

# Property - Implied Easements in Wisconsin

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## PROPERTY—IMPLIED EASEMENTS IN WISCONSIN

The purpose and scope of this article is to discuss the history of the implied easement in Wisconsin and point out the difference between it and the easement of necessity, and the extent to which this state has recognized the former theory. Strictly speaking, the term "implied easement" is somewhat of a misnomer when used to distinguish the type of easement primarily involved here from the easement of necessity, since the latter is also based on implication, at least in part. However, for the purpose of convenience of reference the expression "implied easement" will be limited herein to mean an easement that is created in favor of the grantee by implication when the owner of two tracts of land, who has used one of them in reference to the other in such a manner that, had they not been owned by the same person, an easement in favor of one of the tracts and against the other would exist, sells the quasi dominant tract with no reference in the deed to the use previously so made. Such a use by the common owner of the two tracts of land is denominated a quasi easement.

The theory of implied easements, accepted in the majority of the states,<sup>1</sup> is based purely upon the assumed intention of the parties at the time the transfer of land was made, the reasoning being that the parties are presumed to contract with reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts of land. Since the theory is based on the assumption that the quasi easement is openly existing and obvious to both of the parties at the time of transfer, in order that they may be presumed to have contracted in reference to it, the previously existing quasi easement must have been one that was apparent, permanent, continuous, and to some degree, necessary.<sup>2</sup> In the easement of necessity, on the other hand, those elements do not have to be proven since the implication of the intent to grant an easement does not rest on the use made of the premises by the common grantor, but rather on the need of the easement by the grantee in order to make use of the land conveyed, since it is a presumption of law that "when a person grants anything, he is supposed to grant that also without which the thing cannot be used."<sup>3</sup> Needless to say there is a greater degree of necessity

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<sup>1</sup> 28 C.J.S. 687.

<sup>2</sup> 28 C.J.S. 691.

<sup>3</sup> Translation of the Latin maxim, *Quando aliquis aliquid concedit, concedere videtur et id sine quo res uti non potest*, as given in Black's Law Dictionary, Third Edition (1933).

required for the latter theory than for the former,<sup>4</sup> and it is required in either theory that both parcels of land, that over which the easement is to lie and that which is to be the dominant estate, are owned by the grantor at the time of the conveyance.<sup>5</sup> And it is worthy of note that though the easement of necessity is based on the presumed intent of the parties as indicated above, it is also based in no small part on the compelling logic that it is beneficial to the public to have all land utilized.<sup>6</sup>

Historically the easement of necessity was the first to develop, the implied easement being more or less an extension or evolutionary product of the former, and though the former is a rule of property law firmly embedded in our jurisprudence,<sup>7</sup> Wisconsin from the beginning has shied away from any extension of it. When the theory of the implied easement, based as it is on a previously existing quasi easement, was first presented to the Wisconsin Court<sup>8</sup> they dismissed quite perfunctorily the idea of any right being founded on the use that the common owner of two parcels of land made of one of the parcels in respect to the other.<sup>9</sup> And later, in *Dillman v. Hoffman*<sup>10</sup> the pen of Chief Justice Ryan covered the field of implied easements quite thoroughly, though by way of obiter dicta, and concluded with the following observation: "The whole doctrine was originally restricted to ways of necessity. . . and it may well be doubted whether it might not have been wiser to have always restricted both implied grants and implied reservations to easements of necessity."<sup>11</sup>

In spite of the fact that the decision in the *Dillman* case in regard to implied easements was merely dicta, it contained a reservoir of

<sup>4</sup> Wisconsin requires "reasonable necessity, as distinguished from mere convenience," *Dillman v. Hoffman*, 38 Wis. 559, 574 (1875), which is a requirement so strict in the case of a way that "it never exists where one may reach the highway over his own land, even though it may be difficult and expensive to accomplish it," *Bachausen v. Mayer*, 204 Wis. 286, 288, 234 N.W. 904 (1931), whereas the necessity required to establish the implied easement is variously defined as highly convenient and beneficial, reasonable, or convenient. Tiffany, *Real Property*, Third Edition Sec. 786 (1939).

<sup>5</sup> Tiffany, *Real Property*, Abridged Edition, p. 554 (1940).

<sup>6</sup> "The whole doctrine was originally restricted to ways of necessity, because it is *Pro Bono Publico* that the land shall not be unoccupied." *Dillman v. Hoffman*, supra, note 4.

