'Necessity alone does not an easement create'

By: Justin M. Perrotta and Michael Pill January 21, 2016

Co-author Michael Pill once had the unfortunate experience of having a judge exclaim from the bench: "You can't land-lock property in Massachusetts!" The judge was unaware of the case law summarized with these words in *Kitras v. Town of Aquinnah*, 64 Mass. App. Ct. 285, 298-299 (2005):

"It is well established in this Commonwealth: necessity alone does not an easement create. *Nichols v. Luce*, 41 Mass. 102, 24 Pick. at 104 [(1834)]. *Orpin v. Morrison*, 230 Mass. [529] at 533 [(1918)]. Neither does there exist a public policy favoring the creation of implied easements when needed to render land either accessible or productive. *Richards v. Attleboro Branch R. Co.*, 153 Mass. [120] at 122 [(1891)] ('The law does not give a right of way over the land of other persons to every owner of land who otherwise would have no means of access to it'). *Orpin v. Morrison*, 230 Mass. at 533-534, quoting from *Gayetty v. Bethune*, 14 Mass. 49, 56 (1817) (if one purchases land knowing 'he had no access to the back part of it, but over the land of another, it was his own folly; and he should not burden another with a way over his land, for his convenience')."

Other states have enacted legislation establishing a private right of eminent domain, whereby a landlocked owner can condemn a right of way across land of another to reach the nearest public way, with compensation to the abutting land owner. James W. Ely Jr. & Jon W. Bruce, Law of Easements and Licenses in Land, §4:14. "Statutory ways of necessity" (2015) (Westlaw database LELL).

The late Appeals Court Judge Kent Smith, well aware of the need for such legislation in Massachusetts, made an unsuccessful effort in that direction by stating that when a public way is discontinued, landowners have "a private easement of travel in order to have access to their property." *Nylander v. Potter*, 38 Mass. App. Ct. 605, 609 (1995), reversed, 423 Mass. 158 (1996).

The common law offers an inadequate remedy for the problem of landlocked real estate, because the following factual elements must be present in addition to necessity (*Kitras v. Town of Aquinnah*, 64 Mass. App. Ct. 285, 291 (2005)):

"[A]n easement by necessity may be implied if we can fairly conclude that the grantor and grantee, had they considered the matter, would have wanted to create one. To make this deduction, we require

(1) that both dominant and servient estates once were owned by the same person or persons, i.e., that there existed a unity of title;

(2) a severance of that unity by conveyance; and

(3) necessity arising from that severance, all considered 'with reference to all the facts within the knowledge of the parties respecting the subject of the grant, to the end that their assumed design may be carried into effect.' [Citations omitted.]"

In other words, "[a]n implied easement of necessity … is not created because it is necessary to the grantee, but rather to effectuate the intent of the parties. [Citation omitted.]" *Ward v. McGlory*, 358 Mass. 322, 325 (1970).

But "[w]hat is required … is not an actual subjective intent on the part of the grantor but a presumed objective intent of the grantor and grantee based upon the circumstances of the conveyance. [Citation omitted.]" *Flax v. Smith*, 20 Mass. App. Ct. 149, 153 (1985).

One Appeals Court judge has gone so far as to state in a dissenting opinion that "[t]he doctrine of easement by necessity does not spring forth from a public policy against ownership of landlocked land." *Kitras v. Town of Aquinnah*, 87 Mass. App. Ct. 10, 31 (2015) (Agnes, J., dissenting), review granted, 471 Mass. 1108 (2015).

But the Supreme Judicial Court long ago pointed out that a presumed intent to create an easement by necessity is nothing but "a fiction of law, [by which] there is an implied reservation or grant to meet a special emergency, on grounds of public policy, as it has been said, in order that no land should be left inaccessible for purposes of cultivation." *Buss v. Dyer*, 125 Mass. 287, 291 (1877).

