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IMPLIED EASEMENTS IN THE NORTH CAROLINA COURTS: AN ESSAY ON THE MEANING OF "NECESSARY"

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In this Article, Professor Glenn focuses on distinctions between the two major types of implied easements—the easement by necessity and the quasi-easement or easement implied from prior use. Specifically, Professor Glenn argues that the "necessity" requirement for each type of implied easement must be carefully distinguished. A survey of the North Carolina implied easement cases reveals, however, that such a distinction apparently has not been articulated in the opinions and that dicta suggests that the distinction is not recognized in this state. In an effort to clarify the North Carolina law on this point, Professor Glenn suggests an analytic framework to be used in implied easement cases.

The law generally requires that easements, like other interests in land, be created in writing.[1] Sometimes, however, owners transfer land without documenting useful or necessary easements. The circum-

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My interest in the North Carolina implied easement cases was stimulated by my work, in 1978, as draftsman for the Civil Subcommittee of the North Carolina Conference of Superior Court Judges Pattern Jury Instruction Committee. The Subcommittee, then chaired by Judge Henry A. McKinnon, Jr., drafted pattern jury instructions for use in cases in which an easement by implication or a "way of necessity" is claimed. Those instructions were made available for use by North Carolina judges. NORTH CAROLINA CONFERENCE OF SUPERIOR COURT JUDGES, COMMITTEE ON PATTERN JURY INSTRUCTIONS, NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES §§ 840.20-.25 (Supp. 1979).

Neither Judge McKinnon nor any other member of the Committee bears responsibility for the opinions expressed in this Article. Judge McKinnon and his colleagues are, however, responsible for reteaching me the importance of stating legal rules with sufficient clarity, simplicity and precision to enable a jury to apply the law properly to the evidence. This lesson, which bears repetition for law teachers and appellate judges, is one of the many reasons I am grateful to have had the opportunity to work with the Pattern Jury Instruction Committee.

In earlier form this article was reviewed and criticized by my colleagues, Denis J. Brion, Lewis H. LaRue and Roger D. Groot. I am grateful for their comments and suggestions.

1. J. WEBSTER, REAL ESTATE LAW IN NORTH CAROLINA § 278, at 345 (1971); 2 AMERICAN LAW OF PROPERTY § 8.20, at 244-45 (A.J. Casner ed. 1952). *See generally* Conard, *Easements, Licenses and the Statutes of Frauds*, 15 TEMP. L.Q. 222 (1941).

North Carolina cases on this point include: Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963); Borders v. Yarbrough, 237 N.C. 540, 75 S.E.2d 541 (1953); Prentice v. Roberts, 32 N.C. App. 379, 232 S.E.2d 286 (1977); Simmons v. Morton, 1 N.C. App. 308, 161 S.E.2d 222 (1968).

stances of some of these transactions suggest that the parties probably intended to create an easement. If the writing requirement were applied to deny legal recognition to these easements, reasonable, and probably intended, land uses would be impeded by the expense and difficulty of finding alternatives for the easements. Judges have regarded these consequences as unacceptable and have, therefore, applied rules permitting the implication of undocumented easements from some circumstances of land transactions.

Easements are implied in two basic situations. In the first, the implication is based on findings that the claimed easement is "necessary" to the enjoyment of claimant's land and that the necessity arose when the claimed dominant parcel was severed from common ownership with the claimed servient parcel. Typically, of course, this involves land that became landlocked as a result of a sale or transfer. In the literature and opinions this type of implied easement is called the "easement by necessity."[2]

In the second situation, the easement is implied to protect the probable expectations of the grantor and grantee that an existing use of part of the land would continue after the transfer. A typical situation giving rise to this type of implication begins with a landowner who builds and uses a driveway from the public road. Later he sells a portion of the land served by the driveway but retains title to the driveway itself. The purchaser, who knew of the driveway at the time of the transfer, may have reasonably assumed that the driveway would continue to serve his land, regardless of whether his land had some other access to the public road. Easements of this type often are described in the treatises and opinions as easements implied from a "quasi-easement"[3]; the phrase "quasi-easement" denotes the prior use by the original owner.[4] In this Article, these implied easements will be called

2. *E.g.*, Oliver v. Ernul, 277 N.C. 591, 178 S.E.2d 393 (1971); Reese v. Borghi, 216 Cal. App. 2d 324, 30 Cal. Rptr. 868 (1963); J. WEBSTER, *supra* note 1, § 280, at 346; 3 R. POWELL, THE LAW OF REAL PROPERTY ¶ 410, at 34-35 to -75 (1979). The *Reese* opinion discusses, with citation to authority, the distinction between the two types of implied easements. The types of implied easements also are contrasted in Note, *Implied Easements of Necessity Contrasted with Those Based on Quasi-Easements*, 40 KY. L.J. 324 (1952).

3. *E.g.*, Van Sandt v. Royster, 148 Kan. 495, 83 P.2d 698 (1938); Knight v. Sheel, 313 Ky. 852, 233 S.W.2d 973 (1950); Frater Okla. Realty Corp. v. Allen Laughon Hardware Co., 206 Okla. 666, 245 P.2d 1144 (1952); 3 R. POWELL, *supra* note 2, ¶ 411, at 34-80; 2 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 351, at 319 (repl. ed. 1961); 3 H. TIFFANY, THE LAW OF REAL PROPERTY § 781, at 255-57 (3d ed. 1939 & Cum. Supp. 1979). *See generally* Note, 25 S. CALIF. L. REV. 376 (1952); Note, *supra* note 2.

4. When one thus utilizes part of his land for the benefit of another part, it is frequently said that a quasi easement exists, the part of the land which is benefited being referred to

"easements implied from prior use," a less technical but more descriptive term.

An easement by necessity can be implied on proof of two elements: first, that the claimed dominant parcel and the claimed servient parcel were held in a common ownership that was ended by a transfer of part of the land; and second, that as a result of the land transfer it became "necessary" for the claimant to have the easement.[5]

The easement implied from prior use is established by proof of three elements: first, common ownership of the claimed dominant and servient parcels and a transfer separating that ownership; second, that before the transfer the common owner used part of the tract for the benefit of the other part, and that this use was apparent, continuous and permanent; and third, that the claimed easement is "necessary" to the use of claimant's land.[6]

The two types of implied easements are identical in requiring proof of the existence and separation of common ownership and appear to be identical in requiring proof that the claimed easement is "necessary." The requirement of proof of prior use in the "quasi-easement" situation suggests, however, that the meaning of the "necessity" requirement should differ in these two situations; otherwise, proof of prior use would be unnecessary.

The purpose of this Article is to review and analyze opinions of the North Carolina appellate courts that describe the "necessity" element of proof required for establishment of these implied easements. The burden of the argument is that the North Carolina courts have failed to distinguish properly the "necessity" requirement as applied to the easement by necessity from the "necessity" requirement in the case of the easement implied from prior use.[7]

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as the "quasi dominant tenement," and the part which is utilized for the benefit of the other part being referred to as the "quasi servient tenement."

