

HIGHWAYS—RIGHT OF ACCESS BY PRIVATE ROAD ACROSS INTERVENING LAND—DEGREE OF NECESSITY REQUIRED TO SUSTAIN RIGHT—[Kentucky].— Plaintiff instituted proceedings to condemn a passway over defendant's land, defendant having refused to grant an easement. The parties, adjoining land-owners, were formerly separated by a road. The state built a new highway not following the old so that the former was entirely within defendant's land. Plaintiff's only way of reaching the highway exclusively over his own land was to construct at great expense a passway one-fifth of a mile long and entering the highway at an acute and hazardous angle. *Held* for plaintiff, it being in the public interest that he be granted the passway.¹

This case shows an interesting and intelligent construction of a Kentucky statute² designed to alleviate the rigor of the common-law rule that no man can have a right of way over the land of a stranger without his consent.³ The court in holding that the necessity contemplated by the statute is not an absolute but a reasonable necessity followed its own earlier decision of *Vice v. Eden*.⁴

In the absence of statute one seeking a passway over the land of an unwilling adjacent landowner is forced to establish the right to a way of necessity.⁵ Since ways of necessity are incident only to the grantor-grantee relationship, it is uniformly held that there must at some time have been unity of ownership of the dominant and servient estates to support the claim.⁶ In consequence statutes were generally adopted providing for private roads and ways. The courts split sharply as to the constitutionality⁷ of these statutes, some feeling that they sought to authorize the taking of private property for a private use,⁸ others upholding them on the ground that the taking was really for a public use because the public *can* use such roads and ways.⁹

1. *Peery v. Hill* (Ky. 1938) 120 S. W. (2d) 762.

2. Ky. Carroll's Stats. Anno. (Baldwin's Rev. 1936) sec. 3779a-1. The statute provides that whenever it is necessary for a person to have a private passway over the land of one or more persons to enable him to attend courts, elections, a meeting house, a mill, a warehouse, ferry, or a railway depot, most convenient to his residence, commissioners shall be appointed to investigate, and, if favorable to the establishment of the passway, to recommend the condemnation of a passway not to exceed twenty feet in width.

3. On the common-law doctrine, see *Cooper v. Maupin* (1840) 6 Mo. 624, 35 Am. Dec. 456; *Ward v. Bledsoe* (Tex. Civ. App. 1937) 105 S. W. (2d) 1116; *Nichols v. Luce* (1834) 24 Pick. (Mass.) 102, 35 Am. Dec. 302; *Lewisburg v. Emerson* (1927) 5 Tenn. App. 127.

4. (1902) 113 Ky. 255, 68 S. W. 125, 24 Ky. L. Rep. 132.

5. *Barr v. Flynn* (1886) 20 Mo. App. 383.

6. *Collins v. Prentice* (1842) 15 Conn. 39, 38 Am. Dec. 61; *Ellis v. Blue Mountain Forest Ass'n* (1898) 69 N. H. 385, 41 Atl. 856, 42 L. R. A. 570; *McKinney v. Duncan* (1909) 120 Tenn. 265, 118 S. W. 683; see also cases cited in note 3, *supra*.

7. See U. S. Const. Amend. V; Mo. Const. art. II, sec. 20.

8. *Welston v. Dickson* (1894) 38 Neb. 767, 57 N. W. 559, 22 L. R. A. 496; *Dickey v. Tennon* (1858) 27 Mo. 373.

9. *Sherman v. Buick* (1867) 32 Cal. 241, 91 Am. Dec. 577. The cases are collected in (1892) 16 L. R. A. 81, and (1902) 22 L. R. A. (N. S.) 102.

It is a general principle that one has no right of way over the land of another when he can reach the public highway over his own land, however convenient and useful another way might be.¹⁰ The private way statutes contain the word "necessary" in reference to the establishment of the way, but here the harshness of the general principle has been relieved by decisions construing the legislation as contemplating a reasonable necessity,¹¹ probably the majority position today. Some courts, however, still hold to the earlier requirement of strict or absolute necessity.¹² Generally mere steepness, narrowness, circuitousness, *et cetera*, of the way over one's own land will not support a claim for a way over another's land;¹³ but if the way over one's own land can be obtained only at the cost of labor and expense disproportionate to the value of the property, a way should be condemned.¹⁴

It is to be regretted that Missouri has not yet enacted a statute providing for private roads and ways. Inasmuch as the Missouri constitution restricts all private ways to ways of necessity,¹⁵ the plaintiff in the principal case would have been remediless had the instant case arisen here. It seems probable on the authority of *Wiese v. Thien*,¹⁶ that the courts would adopt the rule of reasonable necessity should such a statute be passed.

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10. *Cooper v. Maupin* (1840) 6 Mo. 624, 35 Am. Dec. 456; *Dorsey v. Dorsey* (1930) 153 S. E. 146, 109 W. Va. 111; *Harris v. Caperton* (1910) 141 Ky. 73, 132 S. W. 157; *Birmingham Trust & Savings Co. v. Mason* (1930) 222 Ala. 38, 130 So. 559; *Blackhausen v. Mayer* (1931) 204 Wis-286, 234 N. W. 904, 74 L. R. A. 1245.

11. *Pettingil v. Porter* (1864) 8 Allen (Mass.) 1, 85 Am. Dec. 671; *Crotty v. New River Coal Co.* (1913) 72 W. Va. 68, 78 S. E. 233, 46 L. R. A. (N. S.) 173. For a narrow construction of "reasonable necessity," see *Haskell v. Wright* (1873) 23 N. J. Eq. 389; *Carey v. Rae* (1881) 58 Cal. 159, and cases discussed in Note (1908) 17 L. R. A. (N. S.) 1020-21. For a more liberal construction see *Myers v. Dunn* (1881) 49 Conn. 71; *Camp v. Whitman* (1893) 51 N. J. Eq. 467, 26 Atl. 917; *Grammar School v. Jeffry's Neck Pasture* (1899) 174 Mass. 572, 55 N. E. 462, holding that the existing way must meet the requirements of the uses to which the property may naturally be put.

12. *Nichols v. Luce* (1834) 24 Pick. (Mass.) 102; *United States v. Rindge* (D. C. S. D. Cal. 1913) 208 Fed. 611; *Hill v. Wayne*, (1915) 193 Ala. 312, 325, 69 So. 445; *Lapique v. Morrison* (1916) 29 Cal. App. 136, 137, 154 Pac. 881; Note (1919) 5 A. L. R. 1557.

13. *Vossen v. Dautel* (1893) 116 Mo. 379, 22 S. W. 734; *Violet v. Martin* (1922) 62 Mont. 335, 205 Pac. 221. *Brady v. Correll* (Tenn. App. 1936) 97 S. W. (2d) 448, is an exception, having arisen under a statute even more liberal than the one in the principal case; in Tennessee a party need only prove that he had no *convenient* outlook from his land to the highway.

14. See (1908) 17 L. R. A. (N. S.) 1020, stating that no case has gone so far as to deny a way by necessity when another way can be made available only at a wholly disproportionate expense; accord, *Wiese v. Thien* (Mo. 1919) 214 S. W. 853, 5 A. L. R. 1552.

15. Mo. Const. art. II, sec. 20; *Barr v. Flynn* (1886) 20 Mo. App. 383.

16. (Mo. 1919) 214 S. W. 853, 5 A. L. R. 1552.