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Real Property - Easements by Implication - Effect of the Restatement of Property

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COMMENTS

REAL PROPERTY—EASEMENTS BY IMPLICATION—EFFECT OF THE RESTATEMENT OF PROPERTY—Questions concerning easements by implication usually arise when land which initially was under common ownership is severed and the owner of one part seeks a right to make some specific use of the other. If the conveyor asserts such a right, the easement constitutes an implied reservation; if the conveyee makes the claim, the easement is said to arise by implied grant.

Traditionally the theory supporting the creation of an easement by implication is found in the idea that a conveyance of property includes whatever would be necessary for the beneficial enjoyment of that property.[1] Courts have employed two quite similar tests to aid them in determining whether an easement can be implied. Many courts have accepted this test:

> "Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another part, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership . . . there arises by implication of law a grant or reservation of the right to continue such use."[2]

Other courts have stated the test somewhat differently: ". . . a use must be continuous, apparent, permanent and necessary to be the basis of an implied easement upon the severance of the ownership of an estate."[3] Under either test, the existence of each essential factor must be shown before the easement will be found to have arisen on the basis of terms implied in the grant.[4]

The elements of apparency, continuity, and permanency are

1 See Trattar v. Rausch, 154 Ohio St. 286 at 291, 95 N.E. (2d) 685 (1950). See generally 3 POWELL, REAL PROPERTY 415-416 (1952); Simonton, "Ways By Necessity," 25 COL. L. REV. 571 (1925).

2 See Greasy Slough Outing Club v. Amick, 224 Ark. 330 at 337, 274 S.W. (2d) 63 (1954), quoting with approval from John Hancock Mut. Life Ins. Co. v. Patterson, 103 Ind. 582, 2 N.E. 188 (1885). The exact language used may vary slightly among these courts but it is believed that this is typical. See Rischall v. Bauchmann, 132 Conn. 637, 46 A. (2d) 898 (1946); Spruill v. Nixon, 238 N.E. 523, 78 S.E. (2d) 323 (1953); Keller v. Fitzpatrick, 204 Okla. 192, 228 P. (2d) 367 (1951).

3 See Trattar v. Rausch, 154 Ohio St. 286 at 292, 95 N.E. (2d) 685 (1950); Roberts v. Monroe, 261 Ala. 569, 75 S. (2d) 492 (1954); Hutcheson v. Sumrall, 220 Miss. 834, 72 S. (2d) 225 (1954).

4 See 3 TIFFANY, REAL PROPERTY, 3d ed., §780 (1939).

usually required as being considered essential to give notice of the asserted right to the person against whom the right is asserted. Necessity is regarded as being essential to permit a judicial determination that in fact there must be some defect in the expressed agreement of the parties which justifies judicial modification of that agreement. Several courts distinguish between reasonable necessity, which must be shown to assert an implied grant, and strict necessity, which is essential to the determination that an implied reservation has arisen.[5] The basis for the distinction is founded in the doctrine which looks with disfavor upon a derogation from the grant of the conveyor.

The traditional view that all the essential elements of the tests applied to determine the existence of an easement by implication have independent, determinative significance is in distinct contrast to the position of the American Law Institute. The *Restatement of Property,* section 476, explains the existence of an easement by implication on the basis of an inference drawn from the circumstances of the grant which has severed land initially under common ownership. The judicial function in respect to the easement by implication, according to the *Restatement,* is to effectuate the intention of the parties (or their probable intention if they had thought about the matter) which has not been expressed in the existing agreement. In no instance is there any necessity for demonstrating the existence of any particular factors in order to determine that the easement was intended by the parties.[6] In all events, the factors having a bearing upon intention

[5] Slear v. Jankiewicz, 189 Md. 18, 54 A. (2d) 137 (1946); Bennett v. Evans, 161 Neb. 807, 74 N.W. (2d) 728 (1956); Schachter v. Fider, 5 N.J. Super. 426, 69 A. (2d) 329 (1949); A.J. & J.O. Pilar, Inc. v. Lister Corp., 38 N.J. Super. 488, 119 A. (2d) 472 (1955), affd. 22 N.J. 75, 123 A. (2d) 536 (1956); Mitchell v. Castellaw, 151 Tex. 56, 246 S.W. (2d) 163 (1952); and Chevalier v. Tyler, 118 Vt. 448, 111 A. (2d) 722 (1955). Easements by implied reservation are not recognized by the Georgia court. Srochi v. Postell, 206 Ga. 59, 55 S.E. (2d) 603 (1949). The Wisconsin court does not recognize either implied grants or implied reservations. Scheeler v. Dewerd, 256 Wis. 428, 41 N.W. (2d) 635 (1950).