3 H. TIFFANY, *supra* note 3, § 781 at 255. Although the phrase "quasi-easement" is not unknown in North Carolina law, *see, e.g.*, Potter v. Potter, 251 N.C. 760, 112 S.E.2d 569 (1960), the idea usually is expressed in a more precise manner: "[W]here one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed . . . ." Barwick v. Rouse, 245 N.C. 391, 393, 95 S.E.2d 869, 871 (1957).

5. *E.g.*, 3 R. POWELL, *supra* note 2, ¶ 410, at 34-61 to -73; J. WEBSTER, *supra* note 1, § 281, at 346-47.

6. *E.g.*, 3 R. POWELL, *supra* note 2, ¶ 411, at 34-81 to -89; J. WEBSTER, *supra* note 1, § 282, at 348-49. *See generally* Note, *supra* note 2; Note, *supra* note 3.

7. The inquiry underlying this Article is limited to the North Carolina cases dealing with the most common forms of implied easements, usually rights of way. I have not relied on any cases involving access to subsurface rights. The cases that form the basis for the Article are those

Because the North Carolina courts rarely have been asked to decide whether specific sets of evidence have demonstrated the "necessity" required by the law, this essay is largely about dicta. Despite few opportunities to decide whether the requirement has been satisfied, the judges have not been reluctant to state several meanings of "necessity." These judicial statements, rather than any actual holdings, create the appearance that the "necessity" requirement has a substantially identical meaning in connection with the two types of implied easements. Theoretically, if this were the law, a claimant would never be required to prove prior use: if the uniform necessity requirement were satisfied, an easement by necessity would be established without the need for proof of prior use; if the necessity requirement were not satisfied, neither type of implied easement could be established regardless of proof of prior use.[8]

I doubt the courts intend this result. There is no square holding to this effect. If not deliberate, the imprecision in the opinions probably results from the courts' failure (or lack of opportunity) to focus on the precise meaning of the necessity requirement in each of these two contexts. A major purpose of this Article, then, is to suggest that the courts' dicta should be understood as such and should not become the

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the North Carolina Supreme Court commonly refers to in its opinions and those relied on in Professor Webster's treatise. *See generally* J. WEBSTER, *supra* note 1, §§ 281-283.

In assessing the state of the North Carolina law of "necessity" Professor Webster reached a conclusion that differs from the argument of this Article. He said, "In other words, it would appear that the 'necessity' requirement for establishing an implied easement through the conversion of a quasi-easement into an easement is less strict than if the easement arises as an 'easement of necessity' *per se*." *Id.* § 281, at 348 n.27 (interpreting Smith v. Moore, 254 N.C. 186, 118 S.E.2d 436 (1961), as holding that necessity requirement for establishing implied easement via conversion of quasi-easement less strict than that required for easement by necessity).

I believe the difference between Professor Webster's conclusion and the argument made here can be explained on the basis that, in preparing his treatise, Professor Webster was relying on Smith v. Moore, 254 N.C. 186, 118 S.E.2d 436 (1961), before that case was cited and, in my opinion, misused in Oliver v. Ernul, 277 N.C. 591, 178 S.E.2d 393 (1971). Professor Webster did not have an opportunity to absorb the significance of the language of *Oliver*, which was decided after the publication of the treatise and is mentioned only in the pocket part supplement. *Compare* J. WEBSTER, *supra* note 1, § 281 at 348 n.27 *with id.* (Supp. 1977).

8. The test for necessity appearing on the face of the existing North Carolina opinions is that the claimed easement must be "necessary to the full, fair, or convenient use of the land" or "reasonably necessary." In context, it is clear that these phrases are intended to be synonymous. The opinions suggest that these tests apply both to the easement by necessity, Oliver v. Ernul, 277 N.C. 591, 178 S.E.2d 393 (1971), and the easement implied from prior use, Smith v. Moore, 254 N.C. 186, 118 S.E.2d 436 (1961). *See generally* text accompanying notes 54-146 *infra*; *see also* Carmon v. Dick, 170 N.C. 305, 87 S.E. 224 (1915).

Assuming that the claimant of an implied easement can show common ownership and meet the "necessity" test as stated, why should he be asked also to show prior use? To put the question, and thus the statement in the text, another way, if the courts mean to adopt a uniform standard for "necessity," why not discard the entire "quasi-easement" or prior use doctrine?

law.[9]

It is useful to begin with a brief, summary examination of the implied easement rules as they are stated and reflected in the major secondary sources of American real property law. The argument in this impressionistic summary is that the "necessity" requirement should be stated and understood differently in connection with each of the two types of implied easements, regardless of the way courts choose to describe the policy basis or rationale for the implications. This summary will provide both the background for examination of the North Carolina opinions and the source of suggestions on how the North Carolina courts might usefully restate the elements of proof for implication without changing the essential meaning of the rules.

I. AN IMPRESSIONISTIC LOOK AT IMPLIED EASEMENT LAW: THE "EXTENT OF NECESSITY" REQUIREMENT

In the seventeenth century, the English courts described the easement by necessity as an interest in land implied to serve a public policy favoring the use of land.[10] In finding an easement by necessity in 1658,

9. Judicial difficulty with the necessity requirement is not unique to North Carolina. An appreciation of the general lack of clarity in this body of law can be developed by a mere glance at the treatises. *See, e.g.*, 3 H. TIFFANY, *supra* note 3, § 786, at 269-73: "It is impossible to deduce from the cases [on prior use theory] any general rule by which to determine the existence of this 'necessity,' so called, and such a rule is, perhaps, in the nature of things, impossible of formulation." *Id.* at 271. The semantic difficulty is also illustrated by an excerpt from 2 AMERICAN LAW OF PROPERTY, *supra* note 1, § 8.43, at 263:

> Where [in prior use cases] the test of necessity becomes that of reasonable necessity, it is said that a use is reasonably necessary when it is reasonably convenient to the use of the land benefitted. In fact, however, reasonable necessity too is a flexible test. The more pronounced a continuous and apparent use is, the less the degree of convenience of use necessary to the creation of an easement by implication.

In cases of easements by necessity, Powell notes: "Some courts have asserted that nothing less than 'absolute necessity' suffices. Other courts relax this rigid rule, finding sufficient a 'high degree of necessity' or 'reasonable necessity.' Under any one of these stated criteria, courts are bound to differ greatly in their handling of specific fact situations." 3 R. POWELL, *supra* note 2, ¶ 410, at 34-67 to -68. 2 G. THOMPSON, *supra* note 3, §§ 353, 364 collects and discusses the authorities.

> Some jurisdictions adhere to the rule that ways of necessity for ingress and egress across the land of another will not be decreed unless the necessity is absolute. In other states the rule of law is that a way of necessity must be one of strict necessity . . . . [T]he better rule and weight of authority seem to be that the necessity need only be a reasonable one which renders the easement necessary for the convenient and comfortable enjoyment of the property granted.