<sup>7</sup> *Jarstadt v. Smith*, 51 Wis. 96, 8 N.W. 29 (1881); *Galloway v. Bonesteel*, 65 Wis. 79, 26 N.W. 262 (1886); *Benedict v. Barling*, 79 Wis. 551, 48 N.W. 670 (1892).

<sup>8</sup> *Mabie v. Matteson*, 17 Wis. 1 (1864).

<sup>9</sup> In that case however, counsel did not argue the theory of implied easement based on a previously existing quasi easement, but rather he claimed that the use the common owner made of one tract of land in relation to the other was a right that passed 'with appurtenances' in the deed. The court struck that assertion down with the quotation from 2 Washburn on Real Property 623, that "in order to pass as appurtenant, there must . . . be an existing easement, in the technical sense, meaning thereby the right to use *another's* land. . ."

<sup>10</sup> 38 Wis. 559 (1875).

<sup>11</sup> p. 574.

language directed against the adoption of the theory that later opinions have deferred to and freely quoted from. In *Fisher v. Laack*<sup>12</sup> the court was asked to imply an easement where the degree of necessity required for an easement of necessity was lacking and they categorically declined to do so with the curt statement that "The only methods known to the law by which one person may acquire an easement in the lands of another are by grant or prescription, or in the case of a right of way, by necessity."<sup>13</sup> The court went over the entire question again in the case of *Miller v. Hoeschler*<sup>14</sup> and reaffirmed the language of the earlier decisions. There a father owned a lot with a house on it that adjoined another smaller strip of land located in such a manner that the strip lay between the father's lot and the street. He used the strip as a dooryard and acquired title to it by adverse possession. Upon his death, the original lot was devised to one of his sons and, as the adjoining strip was not mentioned in the will, it descended to all the heirs jointly. They in turn conveyed it to the defendant and, in the meanwhile, the son had conveyed the lot and house to the plaintiff. When the defendant blocked off the strip so that it could no longer be used as a dooryard, the plaintiff brought suit to enjoin him from continuing to do so, based on the claim that an easement to use the strip as a dooryard had impliedly passed to the son under the theory of implied easement based on a previously existing quasi easement, and through the son, to the plaintiff. Though an argument might be made that a devise is not a proper type of conveyance upon which to base an implied easement of this type, still the court faced the issue squarely and based their decision entirely on the reasoning that Wisconsin would not imply an easement under those circumstances where the use of the strip was not reasonably necessary to the use of the house and lot. The reasons for rejecting the rule that were first aired by Chief Justice Ryan were approved and aptly stated in the following quotations:

"It is so easy, in conveying a defined piece of land, to express either any limitations intended to be reserved over it, or to be conveyed with it over other land, that the necessity of raising any such grant or reservation by implication is hardly apparent . . . Such rights outside the limits of one's proper title seriously derogate from the policy of both our registry statutes and our

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<sup>12</sup> 76 Wis. 313, 45 N.W. 104 (1890).

<sup>13</sup> p. 319. There the easement was claimed to be implicable from the words of the deed and was not based on the theory of the implied easement as discussed above. However the decision of the court was directed against implying any easement other than the one based on necessity, and frequent quotations were made from *Dillman v. Hoffman*, supra, note 4.

<sup>14</sup> 126 Wis. 263, 105 N.W. 790 (1905).

statute against implication of covenants in conveyances."<sup>15</sup>

And on another ground:

"As the city grows, large grounds appurtenant to residences must be cut up to supply more residences near to business, and it must be expected that land will be occupied by the apartment building covering all the ground of the owner. The cistern, the outhouse, the cesspool, and the private drain must disappear in deference to the public waterworks and sewer; . . . Hence there can be but slight reason to suppose that, upon the sale of that part of an entire tract on which stands a house, it is intended to subject other parts of the whole tract to such obsolescent uses, although the owner of the whole had so devoted them."<sup>16</sup>

The fact that the prediction of the court, that the trend of the majority of the states was towards the view they espoused, failed to materialize, does not vary the rule of law they laid down, and the foregoing reasoning and that of Chief Justice Ryan upon which it is based, has been resorted to several times to strike down the assertion of any right based on an implied easement.<sup>17</sup> The most recent case is *Tarman v. Birchbauer*<sup>18</sup> where the court deemed the law so firmly established against the theory of implied easements as to uphold a lower court decision granting a summary judgment for lack of even a triable issue.