[6] "In determining whether the circumstances under which a conveyance of land is made imply an easement, the following factors are important

(a) whether the claimant is the conveyor or the conveyee,
(b) the terms of the conveyance,
(c) the consideration given for it,
(d) whether the claim is made against a simultaneous conveyee,
(e) the extent of necessity of the easement to the claimant,
(f) whether reciprocal benefits result to the conveyor and the conveyee,
(g) the manner in which the land was used prior to its conveyance, and
(h) the extent to which the manner of prior use was or might have been known to the parties." PROPERTY RESTATEMENT §476 (1944).

must be examined in order to reach a proper determination of the existence of an easement. But the intention of the parties is the sole fact of decisive significance. The listed factors are those which frequently recur and may help to indicate intention, but none has decisive significance.

Apparency, continuity, permanency, and necessity may be used to indicate the intention of the parties, which is actually controlling. But to the extent that any of these factors has an independent and decisive significance, the purport of the *Restatement* has been rejected by application of the traditional standards. It is the purpose of this comment to examine the cases involving easements by implication which have appeared since the *Restatement* was adopted in 1944 to determine the extent to which courts have followed or been influenced by the *Restatement* or have independently adopted a similar standard.

I. *Courts Which Have Not Considered the Restatement*

Despite the logical consistency of the *Restatement* analysis of the easement by implication, several courts have continued to assert the traditional rationale of the two previously described tests as the basis for the right claimed, and have ignored the *Restatement* entirely. It is frequently impossible, however, to determine the exact way in which the essential factors of the traditional tests are applied. In some instances, it appears that they are merely labels attached by the court to determine the existence of an easement by implication after the central issues have actually been resolved on the basis of the intention of the parties. Or the essential factors may be regarded as independent, determinative elements apart from intention, which must be shown before the easement will be found to have arisen.

When a party seeks an implied easement of way, for example, it is commonly found that the way has been continuous, permanent, and apparent.[7] Attention of the court is then focused on necessity. Only those facts bearing on necessity will be detailed, rendering impossible a determination of the potential influence of other factors on the decision. Frequently the decision will depend upon the existence and adequacy of alternative means of ingress

[7] Common examples of a way are alleys, walks, and roads.

and egress.[8] But the Illinois court has determined that an easement existed over an alley between two apartment buildings when it was shown that there was a general plan to make the alley available for the joint use of the occupants of both properties.[9] Similarly, another court noted that a common driveway was used by occupants of each lot for an extended period, and failed to discuss the question of necessity.[10] These cases indicate that other adequate means of ingress and egress do not prevent a finding of necessity and the implication of an easement.[11] Indeed, they may indicate that necessity even in the traditional application constitutes a label describing various considerations. But because of the insufficiency of the facts reported it cannot be determined whether these courts would imply an easement on the basis of intention alone without the showing of necessity as an independent, determinative element. To the extent that the requirement of necessity is relaxed because of other factors, a court moves toward the *Restatement* position.

In two cases courts have stressed the requirement of strict necessity for implied reservations, stemming from the principle which frowns upon derogation from a grant by the conveyor. The Maryland court recently decided that a garage wall encroaching upon the plaintiff's lot by six inches was protected by an implied reservation.[12] Strict necessity existed because removal of the wall would destroy the garage. The dissenting judge argued that there was no strict necessity since the encroachment could be eliminated by razing the garage. In a Vermont case the sewage from a hotel erected by a common owner emptied into two cesspools and then on to a twenty-five acre plot of land, also under common ownership.[13] This sewer arrangement existed for thirty years before severance of the plot and conveyance to the plaintiff. The court concluded that the overflow had been intended to be permanent. Although it was not the only sewer system

8 Spruill v. Nixon, 238 N.C. 523, 78 S.E. (2d) 323 (1953); Goldstein v. Wachovia Bank and Trust Co., 241 N.C. 583, 86 S.E. (2d) 84 (1955). The *Restatement* recognizes that necessity alone may be sufficient to imply an easement. See comment *g*, §476.

