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Easements--Way of Necessity Where Other Mode of Access

a third person by securing a promise from the promisor to pay the promisee's creditor, does not come within the meaning of "sole" in the statute[7] and that such contract must be enforced in a suit in equity.[8] Some of the cases permit recovery under the doctrine of subrogation.[9] Since in the principal case the distinction between the two types of beneficiary contracts was not called directly to the attention of the court, no attempt being made to distinguish between them, it is doubtful whether the court would follow the principal case where such distinction would be called directly to their attention.[10] But the principal case may be said to stand, on its facts, for the proposition that the creditor-beneficiary type of contract may now be enforced in an action at law in West Virginia.

EASEMENTS — WAY OF NECESSITY WHERE OTHER MODE OF ACCESS — CREATION OF EASEMENT BY IMPLIED GRANT. — The plaintiff, owner of part of the dominant estate and an appurtenant easement in a private alley separated therefrom by the servient estate, seeks to enjoin the defendant from obstructing its alleged way of necessity over the servient estate. *Held,* that no way of necessity existed since another mode of ingress and egress was available to the plaintiff. Decree denying injunction affirmed. *Beckley National Exchange Bank v. Lilly.*[1]

The right to a way of necessity over the servient estate has been generally denied where there are other modes of ingress and egress.[2] This rule is consistently followed in some jurisdictions

[7] Nutter v. Sydenstricker, 11 W. Va. 535 (1877); King v. Scott, 76 W. Va. 59, 84 S. E. 454 (1915); Hamilton v. Wheeling Public Service Co., 88 W. Va. 573, 107 S. E. 401 (1921).

[8] *Supra* n. 5.

[9] Petty v. Warren, *supra* n. 5.

[10] Judge Hatcher stated the policy of the court: "It is true that the practice pursued by claimants was followed in the case of . . . . But no objection was raised in that case to the manner of bringing the suit, and its violation of equity procedure was not brought to our attention. Our inadvertence in that case must not be taken as approval of that practice." State v. Arthur, 106 W. Va. 559, 561, 146 S. E. 619 (1928).

[1] 182 S. E. 767 (1935).

[2] Dorsey v. Dorsey, 109 W. Va. 111, 153 S. E. 146 (1930); Whitehouse v. Cummings, 83 Me. 91, 21 Atl. 743 (1890); Wills v. Reid, 86 Miss. 446, 38 So. 793 (1905); Feoffees of Grammar School v. Proprietors of Jeffreys' Neck Pasture, 174 Mass. 572, 55 N. E. 462 (1899); Vossen v. Dautel, 116 Mo. 379, 22 S. W. 734 (1893); Batchelder v. National State Capital Bank, 66 N. H. 386, 22 Atl. 592 (1891); Staples v. Cornwall, 190 N. Y. 506, 83 N. E. 1132 (1907).

even though hardship results.[3] Some courts have given the rule a more liberal interpretation,[4] however, so as to include cases where other possible modes of access cannot be made available without labor and expense disproportionate to the value of the dominant estate.[5] This interpretation has been extended in some cases to include a "reasonable necessity" where the party has another way, but such way is so limited as to be inadequate to permit the full enjoyment of the dominant estate.[6] Though the dominant estate in the instant case may be deprived of its full enjoyment by the decision, still a more liberal interpretation would have been a marked extension of the rule as it now exists in West Virginia.[7] In the light of the exceptions[8] to the strict rule as it exists in our jurisdiction, our court might have implied a way of necessity under the reasonable enjoyment theory.

An opposite result could also have been reached had the court found that there was an implied grant of an easement.[9] There is no question but that at the time the dominant and servient estates were severed that this way was apparent[10] and reasonably necessary[11] to the enjoyment of the estates granted.[12] Our court

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[3] Meredith v. Frank, 56 Ohio St. 479, 47 N. E. 656 (1897); Lankin v. Terwilliger, 22 Ore. 97, 29 Pac. 268 (1892).

[4] Uhl v. Ohio River R. R. Co., 47 W. Va. 59, 34 S. E. 934 (1899); Trump v. McDonnell, 120 Ala. 200, 24 So. 353 (1897); Graines v. Lunsford, 120 Ga. 370, 47 S. E. 967 (1904); Schmidt v. Quinn, 136 Mass. 575 (1883); Galloway v. Bonesteel, 65 Wis. 79, 26 N. W. 262 (1886).

[5] Crotty v. New River & Pocahontas Coal Co., 72 W. Va. 68, 78 S. E. 233 (1913); Smith v. Griffin, 14 Colo. 429, 23 Pac. 905 (1890); Watson v. French, 112 Me. 371, 92 Atl. 290 (1914).

