EASEMENTS BY NECESSITY, IMPLICATION AND PRESCRIPTION

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Easements may arise, even when not expressly created by written instrument, under legal doctrines severally designated "necessity", "implication" and "prescription." Each doctrine has a long legal history, and has a myriad of potential applications in modern real estate practice.

EASEMENTS BY NECESSITY

When a grantor conveys a tract of land to which there is no access except over other lands of the grantor or over lands of strangers, courts have declared an easement over the remaining lands of the grantor (the servient parcel) in favor of the grantee's otherwise landlocked parcel (the dominant parcel). Gilfoy v. Randall, 274 Ill. 128, 113 N.E. 88 (1916), Finn v. Williams, 376 Ill. 95, 33 N.E.2d 226, (1941).

Early English courts established the doctrine of necessity based on public policy considerations. It would "prejudice the common weal that land should lie fresh and unoccupied." Packer v. Welsted, 2 Sid.39, 82 Eng.Rep. 1244 (1657). Modern courts tend to ignore the public policy doctrine and rely upon the legal fiction that the parties did not intend to render the land unfit for occupancy. Granite Properties Ltd. v Manns, 117 Ill.2d 425, 512 N.E.2d 1230 (1987).[1] However, practical application of the doctrine still focuses on whether there was access to the conveyed land at the time of the severance. The intention of the parties is not really a factual issue, but is inferred from the fact of necessity. Nevertheless, the inference may, in some cases, be rebutted by clear evidence that the parties did not intend to grant an easement.

The requisites for ways of necessity are (1) initial unity of ownership and (2) necessity at the time of severance. Unity of ownership is a relatively straight-forward criteria, usually established by an analysis of the chain of title. Necessity, however, is open to interpretation. Courts have variously required "absolute necessity",[2] "high degree of necessity"[3] or "reasonable necessity".[4] Illinois courts have found easements by necessity under circumstances short of "absolute necessity" where there was no reasonable alternative access to the conveyed land. Rextroat v. Thorell, 89 Ill.2d 221, 60 Ill.Dec. 438, 433 N.E.2d 235 (1982), cert. denied, 459 U.S. 837, 103 S.Ct. 83, 74 L.Ed.2d 79, (1982). This seems to be the majority view. See 10 ALR4th 447. An Illinois Court has found "necessity" even where at the time of severance the grantee had alternative access over other lands by reason of a revocable license, Finn v. Williams, supra. Generally, the facts at the time of severance control,[5] except where the necessity arose after severance from reasonably anticipated changes in the use of the dominant parcel, Powell on Real Property, Sec. 34.13, pp.

34-196 to 34-197.

Courts also recognize reserved easements by necessity in favor of the grantor on the parcel conveyed where the grantor retains a parcel without access, except over the lands conveyed.[6] However, in such cases courts have generally required a higher degree of necessity. Shive v. Schaefer, 137 Ill.App.3d 139, 91 Ill.Dec. 835, 484 N.E.2d 394 (5th Dist., 1985). This difference is based in part on the rule of construction that the deed should be construed against the grantor and in part on a recognition of the warranties in the deed itself. The fact that the courts will recognize a reserved easement by necessity in the face of rules of construction and warranties in the deed is a tacit acknowledgment of the original public policy basis of the doctrine.

EASEMENTS BY IMPLICATION

The doctrine of easement by implication has some elements in common with the doctrine of easement by necessity. Both require an original unity of ownership and benefit to the dominant parcel at the time of severance[7]. This superficial similarity has led to a trend in the modern literature to treat easements by necessity as a subcategory of easement by implication[8]. However, the purpose and theory are different.[9] In contrast to easements by necessity where the intention of the parties is primarily a legal fiction, the intention of the parties is the central factual issue in establishing easements by implication.[10] Easements by implication arise in circumstances where prior to severance the grantor already used a portion of the retained tract for the benefit of the granted parcel. For instance, if there existed on the property not conveyed a driveway or road for purposes of access to the granted land, courts have found that the grantor intended to grant, and the grantee intended to obtain an easement for the continued use of such driveway or road for the benefit of the conveyed land (the dominant parcel). Carter v. Michel, 403 Ill. 610, 87 N.E.2d 759 (1949).