The Restatement (Third) of Property (Servitudes) §2.15 "Servitudes Created by Necessity," Comment a. "History and

rationale" (2000 & Supp. 2015), recognizes both presumed intent and public policy as a basis for easements by necessity, in these words:

"Both justifications for the rule have force. The presumed intent of the parties justifies finding that the conveyance included rights necessary to avoid rendering the property useless. Parties to a conveyance would very rarely intend deliberately to render useless either property conveyed or retained by the grantor. Public policy also justifies the rule because it avoids the costs involved if the property is deprived of rights necessary to make it useable, whether the result is that it remains unused, or that the owner incurs the costs of acquiring rights from landowners who are in a position to demand an extortionate price because of their monopolistic position."

Easements by necessity have their roots in English common law, where they date to the reign of Edward I (1272-1307), based on the maxim that "anyone who grants a thing to someone is understood to grant that without which the thing cannot exist." James W. Simonton, "Ways By Necessity," 25 Colum. L. Rev. 571, 572-573 & n. 5 (1925), citing inter alia, *Lord Darcy v. Askwith*, (K.B. 1618) Hobart 234, 80 Eng. Rep. 380 and *Liford's Case*, (K.B. 1614) 11 Co. Rep. 46b, 77 Eng. Rep. 1206.

It was settled law in 19th century Massachusetts that when one "grants land, having other land in the rear, he be entitled to this way of necessity, although he might have secured it by reservation in his grant … ." *Pernam v. Wead*, 2 Mass. 203, 206, (1806).

There the court relied on, among other cases cited by plaintiff's counsel, *Clark v. Cogge*, (1606) Cro. Jac. 170, 171, 79 Eng. Rep. 149, 149, in which it was stated that "if a man hath four closes lying together, and sells three of them, reserving the middle close, and hath not any way thereto but through one of those which he sold, although he reserved not any way, yet he shall have it, as reserved unto him by the law … ."

English easement by necessity cases, including but not limited to those cited above, were cited by Chief Justice Lemuel Shaw in *Bowen v. Conner*, 60 Mass. (6 Cush.) 132, 136 (1850). Where property conveyed would otherwise be landlocked, "[t]his strengthens the conclusion, that it was the intention of both parties, that such a way should be established." 60 Mass. (6 Cush.) at 135.

The fact that property is otherwise landlocked and useless is sufficient to establish the presumed intention to imply a right of access into the deed severing common ownership. *Adams v. Planning Board of Westwood*, 64 Mass. App. Ct. 383, 390-391 (2005) ("[A] conveyance of land that renders the grantor's remaining land landlocked ordinarily gives rise to an easement by necessity, based on the presumed intention of the grantor to retain access to his remaining land. See *Bedford v. Cerasuolo*, 62 Mass. App. Ct. 73, 77 (2004)."). "This presumption prevails over the ordinary covenants of a warranty deed." *Davis v. Sikes*, 254 Mass. 540, 545-546 (1926), quoting *New York & N.E.R. Co. v. Board of Railroad Com'rs.*, 162 Mass. 81, 83 (1894).

This strong presumption of intent to provide access where property is landlocked has been rebutted successfully only in cases in which the facts compelled that result. Factual context is essential for an accurate picture of how the easement by necessity doctrine has been applied in specific situations by Massachusetts cases.

In *Gayetty v. Bethune*, 14 Mass. 49, 55-56 (1817), the presumption of intent to create an easement by necessity was overcome by the fact that the only necessity was for access to an old barn that no longer existed when common ownership was severed.

In *Orpin v. Morrison*, 230 Mass. 529, 533-534 (1918), "the actual intention of the parties as disclosed by the oral testimony makes it plain that there was express understanding that there should be no right of way over other land of the grantor. Hence there is no right of way to the lot over land of Morrison and Berry."

Home Inv. Co. v. Iovieno, 243 Mass. 121, 123-125 (1922), held that one could not claim by necessity a right to exclusively appropriate land by building structures on it.

In *Joyce v. Devaney*, 322 Mass. 544, 549-550 (1948), an attempt to establish an easement by necessity was defeated by the well-established rule that an express easement negates any intent for an implied easement.

Where property would be left landlocked by a severance of common ownership, we believe that the intent to create an easement by necessity should be rebuttable only by clear and convincing evidence, both under the Massachusetts cases reviewed above and under Restatement (Third) of Property (Servitudes) §2.15 (2000 & Supp. 2015), which states as follows (italics added for emphasis):

"A conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights, *unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights*."

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