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IMPLIED EASEMENTS—WAYS OF NECESSITY AS INVOLVED IN EMINENT DOMAIN PROCEEDINGS.—Defendant owned in her own right 120 acres of land to which the only means of ingress and egress to and from the public highway was by a private way running along the north side thereof and over certain land held by her and her husband as tenants by the entirety. In these circumstances the state, under a complaint which purported to deprive the defendant of all her right, title, and interest, condemned for forestry purposes a strip off the north side of the dominant estate which included the way in question. In the proceeding below the damages were assessed upon the assumption that the defendant was cut off from all access to the public way. Appeal by the State.

²⁶ Teets v. Hahn (1927), 5 N. J. Misc. 538, 137 A. 559; Douglas v. Ohio River R. Co. (1902), 51 W. Va. 523, 1 S. E. 911; McCormick, Damages (1935), 91.

²⁷ Storseth v. Folsom (1908), 50 Wash. 456, 97 P. 492.

²⁸ Lian v. Henry Bradford & Co. (1920), 209 Mich. 172, 176 N. W. 412.

Held, (both in the original opinion¹ and upon rehearing²) reversed and remanded, in that the principles of implied easements of necessity are applicable to eminent domain proceedings; and, therefore, there was reserved to the defendant a way of necessity over the land condemned.

The way of necessity, a form of implied easement,³ is said to arise by implied grant or reservation when, upon a conveyance in fee of a part of land held by the grantor, it appears that such a right either in the land retained or the land conveyed is reasonably necessary to the continued beneficial use of the other estate from which it is severed.⁴ Under such circumstances the easement which arises is based upon the presumed intent of the parties, for it is felt that neither desired that the express grant operate to render useless and of no productive value of the premises to be benefited by the implication.⁵ The strength of the presumption indulged in is apparent in the case of the implied reservation wherein the grantor is said to reserve a right of way across the land alienated although he conveys a fee in the same by a deed with the conventional warranties.⁶ However that may be, it must be recognized that the implication in such circumstances is not an irrebuttable rule of law, but, in the final analysis, is dependent upon a finding that the facts of the particular case do not tend to demonstrate a contrary intention.⁷

It is generally conceded that the principles of implied easements will be considered applicable not only to voluntary conveyances as between the par-

¹ State ex rel. McNutt v. Orcutt (Ind. 1936), 199 N. E. 595.

² State ex rel. McNutt v. Orcutt (Ind. 1937), 7 N. E. (2d) 779.

³ Implied easements are of two types: (1) the implied easement of necessity, and (2) the implied easement partaking of the nature of a prior quasi-easement. The first is involved in the principal case. For examples of the latter and for the requirements for their implication, see: John Hancock Mutual Life Insurance Co. v. Patterson (1885), 103 Ind. 582, 2 N. E. 188, 53 Am. Rep. 550; Steinke v. Bentley (1892), 6 Ind. App. 663, 34 N. E. 97; and Indiana Truck Farm Company v. Chambers (1919), 69 Ind. App. 292, 121 N. E. 662. Unfortunately the Indiana Courts have often confused the distinction between the two. For examples hereof, see Ellis v. Bassett (1890), 128 Ind. 118, 27 N. E. 344, 25 Am. St. Rep. 421, and the original opinion of the principal case, *supra*, note 1.

⁴ Logan v. Stogsdale (1889), 123 Ind. 373, 24 N. E. 135, 8 L. R. A. 58; Miller v. Richards (1894), 139 Ind. 263, 38 N. E. 854; Thomas v. McCoy (1911), 48 Ind. App. 403, 96 N. E. 14; Vandalia R. Co. v. Furnas (1914), 182 Ind. 306, 106 N. E. 401.

⁵ Ritchey v. Welsh (1898), 149 Ind. 214, 48 N. E. 1031; Collins v. Prentice (1900), 15 Conn. 39; see, also, cases cited in note 4, *supra*.

⁶ Ritchey v. Welsh (1898), 149 Ind. 214, 48 N. E. 1031; Vandalia R. Co. v. Furnas (1914), 182 Ind. 306, 106 N. E. 401. The fact that the implied reservation stands in derogation of the conveyance has led many courts to refuse any implication of an easement in such circumstances unless an absolute or strict necessity exists: Tong v. Feldman, 152 Md. 398, 136 A. 822, 51 A. L. R. 1291; Wiesel v. Smira (1928), R. I., 142 A. 148, 58 A. L. R. 818. See, also, annotations in 5 A. L. R. 1557 and 38 A. L. R. 1306. Indiana, however, has consistently upheld the reasonable necessity principle: Shandy v. Bell (1934), 207 Ind. 215, 189 N. E. 627, which disproves Dudgeon v. Bronson (1902), 159 Ind. 562, 64 N. E. 910, an early case maintaining that strict necessity is required.