The presumed intention of the parties is based upon the following factors: (1) the prior use of the servient parcel for the benefit of the dominant parcel is apparent and permanent, and (2) the prior use of the servient parcel is important to the enjoyment of the dominant parcel. Cosmopolitan National Bank of Chicago v. Chicago Title and Trust Company, 7 Ill.2d 471, 131 N.E.2d 4 (1955); Parke v. Pietrobon, 101 Ill.2d 248, 139 N.E.2d 750 (1957). The courts have treated the prior use as a burden on the title to the land retained, just as if it had been a recorded easement; but since there cannot be a true easement while the dominant and servient parcel are in common ownership, the use of the servient parcel prior to severance is referred to as a "quasi easement."[11]

If the prior use, or quasi easement, is apparent, permanent and beneficial, the grantee is entitled to expect to have the right to the continuation of such use. Baird v. Hanna, 378 Ill. 436, 159 N.E.

793 (1928). A temporary use of a quasi easement is not sufficient; evidence of permanence is required. In Cosmopolitan National Bank of Chicago v. Chicago Title and Trust Company, supra, the court found an easement by implication over a paved driveway used as access to the dominant parcel for 20 years; but long duration of prior use is not the only possible evidence of permanence. In Gilbert v. Chicago Title and Trust Company, 7 Ill.2d 496, 131 N.E.2d 1 (1955), newly constructed townhomes had a sidewalk which ran along the rear of all of the townhome lots. There was no declaration of easements, but the court found that the buyer of one of the units was entitled to expect to have a right to use that part of the sidewalk on the adjoining lots. Since implied easements are based on the presumed intent of the parties, the grantor can avoid an implied easement by specifically disclaiming the easement in the deed.

The prior use need not be necessary to the enjoyment of the dominant parcel, but only sufficiently beneficial to allow the court to infer that the parties intended its continuation.[12] In Gilbert, supra, the townhome owner had access to the rear of his lot but only through his building, or by going 500 feet around the block. The court granted the easement over the neighbor's land, noting that to mow his back yard, the owner would otherwise have to carry the lawnmower through the house or around the block. The benefit to the dominant parcel need not involve access. The doctrine has been applied to sewer systems,[13] water pipes,[14] golf cart paths[15] and other uses.[16] In addition to the benefit to the dominant parcel, the court will consider the extent of the burden on the servient parcel. Keen v. Bump, 310 Ill. 218, 141 N.E. 698 (1923).

Courts may find reserved easements by implication, but generally will impose a higher standard of benefit. Granite Properties, supra[17].

EASEMENTS BY PRESCRIPTION

Easements by prescription are based on the theory of adverse possession, but originally, under English law, they were based on the theory that a grant had been made and was lost. In order to establish a presumption of an ancient grant, now lost, the claimant needed to show use of the easement "from time immemorial." In other words, a grant had been made before proper records were maintained. This standard became impossible for the plaintiff to meet, even in cases where it might have been true. The year 1189 was set as the benchmark year, validating, on a lost grant theory any easement in use since that year. As time passed, this standard, too, became impracticable. Eventually the English courts were forced to give up the concept of a lost grant, and they recognized easements under an adverse possession theory, requiring only that the easement had been used for a period of time. In the Prescription Act of 1832, Parliament set the period at 20 years.[18]

In the United States, easements by prescription were generally

based on use for the period set in the applicable adverse possession statute. Although some states have specific statutes for easements by prescription, Illinois relies on the same rules applicable to obtaining fee simple title by adverse possession. Thus to establish an easement by prescription, a party must show continuous adverse use pursuant to a claim of right. Peterson v. Corrubia, 21 Ill.2d 525, 173 N.E.2d 499 (1961). As in other adverse possession cases the critical inquiry usually is whether the use was adverse. Burrows v. Dintlemann, 41 Ill.App.2d 83, 353 N.E.2d 708 (1976). The clearest cases of adversity occur when there is either a defective grant of easement or continued use after revocation of a license. Look v. Bruninga, 348 Ill. 183, 180 N.E. 816 (1932). The claimant is aided by a presumption of adversity; Duncan v, Hughes, 399 Ill. 120, 77 N.E.2d 36 (1948); Light v. Steward, 128 Ill.App.3d 587, 83 Ill.Dec. 760, 470 N.E.2d 1180 (1984); but the presumption can be overcome by showing that the use was permissive, Burrows v. Dintleman, supra.

Unlike easements by necessity and implication, initial unity of ownership is not required and the claimant need not demonstrate any benefit from the easement—only adverse use.