9 Gilbert v. Chicago Title & Trust Co., 7 Ill. (2d) 496, 131 N.E. (2d) 1 (1955).

10 Jacobson v. Luzon Lumber Co., 192 Misc. 183, 79 N.Y.S. (2d) 147 (1948).

11 But see Crawford v. Tucker, 258 Ala. 658, 64 S. (2d) 411 (1952), where an easement will be denied if there are any other practical means of ingress and egress.

12 Slear v. Jankiewicz, 189 Md. 18, 54 A. (2d) 137 (1946).

13 Chevalier v. Tyler, 118 Vt. 448, 111 A. (2d) 722 (1955).

which could service the hotel, it was the only one reasonably available and the court found strict necessity. In both these cases the circumstances seem sufficient to imply an easement under the *Restatement* approach. Despite the insistence upon strict necessity as an independent determinative element, it is doubtful that the definition of strict necessity applied by these courts constitutes more than a determination of the intention of the parties and the affixation of the proper label. Since strict necessity was said to exist, however, it is uncertain how free these courts would feel to make a determination of the existence of an easement by implication on the basis of intention of the parties as the sole element of determinative significance.

The Connecticut and New Jersey courts have determined that the existence of an easement by implication depends upon the intention of the parties, but without reference to the principles enunciated by the *Restatement.* In both instances the result of the determination was to deny the existence of an easement even though the factors deemed of determinative, independent importance under the traditional tests were found to be present. Both courts regarded the questions whether the right claimed is reasonably necessary and has been long continued in an obvious manner, indicating permanency, as merely an aid to the court in finding the intention of the parties, which was to be controlling. The Connecticut case regarded proof of the traditional elements as creating a presumption that an easement had been conveyed which was successfully rebutted by parol evidence showing that only a license had been granted.[14] The New Jersey case indicated that the traditional elements, which had previously had independent significance, were merely adjectives to aid the court.[15] The plaintiff had sought an easement by implied grant permitting trucks unloading at his warehouse to turn around conveniently. The court relied upon the following circumstances in rejecting this claim: the trucks came upon the defendant's land merely as a matter of convenience; the defendant had at the time of the grant given the plaintiff an express easement allowing trucks to enter by a road across the defendant's land; the plaintiff did not

[14] Rischall v. Bauchmann, 132 Conn. 637, 46 A. (2d) 898 (1946).

[15] A.J. & J.O. Pilar, Inc. v. Lister Corp., 38 N.J. Super. 488, 119 A. (2d) 472, affd. 22 N.J. 75, 123 A. (2d) 536 (1955).

seek a conspicuous driveway of determinable limits but a vagrant privilege to be exercised in an area without boundaries. Both decisions indicate merely that the implication to be drawn from the presence of the determinative elements under the traditional tests may be displaced by other evidence. But it is impossible to state that circumstances sufficient to create an easement under the *Restatement* approach would be sufficient to permit the implication in these jurisdictions in the absence of at least one of the essential elements of the traditional tests.[16]

The Michigan court has taken an approach clearly contrary to the *Restatement* by giving decisive significance to a single element, continuity, in the sense of use without the interference of man.[17] In a recent case an easement over a mutual driveway was sought.[18] The driveway had been used for many years by the common owner to enter a garage on the lot now owned by the plaintiff and was the only way to enter the garage without knocking a hole in its back wall. But the court refused to imply an easement since use of the driveway required a human act, and therefore was not continuous.

It is difficult to determine the impact of the *Restatement* upon courts which have continued verbally to apply the traditional standards. In some instances the circumstances of the case are such that identical results could have been reached under the traditional tests or the *Restatement* view. In others it cannot be known whether the traditional factors are flexible labels applied after the court in fact has weighed all the circumstances or whether they have independent, determinative significance. It is only when a court refuses to imply an easement, though under the *Restatement* standards the circumstances suggest its implication, that a definite determination of the test applied by the court can be made.

[16] In Schachter v. Fider, 5 N.J. Super. 426, 69 A. (2d) 329 (1949), the court indicated that when an implied reservation is sought, strict necessity must be shown.

[17] This test will differentiate between a way which is non-continuous, and a sewer which is continuous. The reason given for this distinction is that a way ". . . has no existence during the continuance of unity of seizin, and upon severance of the tenements does not pass unless it is a way of necessity or the operative words of the conveyance are sufficient to grant it de novo." Levy v. Dossin's Food Products, (W.D. Mich. 1947) 72 F. Supp. 855 at 861, quoting from Burling v. Leiter, 272 Mich. 448 at 455-456, 262 N.W. 388 (1935).