Id. § 364, at 440-42.

10. 3 R. POWELL, *supra* note 2, ¶ 410, at 34-59; Simonton, *Ways By Necessity*, 25 COLUM. L. REV. 571, 574 (1925). Simonton's article, a good short history of the easement by necessity, traces the doctrine to the late thirteenth century when it was based on the maxim "[A]nyone who grants a thing to someone is understood to grant that without which the thing cannot be or exist." *Id.* at 572. The early courts relying on this maxim were not, in any currently meaningful sense, implying an easement on the basis of public policy. Powell describes the maxim as representing a pre-

Chief Justice Glyn said, "[I]t is not only a private inconvenience, *but is also to the prejudice of the public weal, that land should be fresh and unoccupied.*"[11] In 1680, Serjeant Williams prepared a note to *Pomfret v. Ricroft*[12] in which he described the easement by necessity as created "by operation of law."[13]

By the nineteenth century, however, many courts described the easement by necessity in terms of a policy to give effect to the unexpressed intention of the grantor and grantee rather than in terms of a public policy favoring land use.[14] By 1815, the claimant of an easement by necessity was required to prove unity and severance of title in addition to the necessity.[15] Faced with proofs related to land transactions, judges must have been greatly tempted to think in terms of inferences of actual intention. And, we are told, nineteenth century judges were ready to yield to that temptation because of a general tendency to draw all questions into the terminology of contract, which emphasized individual will and intention.[16] The judicial position that the easement by necessity is based on inferences of intent rather than on land use policy is exemplified by a 1915 quotation from the North Carolina Supreme Court: "Necessity does not create the way [easement] but merely furnishes evidence as to the real intent of the parties."[17]

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public policy stage in the development of the easement by necessity. 3 R. POWELL, *supra* note 2, ¶ 410, at 34-59. According to Simonton, "it seems clear that the judges of the 13th and 14th centuries would not have understood this notion of public policy, for the idea of nationality had not yet sufficiently developed." Simonton, *supra*, at 574.

11. Packer v. Welsted, 2 Sid. 39, 111, 82 Eng. Rep. 1244, 1284 (K.B. 1658), *quoted in* Simonton, *supra* note 10, at 574 (translation and emphasis Simonton's).

12. 1 Wms. Saund. 321, 85 Eng. Rep. 454 (K.B. 1669).

13. *Id.* at 323 n.6, 85 Eng. Rep. at 460 n.6, *quoted in* Simonton, *supra* note 10, at 575. The conclusion that the phrase "by operation of law" had a meaning akin to the contemporary understanding of a contract term imposed on the basis of overriding public policy is expressed in Note, 31 CORNELL L.Q. 516, 517 (1946):

> It seems likely that Serjeant Williams considered the way by necessity to arise by a process akin to the modern 'quasi-contract' or contract implied in law. . . . The indication is that [the easement] . . . was thrust by law upon the parties regardless of their intention. In fact, he does not mention as relevant the intention of the parties.

14. Simonton, *supra* note 10, at 575-77.

15. Bullard v. Harrison, 4 M.&S. 387, 392, 105 Eng. Rep. 877, 879 (K.B. 1815).

16. Simonton, *supra* note 10, at 576.

17. Carmon v. Dick, 170 N.C. 305, 308, 87 S.E. 224, 226 (1915). The literature suggests that by the late nineteenth century American courts recognized two distinct theories for the easement by necessity. The public policy theory was recognized in cases such as Buss v. Dyer, 125 Mass. 287 (1878): "[The rule is based on] a fiction . . . [that] there is an implied reservation or grant to meet a special emergency, on grounds of public policy . . . in order that no land should be left inaccessible for purposes of cultivation." *Id.* at 291. The inferred intent theory was recognized in cases such as Collins v. Prentice, 15 Conn. 39, 38 Am. Dec. 61 (1842): "The law . . . will give effect to the grant according to the presumed intent of the parties." *Id.* at 44, 38 Am. Dec. at 63.

Thus, although Simonton asserts that by 1925 the "notion that the easement by necessity is

This description of the basis for the easement by necessity is nearly identical with the courts' typical description of the policy basis for the easement implied from prior use.[18] In the case of an easement implied from prior use, proof of the prior use is said to support a conclusion that the parties intended an easement, on the assumption that a grantor and grantee would have intended to continue an important—or "necessary"—use of the land known to them that was apparently continuous and permanent in its nature.[19] When an easement by necessity is claimed, there is no requirement of proof of a known existing use from which to draw the inference of intention. This leaves the proof of necessity alone to support the inference. This suggests that as courts shifted the basis of the easement by necessity from promotion of land use to implementation of intention, it became possible for courts and commentators to conceptualize the two types of implied easements as points along a continuum of inferential reasoning rather than as separate doctrines.

That essentially is the position of the *Restatement of Property*.[20] The *Restatement* describes a doctrine creating easements "by implica-

based on public policy [had] been accepted," Simonton, *supra* note 10 at 574, his own research revealed a line of cases replacing the public policy basis with the presumed or inferred intent theory, *see id.* at 576 nn. 24 & 25.

Most commentators recognize these two theories, although each of the treatises appears to have a bias in favor of one or the other of the policy bases for the easement by necessity. Thompson opts for public policy while recognizing that some courts derive the easement from presumed intent. *See* 2 G. THOMPSON, *supra* note 3, § 352, at 325, § 362, at 410, § 364, at 430-31, 433. Powell seems to prefer the public policy basis for the easement by necessity; he describes the attribution of these easements to the inferred intent of the parties as an "unadulterated fiction." 3 R. POWELL, *supra* note 2, ¶ 410, at 34-72.

On the other hand, *American Law of Property* and the American Law Institute's *Restatement of Property* (which are, on this subject, intellectual twins) share a preference for stating the basis for all implied easements as giving effect to the inferred intent of the parties. *See* 2 AMERICAN LAW OF PROPERTY, *supra* note 1, §§ 8.33, .36, at 257-59; RESTATEMENT OF PROPERTY § 474, Comment b, § 476, Comment g (1944). But at least one court that looks to the *Restatement* as authority on implied easements does not accept the easement by necessity as based on a search for intent. Schwob v. Green, 215 N.W.2d 240, 243, 244 (Iowa 1974).

As suggested by the quotation in the text, the North Carolina courts have tended to describe the easement by necessity as based on the inferred intent of the parties. *See also* text accompanying notes 65-68 *infra*.

The argument of this Article does not, however, depend on acceptance of one or the other of these theories. *See* text accompanying notes 33-36 *infra*.

18. *See* 3 R. POWELL, *supra* note 2, ¶ 411, at 34-82, 92; 3 H. TIFFANY, *supra* note 3, § 780; Note, *supra* note 2, at 325.

