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Real Property—Easements—Implied Grants and Reservations of Ways of Necessity Abolished

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REAL PROPERTY — EASEMENTS — IMPLIED GRANTS AND RESERVATIONS OF WAYS OF NECESSITY ABOLISHED—Plaintiffs purchased from the Northern Pacific Railway a parcel of land surrounded on three sides by mountains, and on the fourth by land defendants had previously purchased from the Northern Pacific. Having no means of access to this grazing and timber land, plaintiffs brought an action for a right of way across defendants' land. Plaintiffs contended that when the Northern Pacific sold the land to defendants it reserved by implication an easement by necessity over that land for the benefit of the retained land, and that when the railway conveyed the remaining section to plaintiffs, there was an implied conveyance of the easement across defendants' lands. The trial court granted plaintiffs the right of way. On appeal to the Montana Supreme Court, *held,* reversed. There can be no implied reservations or implied grants of easement by necessity. They may be obtained in eminent domain proceedings if necessity is established. *Simonson v. McDonald,* 311 P.2d 982 (Mont. 1957) (Justice Adair dissenting in part, concurring in result).

This decision rests on three grounds: first, that the statutory provision on implied covenants precludes the implication of an easement; second, that the statute of frauds requires an easement in real property to be in writing; and third, that constitutional and statutory condemnation procedures have superseded the common-law way of necessity.

In Montana the covenants which are implied in a conveyance of real estate are specified by statute.[1] The Montana Supreme Court construed this statute as abolishing all implied covenants except the two enumerated, and concluded that "the two excepted do not reach the question here involved." This statement, in connection with other language in the opinion, implies that the statute militates against the implication of easements. It is possible that this construction also abolishes all implied covenants in oil and gas leases.

The Court's novel interpretation of the covenant statute apparently arises from a failure to distinguish between covenants and easements. That distinction was succinctly drawn by the Supreme Court of Wyoming as follows: "An easement is but a claim on lands. A covenant is a personal undertaking. . . ."[2]

[1]REVISED CODES OF MONTANA, 1947, § 67-1616: "From the use of the word 'grant' in any conveyance by which an estate of inheritance or fee simple or other possessory title is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance:

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee.

2. That such estate is at the time of the execution of such conveyance free from encumbrances done, made, or suffered by the grantor, or any person claiming under him.

Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance." (Hereinafter REVISED CODES OF MONTANA are cited R.C.M.).

[2]Lingle Water Users' Ass'n v. Occidental Bldg. & L. Ass'n, 43 Wyo. 41, 297 Pac. 385, 387 (1931).

The Montana statute on implied covenants was borrowed in 1895 from an 1872 California statute.[3] Hence decisions of the California Supreme Court, construing the statute prior to its 1895 adoption by Montana, are presumptively controlling unless manifestly unsound.[4] Three pre-1895 California cases, construing both the present section and its predecessor, interpreted the statute as merely raising implied covenants for title and against encumbrances.[5] California decisions of the same period recognized and upheld ways of necessity, the above-mentioned statute not having been considered.[6]

These early California cases still represent the weight of authority in construing such statutes. Three states have identical statutes,[7] three more states have substantially the same statute with slightly different wording,[8] and seven states have statutes implying the same covenants from other specified words of conveyance.[9] These states construe such statutes as merely raising the implied covenants.[10] No case was discovered in which any of these states considered the statutes in relation to implied easements. Several of them show a marked tendency to severely restrict the statutes in their operation on implied covenants. The tendency to narrow rather than to extend the scope of a statute like Montana's is demonstrated by the statement of the United States Supreme Court, in passing on a similar statute, that, being in derogation of the common law, it must be strictly construed.[11]

The second ground for this decision, that the statute of frauds requires an easement in real property to be in writing, is equally contrary to the

[3]The predecessor of the present section, enacted in the Bannack Statutes of 1865, was also copied from the predecessor of the present California statute, enacted by that state in 1855.

[4]*In re* Murphy's Estate, 99 Mont. 114, 125, 43 P.2d 233, 237 (1935).