[18] Milewski v. Wolski, 314 Mich. 445, 22 N.W. (2d) 831 (1946). See also Waubun Beach Assn. v. Wilson, 274 Mich. 598, 265 N.W. 474 (1936); Levy v. Dossin's Food Products, (W.D. Mich. 1947) 72 F. Supp. 855.

II. *Courts Which Have Considered the Restatement*

A. Courts Which Seem To Reject the Restatement

One court has expressly rejected the approach of the *Restatement* in favor of a requirement of strict necessity as an independent, determinative element for an implied reservation.[19] *O,* the owner of two adjoining lots, leased lot 1 for use as a gas station. A wash shed, attached to the gas station, encroached upon lot 2. *O* sold lot 2 to her daughter for $10 and love and affection. The Texas court rejected *O*'s claims for an implied reservation because the evidence did not show that the gas station could not be conducted without the wash shed. The circumstances favoring the implication of a reservation were (1) the grant to the daughter was gratuitous, indicating that the grantor did not intend to deprive herself of existing uses benefiting the lot retained; (2) the use had been exercised for a considerable period of time; and (3) the shed was beneficial although not strictly essential to the station. In its opinion, the court stated:

> "The Institute formula, [*Restatement*] in its approach to the fundamental matter of intent of the parties, is perhaps more scientific than a doctrine, which includes the 'strict necessity' requirement. But the latter, too, has its good points. It is undoubtedly simpler of application. . . ."[20]

The Nebraska court, while not expressly rejecting the *Restatement,* may have done so inferentially. In a recent case,[21] the adjoining lots of *P* and *D* were prior to severance under the ownership of *O,* who had built a house and garage on each lot. One wall of *D*'s garage encroached on *P*'s lot two feet and its eaves extended an additional six inches, but this was unknown at the time of severance. *D* claimed an implied reservation, but his claim was denied because the evidence failed to show that the use was open, visible, and apparent as an inspection of the premises without a survey would not show the encroachment, or that the easement was strictly necessary.[22] The court discussed the question whether a rule of reasonable or strict necessity should

19 Mitchell v. Castellaw, 151 Tex. 56, 246 S.W. (2d) 163 (1952).

20 Id. at 66.

21 Bennett v. Evans, 161 Neb. 807, 74 N.W. (2d) 728 (1956).

22 Compare Slear v. Jankiewicz, 189 Md. 18, 54 A. (2d) 137 (1946), where an encroachment was apparent even though not detectable without a survey.

apply to a reservation. To support its conclusion in favor of strict necessity it cited *Restatement,* section 476, comments *a* and *c*.[23] The *Restatement* acknowledges that whether a grant or reservation is involved is one of the factors to be considered and suggests that the implication of a grant will be made more readily than that of a reservation, but rejects the conclusion of the Nebraska court that strict necessity is an indispensable element. The facts stated in the report are insufficient to determine whether a different result would be reached under the *Restatement* approach, but the case at least indicates that the court did not understand the *Restatement* position that no one factor is of determinative influence in ascertaining the intention of the parties.

One Missouri appellate court also denied an easement where an encroachment on the plaintiff's property could be altered.[24] Adjoining lots of *D* and *P* were, prior to severance, owned by *O* who erected a building on *D*'s lot, one wall of which was flush with *P*'s lot line. *P* sought to enjoin *D* from maintaining downspouts which overhung *P*'s lot and emptied into a sewer running over *P*'s land. *D* could, by a $2,000 alteration, cause the water to run in the opposite direction. The court did not consider the fact that *O* had erected the building so that the water would drain in this manner, that the downspouts emptied into a sewer maintained by *O* solely for this purpose, and that *O* had conveyed this lot to *D*'s predecessor prior to conveying the other lot to *P*, making the claim one for an implied grant.[25]

In all three of these cases, the courts conceived that the determinative factor was whether the existing encroachment might feasibly be moved. If such was the case, the necessity required by the traditional tests did not exist, and thus any other circumstances indicating the intention of the parties which could have outweighed the lack of strict necessity were ignored. While the *Restatement* does not suggest that a court should focus its atten-

[23] "In construing conveyances doubts are resolved in favor of the conveyee and against the conveyor." Comment *c*. This was used by the court to support its conclusion that strict necessity should be required.