19. *E.g.*, 2 AMERICAN LAW OF PROPERTY, *supra* note 1, §§ 8.40-.43. *See also* 3 R. POWELL, *supra* note 2, ¶ 411, at 34-82 to -84. Here and at other points in the text, unless otherwise indicated, the phrase "prior use" is intended to refer to a pre-existing quasi-easement that is continuous, permanent and apparent.

20. RESTATEMENT OF PROPERTY §§ 474-476 (1944).

tion from the circumstances under which the conveyance was made."[21] This implication "arises as an inference of the intention of those making a conveyance."[22] The *Restatement*'s rule of implication operates on the basis of eight illustrative "important circumstances"[23] from which the inference of intention may be drawn.

The "important circumstances" include the amount of consideration, the extent of the prior use of the claimed easement, the degree to which the prior use was known to the parties, whether the claimant is the grantor or the grantee, and "the extent of necessity."[24] The circumstances must be understood as having variable importance in relation to each other.[25] For example, the significance of the price paid for the land will vary in relation to the existence of other factors. A price less than fair market value may be dispositive if the grantor is claiming the easement. The same low price, however, will have little or no significance if the grantee is the claimant and the "extent of necessity" is great. The "extent of necessity" is the most significant of the circumstances: "In the greater number of cases [the easement's] necessity to the use of land of the claimant is the circumstance that contributes most to the implication of an easement."[26]

The variable relationship among the listed circumstances and the special significance of "necessity" are factors supporting an assertion that the *Restatement* describes implied easement law as a range of inferential reasoning. As the "extent of necessity" becomes greater, the need for proof of other circumstances diminishes. Conversely, as the "extent of necessity" diminishes, proof of one or more of the other circumstances is, correspondingly, more important. The *Restatement*'s comments expressly recognize that in some cases "necessity" will be the only circumstance supporting the implication.[27] This, however, is not a bar to implication: "If the necessity of an easement is such that without it the land cannot be effectively used, nothing less than explicit language in the conveyance negating the creation of the easement will prevent its implication."[28]

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21. *Id.* § 474.

22. *Id.* § 474, Comment b.

23. *Id.* § 476.

24. *Id.*

25. *See id.* § 476, Comment a at 2978-79, Comment e at 2981-82, Comment g at 2983-84; 2 AMERICAN LAW OF PROPERTY, *supra* note 1, § 8.40, at 261.

26. RESTATEMENT OF PROPERTY § 476, Comment g at 2983 (1944).

27. *Id.*

28. *Id.* at 2984.

Significantly, the *Restatement* comment explains that when necessity is the only important circumstance, "the inference as to intention which is made is influenced largely by considerations of public policy in favor of land utilization."[29] On the other hand, when the "extent of necessity" is not so great, implication is presumably accomplished by a more direct inference of probable actual intention.[30]

Under the *Restatement* formulation, the "necessity" requirement will have a different meaning and significance in a case involving proof of prior use than it will in a case in which necessity alone supports the implication. The "extent of necessity" rubric itself suggests a concept with variable parameters. The *Restatement*'s comment states that if there is proof that the land "cannot effectively be used" without the claimed easement, the easement will be implied unless there is explicit language stating the parties' intention not to create the easement.[31] But if the proof shows that some use might be made of the land without the easement, the implication is controlled by other circumstances.[32]

> Eventually, without its being possible to draw any precise line, necessity will not be sufficiently great to justify the implication except as it is strengthened by reference to a prior use of the land. In the different situations that may appear, a constantly decreasing degree of necessity will require a constantly increasing clearness of implication from the nature of the prior use.[33]

A similar differentiation of the meaning and significance of the necessity requirement would be necessary if courts did not follow the *Restatement* theory but instead clearly described the easement by necessity as based on a public policy favoring land use and the easement implied from prior use as based on inferred intention. Under this hypothesis, the required showing of "necessity" in the easement by necessity case would be a measure of whether, in a given case, the public land utilization policy should be applied to impose an easement on a party who had not expressly stated an intention to bear the burden and who, from all else appearing at trial, had no such intention. On this basis, judicial intervention would be inappropriate without a demonstration that there was no reasonable way to use claimant's land without implication of the easement.[34]

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29. *Id.* at 2983.

30. *See id.* at 2984.

31. *Id.* § 476, Comment g at 2984.

32. *Id.*

33. *Id.*

34. Simonton took the position that the applied definition of necessity would differ depending on whether the theory for the implication was based on inferred intent or accomplishment of

On the other hand, in the case of the easement implied from prior use, proof of "necessity" would provide evidentiary support for an inference that the parties probably intended to create the easement.[35] It is quite possible, in such a case, that a reasonable use of the land could be made without the claimed easement, as, for example, when there is an alternative but less convenient substitute for the claimed easement. In that case the "extent of necessity," while insufficient to invoke the public policy supporting the easement by necessity, might be sufficient, together with other circumstances, to suggest that the parties actually intended to create an easement. For example, the proof might show that although there is another reasonable way for the claimant to make use of his land, the claimed easement is so useful that its utility, together with the extent of prior use and the parties' knowledge of that prior use, are enough to support an inference of intent to create the easement.

The same type of difference in the required "extent of necessity" ought to be recognized, moreover, even if the courts describe both the easement by necessity and the easement implied from prior use as based on a response to the probable, actual intention of the parties without, as in the *Restatement*'s formulation, the influence of public policy on the inference of intention in an easement by necessity situation.[36] Under this hypothesis, in a case without proof of prior use, the claimant is asking the court to imply an easement when proof of the "extent of necessity" is the only basis for the inference of intention. In that case the extent of necessity required to support the inference ought to be greater than the extent required when other circumstances provide additional support for the inference. Conversely, when circum-

public policy. Simonton argued that if the necessity were to be considered evidence of the parties' intent, no intent should be implied unless the extent of necessity is that there is "no other means of access to his land." Simonton, *supra* note 10, at 580. Simonton contrasted this with the public policy theory:

> But as soon as it is sought to consider the matter from the social interest viewpoint, the easement ought to be allowed whenever it is necessary to enable the owner to have the full enjoyment of the land: it is not essential if he has an adequate though less convenient means of access; it is essential where he has a means of access too limited to enable him to enjoy his land fully.

Id. See also RESTATEMENT OF PROPERTY § 476, Comment g at 2983-94 (1944). Powell, operating on the basis that the "fictional" inferences of intention are rooted in public policy, said:

> It would seem that whether easements by necessity are believed to be products of public policy or to be the embodiments of inferences as to the intent of the parties, they should be establishable by proof that they are necessary to the reasonable utilization of the claiming dominant parcel.

3 R. POWELL, *supra* note 2, ¶ 410, at 34-68 to -70.

35. *See, e.g.*, authorities cited note 19 *supra*.

36. *See* RESTATEMENT OF PROPERTY § 476, Comment g at 2983 (1944).

stances such as an apparent prior use of the land support the inference of the parties' intention, the required extent of the claimed easement's necessity might be less than when "necessity" is the only circumstance from which the inference of intention will be drawn.

