plied. If the facts are not such that the way may be otherwise implied, the *prima facie* right of the plaintiff to have his estate unencumbered by the way must prevail. We think the way cannot properly be implied from the facts which are stated. We therefore sustain the exceptions and grant the plaintiff a new trial.

Exceptions sustained.

(Note by Editor of *American Law Register*.)

After reading the above opinion one is impressed with the thought that there is much to be said in favor of the decision of the court below. It might well be argued that as the use of the well was reserved equally for the benefit of all portions of the "homestead estate" at the time of the sale to Delaney and the testator, during his ownership of both sections of land, having impressed upon the portion owned by the plaintiff a *quasi* servitude or easement, for real servitude or easement, of course, could not be, the land servient and dominant belonging to the same person, and that fact being presumably known to the devisees, the son and the daughter of the testator probably his heirs, the land would naturally pass to the devisees, with the respective portions charged and benefited, as they were in the testator's lifetime; unless something should appear in the devise, manifesting the intention of the testator to change the character of the enjoyment of the land; and that the devise in fee simple is not enough *per se* to manifest such intention since the enjoyment of an estate in fee simple is by no means inconsistent with its enjoyment subject to an easement, and as the will is to be taken as a whole and the intention of the testator collected therefrom (3 Burr. 1541, 1581; *Ruston* v. *Ruston*, 2 Dall. 244), if the devise to plaintiff's grantor "gave the devisee as perfect an estate as the devisor himself had and that was an estate so unencumbered;" so the devise to the defendant gave her "as perfect an estate as the devisor himself had" and that was an estate with the advantage of the use of the well annexed thereto and solemnly reserved to it, and that as to the use of the well, the way, long used by the testator, was necessary, as no presumption could be raised that the owner of the Delaney lot would permit a new and more burdensome way to be laid out upon his premises—as he certainly could not be compelled to—the way having been once located, the power of location was gone for ever, and in this case, the effect would be not merely to change the way but to create an additional and distinct one.

The English authorities seem to uphold the decision and to show a tendency to restrain ways by implication to those of strict necessity (though occasionally straining the word "necessity" and sometimes taking a more liberal view as to the character of the necessity), and by no means to favor the granting of ways by implication as original rights, or their revival after extinction by unity of possession, and, in view of the assumed non-continuous character of ways, not to apply to that species of easements the rule laid down in Gale on Easements 40. "Easements which are apparent and continuous are not merely those which *must* necessarily be seen, but those which *may* be seen or known on a careful inspection by a person ordinarily conversant with the subject."

In *Whalley* v. *Thompson*, 1 B. & P. 371 (1799), it was held that a way extinguished by unity of possession did not revive on severance. In *Plant* v. *James*, 5 B. & Ad. 794 (1833), Lord Denman said, "If the grantor wishes to revive or create such a right he must do it by express words or introduce the words therein used and enjoyed "in which case easements existing in point of fact though not existing in point of law would be transferred to a grantee."

In *Glave* v. *Harding*, 27 L. J. (N. S.) Exch. 286 (1858), Baron Bramwell appears to be disposed to apply a somewhat more liberal rule to ways and to grant that there might be such a thing as a continuous way. "It [a lease] did not grant the right in terms and the only way in which it could grant it was that the condition of the premises, at the time when the lease was granted, showed that it was intended that the right of way should be exercised on the principle I have adverted to, that by the devolution of the tenements a right of way to a particular door or gate would, as an apparent or continuous easement, pass to the owners and occupiers of both of them. But I think that the way in question is not a continuous and apparent easement within the principle of law * * * I found my opinion upon the condition of the premises at the time the lease was granted."

In most of the English cases, there were other outlets besides the one claimed as a way by implication and as reasonably necessary, and therefore they do not exactly cover the point of the principal case; indeed in *Pheysey* v. *Vicary*, 16 M. & W. 484, it was doubted by Alderson, B., whether a new trial should not be granted to try whether the way claimed were not necessary to the *convenient* occupation of the house, although there was another outlet from the premises. In *Dodd* v. *Burchell*, there was an additional way.

Necessity has in some cases been given a more liberal interpretation. In *Pyer* v. *Carter*, 1 H. & N. 972, it was said that by necessity should be understood the necessity at the time of conveyance and as matters then stood without alteration. This case which was not that of a way, has run the gauntlet of criticism and it is questionable how far it is authority beyond its own facts. In *Ewart* v. *Cochrane*, 8 Jur. 925 (1861), Lord Campbell said: "When two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used and was necessary for a comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant, if there be the usual words of conveyance."

Polden v. *Bastard*, 4 B. & S. 258, does not materially differ from the principal case, except perhaps in the particular, that in the English case, there was evidence that water could be obtained on the premises of the defendant by digging a well of a certain depth, but this distinction can be easily resolved to a mere question of the burden of proof, which Chief Justice Durfee thinks should rest upon the person claiming the easement.

In the United States, in Massachusetts, in the case of *Pettingill* v. *Porter*, 8 Allen 1 (1869), it was left to the jury to say whether there would be unreasonable labour and expense in constructing another way, and in the Supreme Court, Chapman, J., said: "The word 'necessity' cannot reasonably be held to be limited to physical necessity. If it were so, the way in question would not pass with the land if another way could be made by any amount of labour or by any possibility."

In *Fetters* v. *Humphrey*, 3 C. E. Green (Ch.) 262 (1867), Zabriskie, Ch., remarked, "If until the time of severance of title there has been a way, or drain, or other matter in the nature of an easement, from one of the parcels through the other, established and kept up by the common owner of both, and necessary for the