[5]Lawrence v. Montgomery, 37 Cal. 183, 188 (1869); Bryan v. Swain, 56 Cal. 616, 618 (1880); Waggle v. Worthy, 74 Cal. 266, 267, 15 Pac. 831 (1887).

[6]Cheney v. O'Brien, 69 Cal. 199, 10 Pac. 479 (1886); Taylor v. Warnaky, 55 Cal. 350 (1880).

[7]CAL. CIV. CODE § 1113 (Deering 1949); IDAHO CODE ANN. § 55-612 (1947); N.D. REV. CODE § 47-101 (1943).

[8]ARIZ. CODE ANN. § 33-435 (1956); ALA. CODE ANN. § 47-154 (1940); TEX. REV. CIV. STAT. art. 1297 (1948).

[9]ARK. STAT. § 50-401 (1947); ILL. STAT. ANN. § 30-7 (Jones 1949); MISS. CODE ANN. § 845 (1942); MO. REV. STAT. § 3407 (1939); NEV. REV. STAT. § 111.170 (1957); N.M. STAT. ANN. § 70-1-12 (1953); PA. STAT. ANN. §§ 21-1 to 21-4 (Purdon 1955). Apparently all 13 of these similar statutes were taken from a 1715 Pennsylvania statute, which was in turn taken from the Statute of 1707, 6 ANNE, c. 35. See Dun v. Dietrich, 3 N.D. 3, 53 N.W. 81 (1892); RAWLE, COVENANTS FOR TITLE 533-48 (3d ed. 1860).

[10]Dothan Nat. Bank v. Hollis, 212 Ala. 628, 103 So. 589, 590 (1925); Bailey v. Kuida, 69 Ariz. 357, 213 P.2d 895, 897 (1950); Graham v. Quarles, 206 Ark. 542, 176 S.W.2d 703, 706 (1944) (dictum); Snyder v. Pine Grove Lumber, 40 Cal. App. 2d 660, 105 P.2d 369, 371 (1940); Brinton v. Johnson, 35 Idaho 656, 208 Pac. 1028 (1922); Bliss Town-Site Co. v. Morris-Roberts Co., 33 Idaho 110, 190 Pac. 1028 (1920); Wheeler v. Wayne County, 132 Ill. 599, 24 N.E. 625 (1890); Biwer v. Martin, 294 Ill. 488, 128 N.E. 518, 523 (1920) (dictum); Allen v. Caffee, 85 Miss. 766, 38 So. 186 (1905); Brown v. Evans, 182 S.W.2d 580, 582 (Mo. 1944); Dun v. Dietrich, 3 N.D. 3, 53 N.W. 81 (1892); Douglas v. Lewis, 3 N.M. 596, 9 Pac. 377 (1886), *aff'd.* 131 U.S. 75 (1889); Litmans v. O'Donnell, 173 Pa. Super. 570, 98 A.2d 462, 464 (1953); City of Beaumont v. Moore, 146 Tex. 46, 202 S.W.2d 448, 453 (1947). Research disclosed no cases construing the Nevada statute.

[11]Douglas v. Lewis, 131 U.S. 75, 86 (1889).

trend of authority. New York and California have held that an implied easement does not contravene the statute of frauds.[12] Tiffany justifies excluding implied easements from the statute because the requirement of a writing is satisfied by the fact that the easement is implied from a written conveyance, and the writing is merely explained by extrinsic evidence.[13]

To except implied easements from the prohibition of the statute of frauds would not do violence to the apparent meaning of the statutes cited by the court in the instant case, because those sections only require a writing for an *agreement* to sell realty, not for a conveyance thereof,[14] although the court has previously interpreted section 13-606 as requiring a writing for creation of a right of way.[15] However, two equally pertinent sections of the Code were not cited in the instant opinion.[16] These sections of the statute of frauds specify that an interest in real property may be transferred *by operation of law.* A common-law implied way of necessity is just such a transfer.[17] Furthermore, two Montana decisions recognize that an easement may be transferred by operation of law.[18] Other decisions of the Montana Supreme Court also support the exception of implied easements from the statute of frauds; for example, the court has held that a settler on public lands can orally convey his rights therein,[19] and that a contract implied in law does not come within the prohibition of the statute of frauds.[20]