[24] Schnider v. M.E.H. Realty Investment Co., 239 Mo. App. 546, 193 S.W. (2d) 69 (1946).

[25] In support of its decision, the court cited part of Comment *c,* note 23 supra. Under the facts this was a misapplication. Comment *c* refers to the parties at the time of severance of the original estates and all doubts should thus have been resolved in favor of *D* who was seeking the easement. See Marshall v. Callahan, 241 Mo. App. 336, 229 S.W. (2d) 730 (1950), where this principle was properly applied.

tion on necessity as an element of independent significance, the only express repudiation of the *Restatement* approach is made by the Texas court, on the basis of the greater simplicity in applying the objective standards of the traditional test. Though it is true that a determination of intention which is unexpressed is a difficult task, ease of determination should not be substituted for propriety of result.

B. Courts Which Approve the Restatement Approach

It should be recalled that the factors given independent significance under the traditional tests are likewise regarded by the *Restatement* as factors of importance to be considered in determining the intention of the parties. Where a court cites the *Restatement* with approval, but determines intention solely on the basis of the existence of the traditional factors, it cannot be definitely determined which approach is being used as the basis for decision.

The Washington court has implied a reservation where a concrete driveway, in existence since the horse and buggy days, was the only means of ingress and egress for vehicular traffic to the defendant's apartments.[26] The reported facts are insufficient to indicate whether the court considered circumstances other than necessity and long prior use of the driveway. Even so, however, the result is consistent with the *Restatement* approach, which recognizes that absent other circumstances these two factors may justify a determination that the intention of the parties was to reserve an easement to the conveyor.[27] The result is likewise consistent with the traditional view, giving these elements independent significance apart from their effect on the intention of the parties.

The Minnesota court in one case listed the eight factors of section 476, but based its decision regarding the existence of an easement on a failure to prove sufficient necessity since this was the only issue argued in the appellate court.[28] The Kansas court in a much-cited case[29] implied a reservation of an easement in a sewer line. In doing so the court discussed the *Restatement* at length and appeared expressly to accept the approach of determin-

26 Adams v. Cullen, 44 Wash. (2d) 502, 268 P. (2d) 451 (1954).
27 See comments *c* and *j* of §476.
28 Olson v. Mullen, 244 Minn. 31, 68 N.W. (2d) 640 (1955).
29 Van Sandt v. Royster, 148 Kan. 495, 85 P. (2d) 698 (1938).

ing the existence of the reservation on the basis of the intention of the parties. In a later case, however, this court justified an implied reservation of an easement in a concrete driveway on wholly traditional grounds.[30] In both cases the same result might have been reached under either the traditional tests or the *Restatement* standards. The language of the decisions leaves doubt about the position of the Kansas court in respect to the *Restatement* principles.

C. Courts Which Seem To Adopt the Restatement Approach

The *Restatement* lists eight factors to aid a court in arriving at the intention of the parties, but its basic approach involves a consideration of all factors which may indicate that intention. A number of courts have adopted this approach either by weighing all relevant circumstances or by using the eight *Restatement* factors as a check list, without denying the significance of other factors.

The Massachusetts court has refrained from attaching any particular significance to the presence or absence of such traditional elements as apparency, continuity, permanency, and necessity. In one case[31] two woolen mills had been linked by a canal for twenty-seven years. During common ownership the mill on lot 1 was supplied with water from the canal, which extended over lot 2 to a water supply thereon. After severance by an auction, the owner of lot 2 cut off this supply of water. Among the circumstances inducing the court to imply an easement supporting the claim of the auction purchaser to the use of the water were (1) the canal was apparent and obvious; (2) the canal's location indicated that it was for the exclusive use of the mill on lot 1; and (3) the auction catalog and the auctioneer's representations indicated that continued use was contemplated. In another case *P* sought an easement over a roadway leading from a public street across *D*'s land to a barn on *P*'s land.[32] The court found the road had been used by people traveling to the barn since 1897, that it was clearly visible, and that it was necessary for the use and enjoyment of the barn. *D* pointed out that *P*'s predecessor in title had received this property by a gratuitous transfer from the com-

