

before and after the death of Michael Coyle, used the well, and the path to go to and from the well, when they saw fit. The plaintiff built a fence across the path on the line between his lot and the defendant's, and on the line between his lot and the Delaney lot. On the 17th June 1872, the defendant removed the lengths of fence stretching across the path, as being obstructions to her right of way along the path to and from the well, this removal being the trespass complained of.

The statement showed, in addition to the facts above stated, that both parties could go to the well in another way, by first passing directly from their own lots into Weeden street, then down Weeden street to the Delaney lot, and across the Delaney lot; but this was not the accustomed way—was more burdensome to the Delaney lot, and it was not known that the owners of the Delaney lot would consent to its use.

The opinion of the court was delivered by

DURFEE, C. J.—The plaintiff contends that Michael Coyle, being the absolute owner of the estate, had the right to dispose of the lot which he now owns unencumbered by the way; that Michael did so dispose of it when he devised it to John Coyle in fee simple, and that under John Coyle he holds it unencumbered.

The defendant contends that by force of the reservation in the deed to Delaney, the privilege of the well became appurtenant to the homestead estate and to every part of it, and consequently to the part which she now owns, and that inasmuch as she cannot use the privilege without the way, she is entitled to the way, either as a way of strict necessity, or as a way which, being reasonably necessary, may be implied from the circumstances.

1. We do not think that the defendant is entitled to the way as a way of strict necessity. Ordinarily, such a way is implied as incident to an express grant upon the presumption that when a man grants a thing he intends likewise to grant that without which the thing granted cannot be enjoyed. The privilege of the well has not been expressly granted or devised. If it passed to the defendant it passed to her as appurtenant to the estate which was devised to her, and that, too, without any mention, even in the most general way, of appurtenances. Now it will not be denied that Michael Coyle had the power to devise the estate without the privilege. He might have done so in express terms. Or, again, he might have expressly devised the intervening lot unencumbered by the

way, in which case the privilege, if dependent on the way, would be extinguished by implication. The devise of the intervening lot in fee simple was *prima facie* equivalent to such a devise; for *prima facie* it gave the devisee as perfect an estate as the devisor himself had, and the devisor himself had an estate so unencumbered.

2. Is the plaintiff entitled to the way as a way which, being reasonably necessary, may be implied from the circumstances of the estate?

The law in regard to the creation of easements by implication where estates which have been united in a single ownership are severed by deed, will, or partition, is elaborately discussed in the third and last edition of Washburn on Easements and Servitudes, published in 1873. The cases there collected and collated are somewhat discordant, but they are very generally to the effect that where the easement or quasi easement is continuous, apparent, and reasonably necessary to the beneficial enjoyment of the estate for which it is claimed, a grant thereof will be implied. The rule applies especially in favor of easements of air and light, lateral support, partition walls, drains, aqueducts, conduits, and waterpipes or spouts, all these being continuous easements technically so called—that is to say, easements which are enjoyed without any active intervention of the party entitled to enjoy them. Ways are not in this sense continuous easements, but discontinuous or noncontinuous, being enjoyed only as they are travelled. This distinction, however, between ways and the other easements mentioned has not been uniformly regarded, and there are cases, especially in Pennsylvania, in which it has been held that ways which are visibly and permanently established on one part of an estate for the benefit of another will, upon a severance of the estate, pass as implied or constructive easements appurtenant to the part of the estate for the benefit of which they were established: *Kieffer v. Inhoff*, 26 Penna. St. 438; *McCarty v. Kitchenman*, 47 Id. 239; *Phillips v. Phillips*, 48 Id. 178; *Pennsylvania Railroad Co. v. Jones*, 50 Id. 417; *Cannon v. Boyd*, 73 Id. 179; *Thompson et al. v. Miner*, 30 Iowa 386; *Huttenmeier v. Albro*, 2 Bosw. 546; affirmed, 18 N. Y. 48. But in New Jersey the doctrine was held to be inapplicable to ways: *Fellers v. Humphreys et al.*, 19 N. J. Eq. 471. And there are many English cases in which the application of the doctrine to ways has been denied: *Physey et ux. v. Vicary*, 16 M. & W. 484; *Whalley v. Thompson et al.*, 1 Bos. & Pul. 371; *Worthington v. Gimson*, 2 El. & E. 618;