The third basis for the holding of the instant case, that statutory condemnation provisions have superseded the common-law way of necessity in Montana, required an express overruling of two earlier Montana decisions, insofar as those decisions recognized implied easements or grants of ways of necessity.[21] Justice Adair's partial dissent argued that these cases could be distinguished on their facts, and should not be overruled. There is some basis for such a factual distinction because the cases partially overruled involved only a grantor and grantee. In the principal case the common source of title, on which the implication of a way of necessity is based, was a third party from whom both plaintiffs and defendants derived their titles.

Montana law on condemnation of private ways is predicated on a constitutional provision that private roads may be opened in a manner to be prescribed by law, but that a jury trial is required to determine the necessity for such roads and fix damages or compensation.[22] The basic Montana statute enumerating the public uses in behalf of which the right of eminent

[12]Mattes v. Frankel, 157 N.Y. 603, 52 N.E. 585, 587 (1899); Owsley v. Hamner, 36 Cal.2d 710, 227 P.2d 263, 270; 24 A.L.R.2d 112, 120 (1951).

[13]3 TIFFANY, REAL PROPERTY § 780 (3d ed. 1939).

[14]R.C.M. 1947, §§ 13-606 and 74-203.

[15]Renfro v. Dettwiler, 95 Mont. 391, 397, 26 P.2d 992, 994 (1933).

[16]R.C.M. 1947, §§ 67-1601 and 93-1401-5.

[17]Lord v. Sanchez, 136 Cal. App. 2d 704, 289 P.2d 41, 42 (1955); Rogelmair v. City of Los Angeles, 137 Cal. App. 125, 29 P.2d 880, 882 (1934) (dictum).

[18]Mannix v. Powell County, 75 Mont. 202, 205, 243 Pac. 568, 569 (1926); Smith. v. Denniff, 24 Mont. 20, 22, 60 Pac. 398, 50 L.R.A. 741 (1900).

[19]Geary v. Harper, 92 Mont. 242, 248, 12 P.2d 276, 278 (1932).

[20]Muri v. Young, 75 Mont. 213, 218, 245 Pac. 956, 957 (1926).

[21]Violet v. Martin, 62 Mont. 335, 205 Pac. 221 (1922); Herrin v. Sieben, 46 Mont. 226, 127 Pac. 323 (1912).

[22]MONT. CONST. art. III, § 15.

domain may be exercised[23] was borrowed in large part from California, so California decisions construing the parent statute should be highly persuasive.

The first California case involving a way of necessity held that when the plaintiff's and defendant's titles are intitially derived from a common grantor, the plaintiff may be granted a way of necessity across the defendant's land if he has no other means of access, and that the plaintiff need not resort to condemnation proceedings to obtain the way.[24] A subsequent California decision held that the fact that a claimant could have a way by condemnation does not affect his right to a way of necessity.[25]

The Montana court's conclusion that the condemnation statutes preempted the field was based on cases from Utah, Wisconsin, and Texas.[26] The instant case cites also a subsequent Utah decision which overruled the case on which the Montana court relied on the ground that condemnation was not an adequate remedy in all cases because the cost of condemning a right of way through valuable lands would frequently preclude recourse to that procedure.[27] The Montana Court refused to follow the latter decision on the premise that the reasoning of the earlier Utah case was "unanswerable when applied to the circumstances under which a temporary logging road may be obtained in this state." This is correct as applied to the facts of this case; the difficulty is that the holding of the instant case extends far beyond logging roads, and probably encompasses any implied way of necessity.

