

to lay down a definite rule. If we should follow those courts that hold that an indispensable necessity is requisite, then we would destroy the doctrine, or at least very seriously impair it, that the way rests upon a grant.

And it is probable therefore that the rule laid down in the case of *Pettinghill v. Porter*, hereinabove quoted from, that a way of necessity would be held to be implied within a grant, where no other way could be conveniently made from the highway to the land in question, without unreasonable labour and expense; and that what would constitute such unreasonable labour and expense would be a labour and expense excessive and disproportionate to the value of the property purchased.

The courts have held that this necessity should be clearly established for the reason that one man's land should not be taken for the benefit of another where the same could not be justified upon the existence of such a condition of facts from which a clear presumption could be implied, that the parties must have intended that some way was to have been included within the original conveyance.

While we think it is clear that the consensus of opinion of the courts is, that the right of way of necessity rests upon grant, yet the courts seem to have drawn a distinction between a right of way of necessity and a right of way by prescription, or express grant, in this: that it is not one of a permanent nature, although it is one running with the land, and will pass as appurtenant to the land so long as the necessity exists from which the grant might have been implied.

If it is shewn that such necessity exists at the time that the conveyance was made, that will conclusively shew a grant; must this strict necessity at all times continue in order that the right of way may not be lost, is a question which seems not to be conclusively settled.

In *Oliver v. Hook*,¹⁵ while not strictly required for a decision of the case under consideration, the court says:—

“But this way of necessity is a way of new creation by operation of law and is only provisional, for it is brought into existence from the necessities of the estate granted and continues to