⁷ Evidence of extrinsic facts may exclude an implication: Mead v. Anderson (1884), 40 Kan. 203, 19 P. 768; Seeley v. Bishop (1848), 19 Conn. 128. The words of the particular deed may negative the presumption: Doten v. Bartlett (1910), 107 Me. 351, 78 A. 456, 32 L. R. A. (N.S.) 1075.

ties, but, also, when an estate is vested in one by virtue of judicial proceedings.⁸ Whether they are to exist as well as an incident to the exercise of the power of eminent domain is a question upon which there is apparently very little authority; and yet from the decided cases it is possible to formulate at least two conclusions. First, the implied easement partaking of the nature of a prior quasi-easement will not result by implication upon the condemnation of land.⁹ Secondly, that a way of necessity over land retained by the defendant in the condemnation proceeding will not attach by implication to the land appropriated by the state,¹⁰ for the reason that the existence of the power of eminent domain in it negatives the reasonable necessity upon which the implication is based.¹¹ These, however, are not decisive as to whether a way of necessity will be impliedly reserved to the one whose land is partially taken.

That the state, when the fee is taken, may expressly reserve to the defendant a right of way or any other type of easement is recognized by the majority of courts of this country.¹² This proposition is submitted in the dissenting opinion of the principal case in connection with the argument that the courts have no right to delimit the extent of the exercise of the power so long as it is being used for a public purpose.¹³ It is believed, however, that this method of approach begs the question. In implying an easement the court is not restricting the ability to condemn so much of the land as is found necessary, but is interpreting a complaint which does not expressly negative the implication as not intended by the state to deprive the party defendant of the ability to utilize his land by reason of a lack of access thereto. In fact, to be consistent with the position taken relative to a reservation of an easement derogatory

⁸ *Ritchey v. Welsh* (1898), 149 Ind. 214, 48 N. E. 1031 (partition proceedings); *Pernam v. Wead* (1806), 2 Mass. 203, 3 Am. Dec. 43, foreclosure of mortgage—quoted with approval by the Indiana court, in *Hickam v. Golladay* (1925), 83 Ind. App. 569, 149 N. E. 375.

⁹ *New Jersey, Indiana and Illinois R. Co. v. Tutt* (1907), 168 Ind. 205, 80 N. E. 420 (artificial drain); *Evansville Terminal Railway v. Herdink* (1910), 174 Ind. 537, 92 N. E. 548 (same). Admittedly, the authority of the cases for this point are weakened to some extent by virtue of the fact that the power is being exercised solely for the purpose of condemning an easement. On principle it would seem that the doctrine of the implied way of necessity has no application to the passage of such a limited estate in land, as the other party has always been considered as retaining the right to use the fee in any way not inconsistent with the right obtained by the governmental agent. See, *Kansas Cent. Rwy. Co. v. Allen* (1879), 22 Kan. 285, 31 Am. Rep. 190. However that may be, the refusal to imply this type of easement does not negative the possibility of the implication of a way of necessity. The policy underlying the presumption of intent in the latter case is much stronger since it concerns the availability of land at all to the grantee or grantor, as the case may be, and not just whether it may be more beneficially used one way or another.

¹⁰ *Banks v. School Directors of Dist. No. 1 of McLean County* (1901), 194 Ill. 248, 62 N. E. 604.

¹¹ This is, in addition, often given as the reason why courts refuse to allow an implied reservation upon a conveyance of land by the government. See, *State v. Black Bros.* (1927), 116 Tex. 615, 297 S. W. 213, 53 A. L. R. 1181.

¹² *Tylet v. Inhabitants of Hudson* (1888), 147 Mass. 609, 18 N. E. 582; *St. Louis, Keokuk and North Western R. Co. v. Clark* (1894), 121 Mo. 169, 195, 25 S. W. 192, 906, 26 L. R. A. 751; *Indianapolis and Cincinnati Traction Co. v. Wiles* (1910), 174 Ind. 236, 91 N. E. 161; *Louisville, etc., R. Co. v. Western Union Telegraph Co.* (1916), 184 Ind. 531, 111 N. E. 802.

¹³ *State ex rel. McNutt v. Orcutt* (Ind., 1937), 7 N. E. (2d) 779, 781 ff.

to a deed with warranties, such must be our contention. This answer affectively disposes as well of the argument advanced that the public policy underlying the exercise of the power of eminent domain should not be made subservient to the policy evidenced by the implication, as the same circumstances which will in the particular case give rise to the implied way will demonstrate the non-existence of a clash at all between the two.

Two difficulties, however, are involved in attempting to apply the principles of the implied easement of necessity to eminent domain proceedings. In the first place, there is in the principal case no contractual relation between the parties in the light of which the intent is said to be presumed,¹⁴ but instead the state dominates the picture. Secondly, there is a conspicuous absence of what has been said to be the very foundation of the implied way—that is, the “grant” of an estate in fee by the party to be benefited.¹⁵ As to the former, it is submitted that the intent that is the basis of the implication is the one presumed to exist at the time of the actual transfer of the servient estate and not the one existing anterior thereto. Again, it is to be recognized that in any case the intent which is controlling is that which governs the actions of the dominant party to the relationship, which, of course, usually happens to be the grantor, and not the mutual understanding of both parties. In any event, it is true that the absence of a contractual relation has not proved an obstacle in cases involving the application of these principles to judicial proceedings.¹⁶

As to the second difficulty, it is not believed that it proves an unsurmountable barrier in that the language used by the courts wherein it is said that an implied way can arise only as ancillary to an express grant¹⁷ is in the final analysis but descriptive of the necessity of a unity of title¹⁸ to both the dominant and servient estate in the one party, and a severance thereof by the passing of the fee of a part to another. We have both here. The reason this phraseology has been used is to be attributed to the fact that cases involving the implication upon eminent domain proceedings are unusual, and that, as noticed above, generally the transferor rather than the transferee is the dominant party.