Regardless of the expressed policy bases for the two implied easements, the required "extent of necessity" should differ in meaning and significance depending on the existence or nonexistence of proof of prior use. This conclusion makes it necessary to inquire whether it is accurate or useful to say, as does the *Restatement*, that "no precise definition of necessity can be made."[37] A difficulty with accepting this assertion is that we lawyers, like the juries before which we argue, have a tendency to want an answer to the question "what extent of necessity is required in this legal situation?"[38] Judges customarily have answered this question by applying an adjective such as "strict", "absolute" or "reasonable" to the word "necessity".[39]

In its relevant dictionary definition "necessary" means "that which

37. *Id.* at 2984. *See also* 3 H. TIFFANY, *supra* note 3, § 786, at 271.

38. This question is not simply an academic exercise or a reflection of a supposed lawyer's inclination to be concrete; the question can have real significance in a case in which the claimant pleads and seeks to prove, alternatively, an easement by necessity and an easement implied from prior use.

Suppose, for example, plaintiff proves his title to tract B, acquired by intestacy in 1975. His proof also shows that tract B, together with tract A, was owned by Adams until 1910, when Adams conveyed tract B to plaintiff's grandfather. Plaintiff also proves that there are two possible means of access to tract B. The most direct is across a 300-foot-long drive crossing tract A. That drive intersects a state highway. The other way, to which plaintiff concededly is entitled, goes across neighboring land for one mile before it intersects a county road at a point four miles from the state highway. Plaintiff then offers proof that the 300-foot drive across tract A was in use and was apparent and continuous in 1910 when tract B was sold to his grandfather. Necessarily, however, the witnesses offered to support this contention are elderly folks who possibly have sincere but mistaken beliefs about the situation existing 70 years ago. Suppose, in addition to vigorously cross-examining plaintiff's witnesses, defendant produces a credible witness, who testifies that the use of the drive across tract A did not begin until 1918. With the case in this posture the jury might be asked to decide whether plaintiff is entitled to an easement on either a necessity or prior use theory.

One would suppose, on this set of facts, that a jury could find, in considering the prior use theory, that the claimed easement is "reasonably necessary" despite the presence of another way serving plaintiff's tract B. *See* note 42 *infra*. Suppose however, that, although the jury is persuaded that the claimed drive was "reasonably necessary," it fails to find that there was, before 1910, a "quasi-easement," because it is unable to reconcile the conflicting testimony. Would it be appropriate for the jury then to turn to the easement by necessity theory and apply its earlier finding of "reasonable necessity" to that ground for recovery? No. The existence of another right of way ordinarily will preclude an easement by necessity. It is necessary, therefore, to instruct the jury that the "extent of necessity" required on the prior use theory differs from that required on the easement by necessity theory, and to tell the jury what the different concepts of "necessity" might mean as applied to typical fact situations.

39. *See generally* 3 R. POWELL, *supra* note 2, ¶ 410, at 34-67 to -69, ¶ 411, at 34-86 to -88; 3 H. TIFFANY, *supra* note 3, §§ 786, 794; 3 G. THOMPSON, *supra* note 3, §§ 353, 364.

cannot be done without" or "absolutely required."[40] "Essential" and "indispensable" are useful synonyms.[41] The words "essential" and "indispensable" ordinarily are not susceptible to modification in terms of degree. Something is "essential" or it is not. We tend, however, to modify the word "necessary" because we often do not use it as a synonym for "essential" and because we always are faced with the question: "Necessary for (or to) what?" If we define the objective, we refine our understanding of the actual, contextual meaning of the word "necessary." Thus, if I say, "It is necessary for me to have a vacation," most people will hear "necessary" as synonymous with "important" or "desirable." If I say, however, "It is necessary for me to breathe," the appropriate synonym is "essential."[42]

Judges have modified "necessary" with the adjectives "strict" or "absolute" and "reasonable."[43] Recognizing that in an easement by necessity case the extent or degree of "necessity" must be greater than in cases in which there is proof of prior use, courts often have used "strict" or "absolute" to modify the "necessity" required for the easement by necessity.[44] We even find cases speaking of "indispensable necessity."[45] These formulations, apparently meaning "essential," prove to be unsatisfactory because, when presented with the hard cases, neither the courts nor the *Restatement* intend to define "necessary" as "essential"—even in the absence of proof of prior use. For example, the *Restatement* comment tells us: "If land can be used without an easement, but cannot be used without disproportionate effort and expense, an easement may still be implied . . . on the basis of necessity alone, without reference to prior use."[46] This is not, strictly speaking, a description of something that is "essential." Instead, the *Restatement*

40. 2 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1511 (1971).

41. *Id.* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 877 (1969) (words "essential" and "indispensable" are synonyms but "stronger" than word "necessary").

42. "[The] force and meaning [of 'necessary'] must be determined with relation to the particular object sought." BLACK'S LAW DICTIONARY 928 (5th ed. 1979) (citing Kay County Excise Board v. Atchison, T. & S.F.R. Co., 185 Okla. 327, 91 P.2d 1087, 1088 (1939)).

43. *E.g.*, Kirkland v. Kirkland, 281 Ala. 42, 47, 198 So. 2d 771, 775 (1967) ("indispensable"); Zunino v. Gabriel, 182 Cal. App. 2d 613, 616, 6 Cal. Rptr. 514, 517 (1960) ("absolute"); Marrs v. Ratliff, 278 Ky. 164, 174, 128 S.W.2d 604, 609 (1939) ("strict"); Tschaggeny v. Union Pac. Land Resources Corp., 555 P.2d 277, 280 (Utah 1976) ("reasonably necessary"). *See generally* authorities cited note 39 *supra*.

44. *E.g.*, Zunino v. Gabriel, 182 Cal. App. 2d 613, 616, 6 Cal. Rptr. 514, 517 (1960); Marrs. v. Ratliff, 278 Ky. 164, 174, 128 S.W.2d 604, 609 (1939); Hansel v. Collins, 180 Md. 209, 216, 23 A.2d 686, 690 (1942); Bowles v. Chapman, 180 Tenn. 321, 324, 175 S.W.2d 313, 314 (1943).

45. *E.g.*, Kirkland v. Kirkland, 281 Ala. 42, 47, 198 So. 2d 771, 775 (1967); Hall v. McLoed, 59 Ky. (2 Met.) 98 (1859); Rogers v. Cation, 9 Wash. 2d. 369, 378, 115 P.2d 702, 707 (1941).