The Texas decision relied on is not persuasive because it dealt exclusively with the state's sovereign power in the field of eminent domain, and admitted that "the same necessity does not exist in the case of the sovereign as in the case of an individual landowner."[28]

The Wisconsin case cited by the court seems to implicity recognize the very basis on which Utah reversed its earlier decision. The Wisconsin court argued that the law should not imply a way of necessity "where it has provided another method for obtaining the same *at a reasonable expense* to the landowner." (emphasis supplied).[29]

In addition to authority and the doctrine of stare decisis, there are excellent reasons of public policy supporting the doctrine of implied ways of necessity. That doctrine is fundamentally predicated on the policy that land should be fully utilized, and on the fact that without a way of necessity recognizing an implied reservation by the grantor or an implied grant to the grantee, as the case may be, the land cannot be used. Presumably, parties to conveyances such as those involved in the instant case do not intend to render land unfit for occupancy, so the lack of means of access

[23]R.C.M. 1947, § 93-9902.

[24]Taylor v. Warnaky, 55 Cal. 350 (1880).

[25]Blum v. Weston, 102 Cal. 362, 36 Pac. 778, 780 (1894).

[26]State v. Black Bros., 116 Tex. 615, 297 S.W. 213, 219, 53 A.L.R., 1181, 1188 (1927); Alcorn v. Reading, 66 Utah 509, 243 Pac. 922, 926 (1926); Backhausen v. Mayer, 204 Wis. 286, 234 N.W. 904, 905, 74 A.L.R. 1245, 1248 (1931).

[27]Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264, 274 (1947).

[28]State v. Black Bros., 116 Tex. 615, 297 S.W. 213, 218, 53 A.L.R. 1181, 1189 (1927).

[29]Backhausen v. Mayer, 204 Wis. 286, 234 N.W. 904, 905, 74 A.L.R. 1245, 1248 (1931).

merely furnishes evidence of the intention to grant or reserve the right of way.[30] As the Utah and Wisconsin cases recognized, there will be cases in which the owner of land will be precluded from utilizing it if a common-law way of necessity is not granted, even though he might obtain a right of way by condemnation. Obviously one cannot afford to condemn a way across any sizeable area of city land, or even highly valuable farm land, in order to use a small pasture or wood lot. Condemnation requires payment of jury-assessed damages; a way of necessity requires no payment at all. This is not unfair to the owner whose land is taken because in the eyes of the law it was excepted from his property ab initio.

Statutory eminent domain provisions are not in derogation of the common-law way of necessity; rather they complement it. A way of necessity can exist only if the plaintiff's and defendant's titles can be traced to a common grantor other than the sovereign.[31] It is reasonable to assume that condemnation statutes were enacted to broaden this scope, and provide a remedy to persons who could not qualify under the way of necessity doctrine.

The rule enunciated in the instant case has the stated effect of abolishing implied reservations or grants of ways of necessity. It may also have the side effect of militating against implied easements other than ways of necessity, and might even be carried so far as to abolish implied covenants in oil and gas leases. This result is clearly undersirable because at the very least it will prevent *any* utilization of some low-value lands surrounded by high-value lands.

It is submitted that the first basis for the decision strains the meaning of the implied covenant statute beyond the interpretation intended by the legislature in enacting it. The second ground for this case seems contrary to both reason and authority. The third foundation has a basis in reason and is a logical extension of a prior Montana case.[32] But it embodies a restriction which seems both unwise and unnecessary in the light of the public policy considerations in favor of common-law ways of necessity.

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[30]Condy v. Laurie, 184 Md. 317, 41 A.2d 66, 68 (1945); Trattar v. Rausch, 154 Ohio St. 286, 95 N.E.2d 685, 689 (1950).

[31]Bully Hill Copper Mine & Smelting Co. v. Bruson, 4 Cal. App. 180, 87 Pac. 237, 238 (1906).

[32]Tomten v. Thomas, 125 Mont. 159, 161, 232 P.2d 723, 724, 26 A.L.R.2d 1285, 1288 (1951), which stated that under Montana constitutional and statutory condemnation provisions, "an owner of land has the right to acquire a private way of necessity for ingress and egress when his land is so situated with respect to lands of others that it is physically inaccessible to a public highway."