., R. Co., 177 Ky. 835, 98 S. W. 222 (1917). The weight of authority in the United States holds that the word "necessary," in effect, means nothing more than "highly desirable" in cases involving "implied grant." Kentucky's interpretation cannot be differentiated from this general statement, but instead of using the phrase "highly desirable," they employ the following: "Reasonably necessary to its enjoyment or use." Irvine v. McCrery, 108 Ky. 495, 22 Ky. L. Rep. 169, 56 S. W. 766 (1900), 49 L. R. A. 417; Lebus v. Boston, supra; Henry v. Koch, supra; Stone v. Burkhead, 180 Ky. 47, 189 S. W. 489 (1914); 2 Washburn, Real Prop. (6th ed. 1902), 290. However, some jurisdictions require strict necessity. Nichols v. Luce, 24 Pick (Mass.) 102, 35 Am. Dec. 302 (1834). See cases cited in 19 C. J. 112 (4). It should also be pointed out that the use of "necessity" in the sense here applied, should not be confused with "ways of necessity." Applying this view to the principal case it appears beyond doubt that the court correctly found that the easement claimed was reasonably necessary for the enjoyment of A's field, and the fact that the appellant could construct a road on his own land from the field to the state highway is immaterial in this instance. However, this would be applicable in a case of a controversy over a "way of necessity."

The last characteristic has been used interchangeably with "apparent" in a few New Jersey decisions. Petters v. Humphreys, 18 N. J. Eq. 260 (1867); Taylor v. Wright, 76 N. J. 121, 79 Atl. 433 (1909). However, this does not coincide with the general view to the effect that "continuous" is not the same as "apparent." Yet, there exists a conflict of opinion as to the true meaning of the former. Some jurisdictions have considered an easement "continuous" if constantly exercised, while others regard it as "continuous" only if there is a clearly defined road over the servient tenement, evidently intended for the use of the dominant tenement. 2 Tiffany, Real Prop. (2d ed. 1920) 1280, and cases cited in notes. (The eminent author cites a Kentucky case as adopting this view, Stone v. Burkhead, supra, but it is doubtful that such was the exact holding in the case). Some have argued that there should be a distinction between the use of this term when applied to
rights of ways and other easements, but it is not proper to do so, as there is no logical reason behind such contention. The true test whether the easement is "continuous" is whether it imposes upon the land of the servient tenement a permanent or apparently permanent burden. 19 C. J. 110 (b); 2 Tiffany, Real Prop. (2d ed. 1920) 1284.

The court in the Kentucky case under consideration did not expressly treat of "continuous," but from the facts of that case it is unquestionable, that if the above test had been applied, it would have been found that the court was correct in calling this claimed right of way a continuous one.

Consequently, from the above considerations, the writer is of the opinion that in the case of Hedges v. Stucker, supra, the grant to A passed with it the easement claimed, because since it was "apparent," "necessary," and "continuous," it should have been presumed to have been the intention of the parties that it pass, and nothing appearing to overthrow this presumption, the easement did pass as the court correctly found.

This brings us to the second question, namely, did the subsequent conveyance to B, of the servient tenement, destroy or terminate the easement? It is well settled that a conveyance of the servient tenement to one who has either actual or constructive notice does not destroy the easement, or in other words, does not prevent it from passing with the conveyance. Higbee Fishing Club v. Atlantic City Electric Co., 78 N. J. Eq. 434 (1910); 2 Tiffany, Real Prop. (2d ed. 1920) 1285, and cases cited in the notes. Kentucky follows this view and in any jurisdiction there can be no doubt but that the easement is not prevented from passing where the purchaser of the servient tenement has actual notice of the easement claimed. In Jones v. Jones, 31 Ky. L. Rep. 183, 101 S. W. 980 (1907), the defendants contended that they were innocent purchasers, since they had examined the records and had found no evidence of plaintiff's right to a passway, and that their vendor had told them plaintiff's right to a passway was only permissive, but the court held, that inasmuch as they knew of the existence of the passway, they were charged with notice sufficient to prevent the termination of the easement. [As to who has the burden of showing use was only permissive in Kentucky, see Settle v. Cox, 28 Ky. L. Rep. 510 (1905); Smith v. Pennington, 28 Ky. L. Rep. 1282 (1906)]. In Wright v. Willis, 23 Ky. L. Rep. 565 (1901), the Court of Appeals held that it was not sufficient in such case for the purchaser to examine the records and inquire of his vendor, but he should also inquire of those who were using the passway. The court went further in another case and adopted the view that inasmuch as the passway was a clearly marked road through the farm, the purchaser must be charged with notice, and other decisions have followed this view. From the above discussion we are able to determine what constitutes constructive notice, in a few cases at least, and in the case under consideration, the road being greatly worn, the purchaser of the servient tenement must be charged with notice of the existence of the eas-
ment claimed. Having notice, the court correctly found that the purchaser of the servient tenement had no right to obstruct the easement, which was created by the doctrine of "implied grant" in the case of Hedges v. Stucker, supra.

H. W. Vincent.

Master and Servant—Master's Duty to Furnish the Servant a Safe Place to Work.—It is the duty of the master to exercise ordinary care to furnish the servant as reasonably safe a place to work as is compatible with the circumstances.

In the recent case of O'Brien & Co. v. Shelton's Adm'r., 246 Ky. 538, 55 S. W. (2d) 352 (1933), the servant was employed to help wreck a warehouse. While he was sitting astride a brace engaged in the work, the brace slipped loose causing him to be thrown to the ground and killed. Witnesses testified that the work was not being carried on in the usual, customary, and safe manner.

The court held that the strict "safe place" doctrine was not applicable in the case of the demolition of a building for the reason that such work is essentially hazardous and the conditions change continually as the work progresses. Under such circumstances the servant necessarily assumes the ordinary and obvious risks incident thereto. But the servant does not assume the risks of an extra-hazardous method adopted by the master as in this case, and the servant may recover for any injuries resulting therefrom.

The above result is sound. It represents the law in Kentucky and is supported by the decided weight of authority in other jurisdictions. Cases involving injuries incurred while engaged in the construction or demolition of buildings constitute a large percentage of the cases in which the safe place doctrine is invoked, and they are consistently held to be an exception or limitation to this rule. Such work is inherently dangerous. The dangers are mostly unforeseeable and difficult to guard against. The employee then assumes the ordinary risks incident to such work. If a building is out of repair that is why it is being wrecked. Under such circumstances it would be absurd to say the employer must make the building safe so the servant may tear it down. Ballard and Ballard Co. v. Lee's Adm'r., 131 Ky. 412, 115 S. W. 732 (1909); Dyer v. Pauley Jail Bldg. Co., 144 Ky. 592, 139 S. W. 789 (1911); Standard Oil Co. of Ky. v. Watson, 154 Ky. 550, 157 S. W. 929 (1913); Clark v. Johnson County Telephone Co., 146 Iowa 428, 123 N. W. 327 (1909).

It should be noted in such cases that (1) the plaintiff himself does not create the danger during the progress of the work, (2) the plaintiff was not engaged in making a dangerous place safe. The significance of these points is obvious for the reason that the employer is not an insurer of the employee's safety. 39 C. J. Sec. 331; Fuller v. Ill. Ry. Co., 138 Ky. 42, 127 S. W. 501 (1910). If the type of work is such that the servant creates the dangers in the progress of the work it would be unreasonable to hold the master bound to guard against