46. RESTATEMENT OF PROPERTY § 476, Comment g at 2983 (1944).

and the courts seem to define a "necessary" easement as one required to provide the landowner with a reasonably effective right to use his land. Thus, in a case in which there is access to the landlocked parcel by means of a permissive way (a license), an easement of access is not "essential" but it is "necessary" within the meaning of the rule.[47] Likewise, when access can be had only by water[48] or by making very expensive improvements, a right of way is not essential but it is "necessary."[49]

Understanding that the requirement in an easement by necessity case is not that the easement be "essential," some courts have abandoned the adjectives "strict" and "absolute" in describing the requirement. Instead these courts use the phrase "reasonable necessity."[50] But, not surprisingly, this is the same phrase courts use to describe the required "extent of necessity" in the cases in which there is proof of prior use.[51] Thus, the use of adjectives to describe the range of meaning of "necessity" fails because of the improper premise that the phrases "absolute necessity" or "strict necessity" accurately describe the requirement when there is no proof of prior use. Forced to discard "strict," "absolute" and "indispensable," the courts have turned to the law's most popular adjective, "reasonable," only to find that this word is already engaged—in the prior use theory cases. Modification by adjective, then, is not an effective technique for distinguishing between the "extent of necessity" required in a case with proof of prior use and that required in a case without such proof.

Professor Powell suggests an attractive solution to the problem of stating the "extent of necessity" concept for the prior use situation that

47. *E.g.*, Wilson v. Smith, 18 N.C. App. 414, 197 S.E.2d 579, *cert. denied*, 284 N.C. 125, 199 S.E.2d 664 (1973); Parker v. Bains, 194 S.W.2d 569 (Tex. Civ. App. 1946).

48. *E.g.*, Redman v. Kidwell, 180 So.2d 682 (Fla. Civ. App. 1965); Hancock v. Henderson, 236 Md. 98, 103, 202 A.2d 599, 602 (1964); State v. Deal, 191 Ore. 661, 680, 233 P.2d 242, 250 (1951). *But see, e.g.*, Woelfel v. Tyng, 221 Md. 539, 544, 158 A.2d 311, 313 (1960); Bauman v. Wagner, 146 App. Div. 191, 195, 130 N.Y.S. 1016, 1020 (1911). *See generally* 3 R. POWELL, *supra* note 2, ¶ 410, at 34-68 to -69 nn.34 & 35; 3 G. THOMPSON, *supra* note 3, § 364, at 436. There appears to be a division of authority with respect to this question.

49. The *Restatement* would permit a finding of "necessity" if the alternative to the claimed easement would require "disproportionate effort and expense." RESTATEMENT OF PROPERTY § 476, Comment g at 2983 (1944). This position is adopted in a number of the cases. *E.g.*, Condry v. Laurie, 184 Md. 317, 41 A.2d 66 (1945); Crotty v. Coal Co., 72 W. Va. 68, 78 S.E. 233 (1913).

50. *E.g.*, Walkup v. Becker, 161 So. 2d 893, 895 (Fla. 1964); Cummings v. Franco, 335 Mass. 639, 643, 141 N.E.2d 514, 516 (1957); Hurley v. Guzzi, 328 Mass. 293, 296, 103 N.E.2d 321, 323 (1952); Tschaggeny v. Union Pac. Land Resources Corp., 555 P.2d 277, 280 (Utah 1976). *See generally* 3 R. POWELL, *supra* note 2, ¶ 410; 3 H. TIFFANY, *supra* note 3, § 794.

51. *E.g.*, Jack v. Hunt, 200 Or. 263, 268-69, 264 P.2d 461, 463-64 (1953); Silver v. Strohm, 39 Wash. 2d 1, 5, 234 P.2d 481, 483 (1951). *See generally* 3 R. POWELL, *supra* note 2, ¶ 411, at 34-87 to -89.

distinguishes it from the similar concept in the easement by necessity rule. Powell suggests that in a case with proof of prior use, the word "necessity" should be replaced by the phrase "important to the enjoyment of the conveyed quasi-dominant parcel."[52] If, as seems clear, the purpose of the requirement in this context is to support the inference of actual intention, surely the word "important" suffices as well as "necessary." In their ordinary meanings, moreover, the words "necessary" and "important" suggest the range of degree of utility connoted by the phrases "strict necessity" and "reasonable necessity." The British courts have actually gone beyond this and abandoned the "necessity" element altogether in the prior use cases; easements there are implied merely from proof of an "apparent" and "continuous" quasi-easement.[53]

II. THE NORTH CAROLINA CASE LAW

The easement by necessity has long been recognized in North Carolina law but has had a rather peculiar history. It first appeared—in an unusual form—in the 1852 North Carolina Supreme Court case, *Hetfield v. Baum*.[54] *Hetfield* involved a statute designed to cope with the problem of wrecked ships along the state's treacherous Atlantic coastline. Basically, the statute established a procedure whereby state officials would salvage the cargo of the wrecked vessel, auction the goods at public sale, and turn the proceeds over to the shipowner. In *Hetfield*, the court declared an easement "by necessary implication" from the statute to ensure that authorized persons could travel over privately held land on which the ships were stranded or wrecked to carry out the statutory functions.[55]

More than fifty years later, in 1904, the supreme court recognized, in *Milliken v. Denny*,[56] the more traditional easement by necessity.

52. 3 R. POWELL *supra* note 2, ¶ 411, at 34-82, 34-87 to -89. One American court appears to have accepted Professor Powell's suggestion. *See* Dressler v. Isaacs, 217 Or. 586, 597-98, 343 P.2d 714, 720 (1959); *accord*, Winter v. Satchell, 261 Or. 517, 495 P.2d 738 (1972); Silvernale v. Logan, 252 Or. 200, 208, 448 P.2d 530, 533-34 (1968).

53. *See* 3 R. POWELL, *supra* note 2, ¶ 411, at 34-89.

54. 35 N.C. (13 Ired.) 269 (1852).

55. *Id.* at 271.

56. 135 N.C. 19, 47 S.E. 132 (1904). The court ruled that the trial judge erred in refusing to sustain a demurrer to plaintiff's complaint asserting an easement to serve a lot that fronted on two streets. The court held that on the facts of the pleadings "no easement . . . would arise . . . by . . . necessity." *Id.* at 24, 47 S.E. at 133.

From *Milliken* until *Oliver v. Ernul*[57] in 1971, virtually everything the North Carolina Supreme Court said about the easement by necessity was dicta. In only one case did the supreme court reverse a trial court decision that might have been construed to declare an easement by necessity.[58] In no case did the court affirm a trial court decision declaring an easement by necessity or remand a case for entry of judgment declaring such an easement.[59] In all but one[60] of the other pre-1971 cases, the court's statements about the doctrine are either completely gratuitous or made in the context of an opinion in which the issue is the sufficiency of the pleadings rather than the sufficiency of proof.[61]

The absence of a decision based on an easement by necessity theory before 1971 might be explained by the uncertainty created by *White v. Coghill*,[62] which intimated that the common law doctrine of easement by necessity had been superseded by the state's statutory cartway procedure. After this doubt was explicitly removed by *Pritchard v. Scott*[63] in 1961, the next implied easement case to reach the Supreme Court, *Oliver v. Ernul*[64] in 1971, resulted in a decision squarely recognizing the creation of an easement by necessity.