30 Smith v. Harris, 181 Kan. 237, 311 P. (2d) 325 (1957).
31 Jasper v. Worcester Spinning & Finishing Co., 318 Mass. 752, 64 N.E. (2d) 89 (1945).
32 Sorel v. Boisjolie, 330 Mass. 513, 115 N.E. (2d) 492 (1953).

mon owner. In the course of its opinion the court quoted *Restatement,* section 476, comment *c,* to the effect that ". . . while the absence of consideration was an important circumstance, 'the fact that a conveyance is gratuitous does not necessarily rebut the implication of an easement in favor of the conveyee.' "[33]

In four cases the Pennsylvania courts have had to determine whether an easement of way existed.[34] Duration of use prior to severance, necessity, and mutual benefit were important considerations in each instance, with ultimate focus in each case on the intention of the parties. An additional circumstance in one case was the involuntary nature of the conveyance, which indicated that the grantor intended to part with the least amount of property possible and required stronger indications of an intention to make the conveyance than if the transfer had been voluntary.[35]

Where an irrigation ditch was used to transport water over *D*'s land for thirty years prior to severance, the Utah court decided that *P* had an easement by implied grant.[36] Express use was made of several of the *Restatement* factors, including the following:

a. The claimants were the conveyees and therefore all doubts should be resolved in their favor [*Restatement,* §476(a)];
b. The purchase price indicated that the use and value of the water was taken into consideration at the time of purchase [*Restatement,* §476(c)];
c. The evidence clearly indicated that the use of the ditch was necessary for the proper use of the land for the purposes for which it was purchased, i.e., farming [*Restatement,* §476(e)];
d. The land had been used prior to the conveyance for growing irrigated crops [*Restatement,* §476(g)];
e. The manner of prior use was continuous, open, extensive, and well known [*Restatement,* §476(h)].

In a Kentucky case, all the factors did not favor the implication of an easement.[37] It was therefore necessary to balance the

[33] Id. at 518.

[34] Baslego v. Kruleskie, 162 Pa. Super. 174, 56 A. (2d) 377 (1948); Hoover v. Frickanisce, 169 Pa. Super. 443, 82 A. (2d) 570 (1951); Spaeder v. Tabak, 170 Pa. Super. 392, 85 A. (2d) 654 (1952); Schwoyer v. Smith, 388 Pa. 637, 131 A. (2d) 385 (1957).

[35] Schwoyer v. Smith, note 34 supra. In another case the conveyance was voluntary and *D* contended that *P* must show this way was necessary. The court stated, "Not only are appellant's suggestions unreasonable, but necessity is only one factor to be considered with all other surrounding circumstances." Baslego v. Kruleskie, note 34 supra, at 177-178.

[36] Adamson v. Brockbank, 112 Utah 52, 185 P. (2d) 264 (1947).

[37] Knight v. Shell, 313 Ky. 852, 233 S.W. (2d) 973 (1950).

various factors in reaching a determination upon the basis of the intention of the parties. *O* owned 100 acres of land bordered on the east and south by two highways. A roadway extended from the highway on the east across three-quarters of an acre of land which *O* had sold to *D* to give access to a barn on land *O* subsequently conveyed to *P*. Since the road had been in use prior to severance and both *O* and *D* had known of its existence, factors (d) and (e), above, operated in favor of the implication. But the easement was denied because the countervailing factors were deemed to be of greater weight. *O* had been the grantor, so all doubts must be resolved in favor of *D*, the grantee. Since this was not a simultaneous conveyance where the inference is strong that the grantor intended the privileges of use to continue to exist among the various grantees, the implication is weakened to such an extent that other factors, particularly reasonable necessity, must be shown with greater clarity. Finally, the road was not necessary, since *P* had recently built another road to the barn at a cost of $116, which was not disproportionate to an estate worth $16,000.

The Iowa court, in granting *D* an easement to use a railroad spur across *P*'s lot, was influenced by the facts that this spur had a long existence prior to severance, that the price paid by *P* had been $25 at a time when the fair value without an easement was $150, and that no other railway existed to supply a plant on *D*'s lot with coal.[38]

Section 476 has been applied by the Oregon court in two cases. In one the circumstances inducing the court to declare an implied grant of an easement of way were the reciprocal value of the road to each party, the well defined nature of the road and and its apparency at the time of severance, and the absurdity of the position that the owner who severed the common ownership of the tract by a deed of gift to his son intended that a servitude of great value to him should end.[39] In the second case the court

[38] Wilbur v. Council Bluffs, 247 Iowa 268, 73 N.W. (2d) 112 (1955).