It is to be seen then that a reservation of an easement of a way of necessity should be implied upon the condemnation of a fee in land by the state in the absence of an express stipulation to the contrary in the complaint, and unless the implication is negatived by the circumstances of the particular case

¹⁴ As to this element: *Jann v. Standard Cement Company* (1913), 54 Ind. App. 221, 102 N. E. 372; *Ritchey v. Welsh* (1898), 149 Ind. 214, 48 N. E. 1031.

¹⁵ *Logan v. Stogsdale* (1889), 123 Ind. 373, 24 N. E. 135, 8 L. R. A. 58: “A way of necessity exists by grant, and the grant is an implied one.” See, also, *Steward v. Hartman* (1874), 46 Ind. 331.

¹⁶ *Supra*, Note 8.

¹⁷ See the quotations in the original opinion, *State ex rel. McNutt v. Orcutt* (Ind. 1936), 199 N. E. 595.

¹⁸ A way of necessity can't exist over the land of a stranger, but the parties must be able to trace title to a common owner—*Steward v. Hartman* (1874), 46 Ind. 331.

as evidenced by the purposes for which the land is appropriated.¹⁹ If the latter is true, and if the facts demonstrate that it is reasonable to expect that a reservation of this nature would be inconsistent with the probable use of the land by the state, then, of course, the party defendant will in any subsequent proceedings be presumed to have recovered full compensation for the deprivation of a right of access to the public way.²⁰ Admittedly this rule, which is consistent with the result of the principal case, places on a defendant the risk of seeing that his compensation covers any such appropriation; and yet the burden is hardly greater than that resting upon the grantee of an estate which has no means of access unless it be over the land retained by the grantor.

C. D. L.

THE VICARIOUS LIABILITY OF CHARITABLE CORPORATIONS.—Plaintiff, a paying patient in defendant charitable hospital, was being removed in its ambulance to her home. Because of the negligence of the driver, the ambulance collided with another vehicle, and plaintiff received injuries, for which she seeks to recover damages in this action against the hospital. Held, a charitable corporation is liable for the torts of its mere servants, even though it has exercised due care in selecting them.¹

The rule generally prevailing is that the master is liable for all harm caused by the tortious conduct of his servants committed while acting within the scope of the employment.² The true basis of this rule is public policy, rather than merely pecuniary profit to the master or some similar idea.³ The

¹⁹ *Cleveland, Cincinnati, Chicago and St. Louis R. Co. v. Smith* (1911), 177 Ind. 524, 97 N. E. 164. The dissenting opinion cites the following cases for the contra proposition, but they are distinguishable in spite of their broad language upon one ground or another: *Prowattain v. City of Phila.* (Penn. 1886), 4 A. 806. (The rule of the court: where land is taken by virtue of the power of eminent domain for a purpose inconsistent with the existence of a right of way, no way of necessity is created by implication); *Flagg v. Town of Concord* (1916), 222 Mass. 569, 111 N. E. 369 (the court said: the extent of the taking and the rights of the taker are fixed by the purposes for which the land is condemned—further it is not clearly apparent that a way of necessity is actually involved); *Cedar Rapids, I., F., and N. W. R. Co. v. Raymond* (1887), 37 Minn. 204, 33 N. W. 704 (governed by statute); *St. Louis, Keokuk, and Northwestern R. Co. v. Clark* (1894), 121 Mo. 169, 195, 25 S. W. 192, 906, 26 L. R. A. 751 (no reasonable necessity for an open crossing as a close crossing was provided for by statute); *Atchison T. and S. F. R. Co. v. Conlon* (1901), 62 Kan. 416, 63 P. 432, 53 L. R. A. 781 (exception in the conveyance operated to terminate any right of way that might have been impliedly reserved to plaintiff's grantor); *Ham v. City of Salem* (1868), 100 Mass. 350 (no showing of reasonable necessity). *Goggins v. Boston and A. R. Co.* (1892), 155 Mass. 505, 30 N. E. 71, remains, however, directly opposed to the views here expressed.

²⁰ *State v. Patten* (Ind. 1936), 199 N. E. 577; *New Jersey, Indiana and Illinois R. Co. v. Tutt* (1907), 168 Ind. 205, 80 N. E. 420.

¹ *Sheehan v. North Country Community Hospital et al.* (1937), 273 N. Y. 163, 7 N. E. (2d) 28.

² *Harper, Law of Torts*, Sec. 291.

³ *H. J. Laski, The Basis of Vicarious Liability* (1916), 26 *Yale L. J.* 105, at 111.