Dodd v. *Burchell*, 1 H. & C. 113; *Polden* v. *Bastard*, 4 B. & S. 258, and affirmed, Law Rep. 1 Q. B. 156; *Thompson* v. *Waterlow*, Law Rep. 6 Eq. 36; *Langley et al.* v. *Hammond*, Law Rep. 3 Exch. 161; and see *Pearson* v. *Spencer*, 1 B. & S. 571, and affirmed, 3 B. & S. 761; *Daniel* v. *Anderson*, 31 L. J. N. S. 610. cited in Washburn on Easements, 3rd ed. 59.

In *Dodd* v. *Burchell*, 1 H. & C. 113, the owner of an estate had conveyed a part of it upon which there was a way which he claimed to be entitled to by implied reservation, upon the ground that there had been a continuous user of it for a number of years, and that without it the land could not be reasonably enjoyed. The Court of Exchequer decided against the claim. Chief Baron POLLOCK said: "There is a wide difference between that which is substantial, as a conduit or watercourse, and that which is of an incorporeal nature, as a right of way. In my opinion if we were to adopt the principle contended for, it would be a most dangerous innovation of modern times. The law seems to me particularly careful and anxious to avoid important rights to land being determined by parol evidence and the prejudices of a jury."

In *Worthington* v. *Gimson*, 2 El. & E. 618, Justice CROMPTON uses the following language: "It is said that this way passed as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, as part of the necessary enjoyment of the severed property. But this way is not such an easement. It would be a dangerous innovation if the jury were allowed to be asked to say from the nature of a road whether the parties intended the right of using it to pass."

In *Polden* v. *Bastard*, 4 B. & S. 258, the owner of two adjoining estates devised them to different persons. There was on one of them a well and pump to which the tenant of the other was, when the will was made, and for some time before had been, in the habit of resorting for water, with the knowledge of the testatrix, using a foot-way from his dwelling house into the yard where the pump was. He had no supply of water on his own premises, but might have obtained it there by digging a well fifteen or twenty feet deep. The testatrix devised the premises "as now in the occupation" of the tenant. The devisee sold to the defendant, who claimed the right to use the pump. The claim was not sustained. ERLE, C. J., said: "There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The law recognises this distinction, and it is clear that upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shows an intention that they should pass. The right to go to a well and take water is not a continuous easement, nor is it an easement of necessity."

We share the feeling expressed in these cases in regard to making rights in real estate dependent upon facts and circumstances which may be differently interpreted by different minds. If the grant of a way, existing previously *de facto*, can be implied from anything short of necessity, we think at any rate that the party claiming the way should be required either to show, as in *Pettingill* v. *Porter*, 8 Allen 1, that without the use of the way he will be subjected to what, considering the value of the granted estate, will be an excessive expense; or to show, as in *Thompson et al.* v. *Miner*, 30 Iowa 386, that there is a manifest and designed dependence of the granted estate upon the use of the way for its appropriate enjoyment, or to adduce some other indication equally conclusive; and see *Worthington* v. *Gimson*, 2 L. & E. 618; *Leonard* v. *Leonard*, 7 Allen 277, 283.

In the case at bar the legal grounds of the decision made in the court below are not explicitly stated, but only the decision itself, and the facts on which it was based. The question for us, as submitted to us in argument, is whether, the facts being as stated, the decision was right. We think it was not. It does not appear that the defendant's estate is dependent on the Delaney well for its water supply, nor that the defendant has not a well of her own, or could not make a well for herself at moderate cost. And in regard to the way, it does not appear to have been established in the lifetime of Michael Coyle so definitely as to show a *decision* on his part to subject the part of the estate now owned by the plaintiff to a *quasi* servitude in favor of the other part—as, for instance, he might have done by inclosing the way with a fence, which should connect it with the part now owned by the defendant. Indeed we do not see that the case at bar differs materially from *Polden* v. *Bastard*, 4 B. & S. 258, above cited; for, as we have seen, the privilege of the well not having been expressly devised, we cannot infer the way from the privilege, but must rather presume an extinguishment of the privilege unless the way may be otherwise im-