With the exception of *Hetfield v. Baum*, a somewhat exceptional case, and a few stray statements in other opinions, the North Carolina Supreme Court consistently has stated that both the easement by necessity and the easement implied from prior use are based on the policy of carrying out the inferred intention of the parties. For example, in 1915,

57. 277 N.C. 591, 178 S.E.2d 393 (1971). The court reversed a judgment of nonsuit and held that plaintiffs had a way of necessity "by operation of law" to secure access to landlocked parcels.

58. Roper Lumber Co. v. Richmond Cedar Works, 158 N.C. 162, 73 S.E. 902 (1912). The court reversed a decision dissolving an injunction against defendant. The defendant was not entitled to an easement by necessity because, *inter alia*, there was no proof that defendant had "no other possible way to remove the timber." *Id.* at 141, 73 S.E. at 905.

59. *But see* Carmon v. Dick, 170 N.C. 305, 87 S.E. 224 (1915) (new trial ordered; judgment of nonsuit set aside; "some evidence" upon which plaintiff entitled to recover on theory of easement by necessity).

60. White v. Coghill, 201 N.C. 421, 160 S.E. 472 (1931). This case arguably held that the easement by necessity doctrine was superseded by the state's statutory cartway procedure. *See* text accompanying notes 81-89 *infra*.

61. "[W]e have found no decision where a plaintiff, by action in the superior court, has established his right to and the location of a way of necessity." Pritchard v. Scott, 254 N.C. 277, 283, 118 S.E.2d 890, 895 (1961); *see* Carver v. Leatherwood, 230 N.C. 96, 52 S.E.2d 1 (1949) (complaint alleging separation of title, open and visible condition of prior use and no alternative way of access sufficient to withstand demurrer on either prior use or necessity theory); Bradley v. Bradley, 245 N.C. 483, 96 S.E.2d 417 (1957) (jury verdict establishing easement for plaintiff reversed; plaintiff conceded non-entitlement to easement by necessity); Potter v. Potter, 251 N.C. 760, 112 S.E.2d 569 (1960) (dictum); Smith v. Moore, 254 N.C. 186, 118 S.E.2d 436 (1961) (dictum).

62. 201 N.C. 421, 160 S.E. 472 (1931); *see* text accompanying notes 81-89 *infra*.

63. 254 N.C. 277, 284-85, 118 S.E.2d 890, 895-96 (1961).

64. 277 N.C. 591, 178 S.E.2d 393 (1971).

in *Carmon v. Dick*,[65] the court described the easement by necessity:

> "[The] necessity of itself not creating the right; but being only a circumstance resorted to for the purpose of showing the intention of the parties, . . ."[66]

And in 1961, in *Smith v. Moore*,[67] the court described the easement implied from prior use:

> It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that grantor intended grantee should have the right to continue to use the road in the same manner and to the same extent which his grantor had used it, because such use was reasonably necessary to the 'fair' . . . 'full' . . . 'convenient and comfortable' . . . enjoyment of his property.[68]

Carmon v. Dick[69] is the earliest North Carolina implied easement opinion with any significant doctrinal discussion. In that case, plaintiff based his claim to use of a private road on a claim of prescription as well as claims of easement by necessity and easement implied from prior use.[70] Plaintiff's evidence was that while his and the defendant's land were in common ownership, the owner opened a road across the lands to a public road. Plaintiff alleged that the road opened by the common owner was the only way out to the public road.[71] The trial judge granted defendant's motion for nonsuit at the close of plaintiff's evidence. The supreme court reversed, holding that there was some evidence upon which plaintiff might have recovered on a theory of easement by necessity.[72]

The court began its opinion with a statement of the elements of proof for easements implied from prior use: (i) separation of title; (ii) prior use "so long continued and so obvious or manifest as to show that it was meant to be permanent"; and (iii) that the claimed easement was "necessary to the beneficial enjoyment of the land."[73] The court declined, however, to decide the case on the prior use theory because it

65. 170 N.C. 305, 87 S.E. 224 (1915).

66. *Id.* at 308, 87 S.E. at 226 (citations omitted).

67. 254 N.C. 186, 118 S.E.2d 436 (1961).

68. *Id.* at 190, 118 S.E.2d at 438-39 (citations omitted).

69. 170 N.C. 305, 87 S.E. 224 (1915).

70. *Id.* at 309, 87 S.E. at 226.

71. Plaintiff "alleged . . . [his land was] . . . so surrounded by the lands of his grantors and others that he had no way out to any public road." *Id.* at 306, 87 S.E. at 225. "We do not hold that plaintiff is entitled to the right of way, as matter [*sic*] of law, but simply that there was some evidence on which he was entitled to recover." *Id.* at 309-10, 87 S.E. at 226.

72. *Id.* at 309-10, 87 S.E. at 225-26.

73. *Id.* at 308, 87 S.E. at 226. The opinion quotes language from Irvine v. McCreary, 108 Ky. 495, 56 S.W. 966 (1900), describing the easement from prior use. The quotation uses the phrase "reasonably necessary" to describe the required standard of "necessity."

chose not to decide the then unresolved question whether any right of way was sufficiently "continuous" to support the inference of intention.[74]

The court then turned to the easement by necessity theory. The court clearly stated its view that the theory was based on the policy of fulfilling the intention of the parties.[75] Unfortunately, the court was not so clear in its description of the necessity requirement under this theory. In one portion of the opinion, following a quotation about ways of necessity, the court states that the "degree of necessity" for "this right by implication based upon the presumed intention of the parties" is that the claimed easement is "necessary to the beneficial use of the land granted or retained"[76] and to its convenient and comfortable enjoyment. This language is substantially identical with the court's description of the necessity requirement in the case of an easement implied from prior use.[77]

This similarity of language is not surprising because in discussing both types of implied easements the court cites *Kelly v. Dunning*,[78] a New Jersey case involving only the prior use theory. The citation to *Kelly* in the paragraph apparently dealing with easements by necessity is, of course, curious. It may indicate that the court was returning to its discussion of the prior use theory, or that the court was simply confused about or overlooked the distinction between the two theories of implication. In any event, *Carmon* offers no clear indication of the court's view of the necessity requirement under the easement by necessity theory; the opinion's lack of clarity suggests, but does not require, a conclusion that the court adopted a uniform "necessity" requirement for both implied easements.[79]

74. "[An] easement which is not apparent and noncontinuous, such as a right of way, which is enjoyed at intervals, leaving no visible sign, in the interim of its existence, will not pass unless the grantor uses language sufficient to create the easement de novo." 170 N.C. at 308, 87 S.E. at 226. The court recognized later in its opinion that the continuity requirement was not universally applied in that way and that there was a tendency to accept a roadway as sufficiently "continuous" for purposes of the doctrine. For a description and critique of the position actually taken by the court, see 3 R. POWELL, *supra* note 2, ¶ 411, at 34-85 to -86 (1979). Later North Carolina opinions have not found this problem troublesome. *See, e.g.*, Spruill v. Nixon, 238 N.C. 523, 78 S.E.2d 323 (1953); Dorman v. Wayah Valley Ranch, Inc., 6 N.C. App. 497, 170 S.E.2d 509 (1969).