From the above discussion it appears that the declaration in *Fisher v. Laack* that only by grant or prescription, or in the case of a right of way, by necessity, can an easement be created in Wisconsin, is an

<sup>15</sup> p. 269. This argument appears to be based on the observations of Chief Justice Ryan that "alienations of land are, or ought to be, grave and deliberate transactions," and when dealing with such alienations and the rights deriving therefrom "it is always better to let written contracts speak for themselves." *Dillman v. Hoffman*, supra, note 4, p. 573.

<sup>16</sup> p. 268. Thus it is seen that the identical theory of public policy that in part supports the easement of necessity, that of utilizing land to the fullest extent, militates, in the eyes of the Wisconsin Court at least, against the adoption of the theory of implied easements. However at the time this reasoning was first advanced by the court (1875) ours was a young state and Chief Justice Ryan compared the needs of our law with that of England, where the doctrine of implied easements first began to develop, in the following language; "In a new state like this, the uses of land and the structures on land are more variable with the growth of population and business, than in England or the older states; and it might tend to impede the sale and improvement of real property, if old uses of soil or buildings should be too easily placed beyond the power of owners by easements implied by conveyances in their chain of title." p. 574. It seems a reasonable conclusion that our state is as developed now as England was then and hence the need for judicial encouragement of free use of land, necessary in a territory only first developing, has passed. That would remove one of the two expressed objections to the theory of the implied easement and leave the court free to consider the merits of the other objection, namely the desirability of having all things having to do with land in writing, against the justice inherent in presuming that the parties meant to include in their conveyance that which was open and obvious, and apparently appurtenant to the land conveyed.

<sup>17</sup> *Depner v. United States National Bank*, 202 Wis. 405, 232 N.W. 851 (1930); *Frank C. Schilling Co. v. Detry*, 203 Wis. 109, 233 N.W. 635 (1931).

<sup>18</sup> 257 Wis. 1, 42 N.W. (2d) 158 (1950).

apt summary of the Wisconsin position in this matter. There is however, at least one instance where an easement other than a way was implied, though in that case the easement was based on necessity. There the common owner of two lots constructed a building on one of them very close to the dividing line between the two, and upon conveyance of the tract upon which the building stood the court implied an easement of support for the building in the adjacent lot that the common owner retained.<sup>19</sup> And there is a recent case where the court allowed the plaintiff to install an electric pump and pipes to get water from a well where he had an express easement "to use the well" though the water had previously been hauled out by the bucket. They proceeded upon the theory that the easement did not describe the means by which the water was to be taken from the well and the parties placed their own construction on its terms when they first installed the pump under an oral agreement.<sup>20</sup> A dissent by Justice Broadfoot that the decision tended to relax the rule that easements can only be acquired in this state by grant, prescription, or necessity went unheeded and the decision affords some grounds for the argument that our court is using implication to broaden the scope of an already existing easement. However even a repeated and careful reading of those two cases fails to disclose the slightest indication that our Supreme Court is beginning to yield to the weight of the majority and allow the theory of implied easements, as a means of *creating* an easement, to gain a foothold in our law. Indeed, the more thorough the search, the more evident it appears that the Wisconsin position against the adoption of the theory is well cemented into the body of our property law, and rules of property law, once determined, are extremely resistive to change or even modification. And it appears to be more worth the while of one seeking to fasten onto his instrument of conveyance, an easement that he thought he was getting, to sound out the law dealing with reformation of deeds where the situation permits,<sup>21</sup> or to try to find, in the use made of the quasi easement by the common owner, a dedication to the public use.<sup>22</sup>

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<sup>19</sup> Christensen v. Mann, 187 Wis. 445, 204 N.W. 498 (1925). And even that fact situation seems to fit into the observation of the court in Miller v. Hoeschler, supra, note 14: "We cannot avoid the conclusion that, even if in some extreme cases there must be any easement other than a right of way implied from necessity, that necessity must be so clear and absolute that without the easement the grantee cannot in any reasonable sense be said to have acquired that which is expressly granted; such indeed as to render inconceivable that the parties could have dealt in the matter without both intending that the easement be conferred." p. 270.

<sup>20</sup> Scheeler v. Dewerd, 256 Wis. 428, 41 N.W. (2d) 635 (1950).

<sup>21</sup> As suggested in Fisher v. Laack, supra, note 12.

<sup>22</sup> As brought out in Schilling v. Detry, supra, note 17.