Two years later, the court implied a reservation where *O* had built two houses, the house on lot 2 being behind that on lot 1. A sidewalk led from the front door of the house on lot 2 over lot 1 to the street. Since this was the only means of access to the front of the lot 2 house, the circumstances were sufficient to imply an easement under the *Restatement* approach. The court resorted instead to the test of prior decisions: the use must have been so long continued and obvious that it was manifest that it was intended to be permanent, and it must be essential to the enjoyment of the land. Bray v. Hardy, 248 Iowa 794, 82 N.W. (2d) 671 (1957).

[39] Rose v. Denn, 188 Ore. 1, 213 P. (2d) 810 (1950).

refused to imply a reservation of a way where the grantor had been paid full consideration when she conveyed the land by warranty deed, and no reciprocal benefits resulted to the parties.[40] The court stated:

> "Therefore, the conspicuity, i.e., the extent to which the manner of prior use was or might have been known to the parties . . . apparent purpose and reasonable necessity by reason of the use made and to be made of the premises must appear clear and cogent to overcome the import of the above factors."[41]

Additional facts indicated that the necessity for the easement arose only after the conveyance.

III. *Summary and Conclusions*

Section 476 of the *Restatement of Property* determines the existence of an easement by implication through an investigation of all factors bearing upon the intention of the parties. This intention alone is of determinative importance. Although eight factors are suggested as often recurring and of importance in resolving the question of intention, no single factor is given any independent significance. The presence or absence of any particular factor is not individually determinative. "[The suggested factors] are variables rather than absolutes. None can be given a fixed value. Each affects the decision as to the implication arising from all in a different degree in different situations."[42] Where suggested by the circumstances of the case, additional factors may have importance in resolving the question of intention. These may include the consideration paid in relation to the value of the property with and without the easement, the presence or absence of reciprocal benefits, and indications of intended continuance of the rights asserted by the physical characteristics of the estate prior to severance. If contradictory inferences are presented by the circumstances of the case, the court must proceed to determine the relative weight of each through a balancing process.

In apparent contrast, the traditional means of resolving the

[40] Jack v. Hunt, 200 Ore. 263, 264 P. (2d) 461, reh. den. 265 P. (2d) 251 (1954).
[41] Jack v. Hunt, 200 Ore. 263 at 270, 264 P. (2d) 461 (1954).
[42] PROPERTY RESTATEMENT §476, comment *a* (1944).

problem of the existence of an easement by implication is by investigation of the circumstances of the particular case to determine if the factors of apparency, continuity, permanence, and necessity are present. Allegedly, each factor is of independent and potentially determinative significance. Without the concurrence of all, the easement cannot be found to have arisen. However, it may be possible to demonstrate that the intention of the parties was not to create an easement despite the concurrence of the essential factors.

In all events, the easement by implication conflicts with other generally accepted principles of property law. The implied reservation is contradictory to the idea that the grantor will not be permitted to derogate from his grant. This notion does find some expression, however, in the requirement of a greater showing of necessity for the creation of an implied reservation than is necessary for an implied grant. Further, the implied grant contravenes the principle that the owner of property cannot be deprived of his exclusive rights of use and enjoyment except by his voluntary act. Actually, the easement by implication must be recognized as an acceptance by the law of the failure of individuals to express their intentions adequately when conveying property. Judicial relief is thus given to effectuate the intentions of the parties. Difficulty is encountered only in the means applied to determine intent.

The seeming conflict between the *Restatement* position and the traditional view as to the means to resolve the existence of an easement by implication may be more apparent than real. If the traditional view uses the factors of supposedly determinative importance as mere labels to be applied after a determination of the intent of the parties there is only a semantic difference between the two positions. If the factors are actually given independent, determinative significance there is a real difference in approach. Generally, it is impossible to determine from the decisions the actual application of the factors of supposedly independent importance. It is only where intention is established showing the existence of an easement but one of the so-called "independent" elements is lacking that an actual determination of the application of the traditional tests by the courts is possible. And it is only here that a determination of the proper approach is imperative. The increasing acceptance of the *Restatement* approach that intention alone is the determinative factor in resolving the existence of an

easement arising by implication is consistent with the willingness of modern courts to investigate the difficult problem of intention where such an investigation is essential to a resolution of the rights of the parties.

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