[6] Simonton, *Ways by Necessity* (1927) 33 W. VA. L. Q. 64, 74; Goodall v. Godfrey, 53 Vt. 219 (1880); Smith v. Griffin, *supra* n. 5; Schmidt v. Quinn, *supra* n. 4; Pettingill v. Porter, 90 Mass. 1 (1864); Crotty v. New River & Pocahontas Coal Co., *supra* n. 5.

[7] Miller v. Skaggs, 79 W. Va. 645, 91 S. E. 536 (1917); Henrie v. Johnson, 28 W. Va. 190 (1886); Uhl v. Ohio River R. R. Co., *supra* n. 4; Crotty v. New River & Pocahontas Coal Co., *supra* n. 5; Hoffman v. Shoemaker, 69 W. Va. 233, 171 S. E. 198 (1911); Dorsey v. Dorsey, *supra* n. 2. *Cf.* Phoenix Nat'l Bank v. United States Security Trust Co., 100 Conn. 622, 124 Atl. 540, 34 A. L. R. 963 (1924).

[8] Uhl v. Ohio River R. R. Co., *supra* n. 4; Crotty v. New River & Pocahontas Coal Co., *supra* n. 5.

[9] Smyth v. Brick Row Realty Co., 97 W. Va. 40, 124 S. E. 499 (1924); East Atlanta Land Co. v. Mower, 138 Ga. 380, 75 S. E. 418 (1912); Waters v. Greenleaf Johnson Lumber Co., 115 N. C. 648, 20 S. E. 718 (1894); Miller v. Skaggs, *supra* n. 7.

[10] Miller v. Skaggs, *supra* n. 7.

[11] In construing the right to a way by necessity, our court has once held that it must be an "absolute necessity", while only a "reasonable necessity" is necessary to imply the grant of an easement. Dorsey v. Dorsey, *supra* n. 2; Miller v. Skaggs, *supra* n. 7.

[12] It should be kept in mind that two separate estates were granted in the

has found that such an easement does not have to be continuous in nature.[13] Since this would be an implication of a grant, it would of course be subject to a liberal construction in favor of the grantee.[14]

INSURANCE — FALSE STATEMENTS IN APPLICATION FOR LIFE POLICY AS DEFENSE TO LIABILITY — DUTY OF COMPANY'S AGENT TO RECORD CORRECTLY APPLICANT'S ANSWERS. — Action was brought to recover compensation under the disability clause of an insurance policy. The defense was that a prior injury had been falsely denied in the application. Although the insured had truthfully admitted this previous injury, incorrect answers were recorded by the company's medical examiner. *Held,* that the false statements in the application constituted no defense, since the insurance company was bound by the act of its agent. *Kincaid v. Equitable Life Assurance Society.*[1]

The rule adopted by the majority of the courts is that if the agent falsely inserts answers in the application without the knowledge of the person seeking insurance, the company will then be estopped to urge the defense of misrepresentation.[2] This doctrine prevails apparently without regard to whether such acts of the agent were done fraudulently[3] or by mistake.[4] A few jurisdictions, however, have mistakenly invoked the parol evidence rule in refusing to admit evidence of the oral transaction.[5] In the federal courts, answers falsely inserted by the agent may be used as a

principal case; (1) the dominant estate, and (2) the easement in the private alley.

[13] "The legal principle requiring an easement to be 'continuous' as a requisite to a grant or reservation thereof by implication, is not applicable to a way." Hoffman v. Shoemaker, *supra* n. 7.

[14] Deer Creek Lumber Co. v. Sheets, 75 W. Va. 21, 83 S. E. 81 (1914).

[1] 183 S. E. 40 (W. Va. 1935).

[2] Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304, 10 S. Ct. 87 (1889); Phoenix Ins. Co. v. Warttenburg, 79 Fed. 245 (C. C. A. 9th, 1897); McCall v. Phoenix Mutual Life Ins. Co., 9 W. Va. 237 (1876); Medley v. German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101 (1904); Insurance Co. v. Williams, 39 Ohio St. 584 (1883); Mink v. Ins. Co., 76 Cal. 50, 14 Pac. 837 (1888).

[3] Creed v. Sun Fire Office, 101 Ala. 522, 14 So. 323 (1893); Germania Fire Ins. Co. v. McKee, 94 Ill. 494 (1880).

[4] Bennett v. Agricultural Ins. Co., 106 N. Y. 243, 12 N. E. 609 (1887).

[5] McCoy v. Metropolitan Life Ins. Co., 135 Mass. 82 (1882); Thomas v. Commercial Union Assur. Co., 162 Mass. 29, 37 N. E. 672 (1894); Franklin Fire Ins. Co. v. Martin, 40 N. J. Law 568 (1878); Martin v. Ins. Co. of North America, 57 N. J. Law 623, 31 Atl. 213 (1895).