RIGHTS AND DUTIES

The permitted scope of use of an unexpressed easement depends on the theory upon which the easement is based. In the case of necessity, courts will limit the extent of use to that which was necessary at the time of severance, including reasonably anticipated changes in the use of the dominant parcel. In the case of implication, the permitted scope of use is determined by the actual scope of use prior to severance. In the case of prescription, the permitted scope of use is generally limited to the actual nature of the continuous use by which the easement was created.[19]

Just as in the case of an express grant that is silent on the question of maintenance, the owner of an easement by necessity, implication or prescription has the duty to repair and maintain the easement and to prevent interference with the enjoyment of the servient parcel by its owner.[20]

CONCLUSIONS

If a survey or other available information discloses facts which may support a claim of an easement by necessity, implication or prescription on the property being insured, a title insurer should raise the possibility of such easement as an exception to title. On the other hand, a title insurer will understandably be reluctant to affirmatively insure the existence of such an easement benefitting the insured because of the high risk of litigation and the difficulty in predicting judicial disposition of a claim for an easement by necessity, implication or prescription.

Notes:

1"He who grants a thing to another is understood also to grant that without which the granted thing cannot exist." Simonton, Ways of Necessity, 25 Columbia L.Rev. 571 (1925). Civil Law appears not to rely upon the legal fiction of implied intent. See Stuckney v. Collins, 464 So.2d 346 (La.Ct.App.1985).

2Zunio v. Gabriel, 182 Cal.App.2d 613, 6 Cal.Rptr. 514 (1983).

3Cordwell v. Smith, 105 Idaho 71, 665 P.2d 1081 (1983).

4Fisher v. Pilcher, 341 A.2d 713 (De.Sup.Ct., 1975).

5Walker v. Witt, 4 Ill.2d 16, 122 N.E.2d 175 (1951); Moore v. Shrake, 376 Ill. 253, 33 N.E.2d 459 (1941).

6Liford's Case, 11 Co.Rep. 466, 77 Eng.Rep. 1206 (1615).

7Severance may be involuntary. See Flax v. Smith, 20 Mass.App. 149, 479 N.E.2d 183 (1985).

8Gutstein, Illinois Real Estate, Lawyers Cooperative Publishing (1995) p. 2-19.

9The Restatement of Property, Section 476 (1944), in its otherwise admirable attempt to systemize the common law, attempts to lump together easements by necessity and easements by implication as different applications of the same doctrine. In order to catch up all of the differing criteria, the Restatement increases the number of criteria to eight: (1) whether the claimant is conveyor or conveyee, (2) the terms of the conveyance, (3) the consideration, (4) whether the defendant is a simultaneous conveyee, (5) the extent of the benefit or necessity, (6) the reciprocal benefits, (7) the manner of use prior to conveyance, and (8) the extent of use of the prior use. This unnecessarily complicates the adjudication process, suggesting that issues not at all relevant to one or the other of the doctrines have some bearing. In Granite Properties, supra, the court gives lip service to the Restatement's approach, but reverts to the traditional rules when it makes its determination.

10Frantz v. Collins, 21 Ill.2d 446, 173 N.E.2d 437 (1961).

11Granite Properties Ltd. v. Manns, 117 Ill.2d 425, 512 N.E.2d 1230 (1987).

12Again, however, the modern view of easements by necessity and easements by implication as related doctrines causes some confusion.

13Van Sandt v. Royster, 148 Kan. 495, 83 P.2d 698 (1938).

14Hutcheson v. Sumrall, 230 Mass. 834, 72 So.2d 225 (1954).

15Williams Inland Country Club v. San Simeon, 454 So.2d 23,

(Fla.Dist. Ct. App., 1984).

16But see Katch v. Home Savings and Loan Assoc., 53 Cal. Rptr 923 (D.C. App. 1966), wherein the court held that there was no right to an implied easement for light and air.

17Some courts go so far as to recognize reserved easements only under the necessity doctrine. Mitchell v. Castellaw, 151 Tex. 56, 246 S.W.2d 163 (1952). The English courts apparently also refuse to recognize reserved easements by implication.

18Holdsmith, Development of Modern Land Law, 279-86 (1927); Waidlich v. Farmers Bank of Mercersburg, 149 F.Supp. 741 (M.D.Pa., 1957).

19Powell on Real Property, pp.34-196 - 197.

20Ibid.