75. 170 N.C. 305, 308-09, 87 S.E. 224, 226 (1915).

76. *Id.* at 309, 87 S.E. at 226.

77. *See* text accompanying note 73 *supra*.

78. 43 N.J. Eq. 62, 10 A. 276 (1887).

79. Even if *Carmon* did intend to state an identical requirement of necessity for each type of implied easement, the opinion may not be responsible for the confusion that crept into North Carolina law in Oliver v. Ernul, 277 N.C. 591, 178 S.E.2d 393 (1971). *See* text accompanying notes 117-34 *infra*. In general *Carmon* has not been cited for the proposition that the necessity test

Any uncertainty created by *Carmon* might have been cured through the usual process of case-by-case adjudication, had the court's next implied easement case not been *White v. Coghill*,[80] which possibly had the effect of discouraging North Carolina attorneys from litigating cases on the basis of an easement by necessity theory.[81]

White v. Coghill is clearly the worst North Carolina implied easement opinion. Plaintiff appealed from a nonsuit entered on the ground that plaintiff's proper remedy was to seek a statutory cartway[82] rather than a judicial declaration of an easement by necessity. Plaintiff, a devisee of a fifty acre tract of land, alleged that the land devised was without any access to a public road except across the lands of other devisees of the testator.[83]

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is identical in each context, despite the language in the opinion that can be read as stating that proposition, and *Oliver* does not cite *Carmon* in its discussion of the necessity requirement.

80. 201 N.C. 421, 160 S.E. 472 (1931).

81. Of the cases decided between 1931, the date of the *White* opinion, and 1961, when *White* was overruled in Pritchard v. Scott, 254 N.C. 277, 118 S.E.2d 696 (1961), only Carver v. Leatherwood, 230 N.C. 96, 52 S.E.2d 1 (1949), involved a claim based on easement by necessity theory. In that case claimant asserted his right to an easement on the two theories alternatively. The scarcity of easement by necessity claims is, of course, explicable on hypotheses other than the impact of *White v. Coghill.*

82. The modern cartway statute is N.C. Gen. Stat. § 136-69 (1974). The statutory cartway is a very limited form of authorized private eminent domain. The statute gives the owners of land to which there is no public road or other adequate means of transportation the right to have a cartway laid across neighboring land if the petitioner is engaged in one or more specific activities on the land (not including mere residential use) and upon petitioner's payment of damages. *See generally* Taylor v. West Va. Pulp & Paper Co., 262 N.C. 452, 137 S.E.2d 833 (1964); Candler v. Sluder, 259 N.C. 62, 130 S.E.2d 1 (1963); Pritchard v. Scott, 254 N.C. 277, 118 S.E.2d 890 (1961).

The *Pritchard* court held that the statutory requirement of no "adequate means of transportation" would not be met if the petitioner were entitled to an easement by necessity across the lands of one of his neighbors. The court then held that *White v. Coghill* was wrong in intimating that the statutory cartway supersedes the common law easement by necessity. Actually, the two rights are complementary.

83. 201 N.C. at 422, 160 S.E. at 472 (1931). These facts may raise an issue not treated in the *White* opinion: Is a devise the type of "grant" that forms the basis for the easement by necessity theory? Professor Webster cites *White* for the proposition that "a devisee of land cannot establish a way of necessity over the lands of other devisees even though the land devised to him has no access to a public road." J. WEBSTER, *supra* note 1, § 281, at 347. This proposition does fit the facts of *White* but does not reflect the opinion by Justice Brogden. It seems more likely that this issue was avoided by the court because the judges preferred to reach the same result by a different argument.

The notion that a devise cannot form the basis for an easement by necessity is not accepted by the major text writers. *See, e.g.*, 3 R. POWELL, *supra* note 2, ¶ 410, at 34-63 (1979); 2 G. THOMPSON, *supra* note 3, § 362, at 412. Moreover, *Pritchard v. Scott*, the case that rejects the exclusive remedy theory of *White*, involves similar facts. There the question was whether a devisee's possible easement by necessity across the lands of another devisee from the same will would constitute an "adequate means" of access so as to disable the devisee from claiming a cartway across the lands of strangers. The court held that no cartway was available across the lands of strangers. This conclusion was based on reasoning that required an implicit acceptance of the possibility that a devisee can acquire an easement by necessity across the lands of another devisee. For these reasons it seems unlikely that *White* can be fairly read as establishing the proposition that a devise

Justice Brogden began his short affirmance by stating plaintiff's contention of entitlement to a way of necessity. He then cited six North Carolina cases that he described as discussing the "way of necessity."[84] Two of the cited cases do not deal with ways of necessity at all; one involves the law of easement by prescription,[85] and the other is an action for damages in tort for loss of the right of access to timber land.[86] Justice Brogden then quoted statements from *Mordecai's Law Lectures* describing easements by necessity and stating that in North Carolina there is a "peculiar way of necessity"—the statutory cartway.[87] Then, without any analysis or citation of authority, Justice Brogden concluded that the statutory cartway was "the exclusive remedy" to which the plaintiff was entitled.[88]

The *White* opinion possibly had a "chilling effect" on litigants' decisions to claim the common law easement by necessity. All but one of the appellate cases from 1931 to 1961 involving implied easements presented claims expressly based only on a prior use theory.[89]

The court's treatment of these prior use theory claims was, for the most part, consistent and sensible. As stated in *Ferrell v. Durham Bank & Trust Co.*,[90] and quoted in many of the cases of this period, the prior use theory provides for the declaration of an easement when a grantor "impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of

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will not establish the basis for an easement by necessity. *Cf.* Potter v. Potter, 251 N.C. 760, 112 S.E.2d 569 (1960) (*White v. Coghill* not inconsistent with proposition that division of concurrent ownership can form the basis for the implication of an easement from prior use).

84. 201 N.C. at 423, 160 S.E. at 473.

85. Weaver v. Pitts, 191 N.C. 747, 133 S.E. 2 (1926).

86. Grant v. Tallassee Power Co., 196 N.C. 617, 146 S.E. 531 (1929).

87. 201 N.C. at 423, 160 S.E. 472, 473 (citing 1 S. MORDECAI, LAW LECTURES 466 (2d ed. 1916)).

88. *Id.*

89. Smith v. Moore, 254 N.C. 186, 118 S.E.2d 436 (1961) (prior use theory); Potter v. Potter, 251 N.C. 760, 112 S.E.2d 569 (1960) (prior use theory); Bradley v. Bradley, 245 N.C. 483, 96 S.E.2d 417 (1957) (prior use theory; claimant conceded there was no basis for easement by necessity); Barwick v. Rouse, 245 N.C. 391, 95 S.E.2d 869 (1957) (prior use theory); Spruill v. Nixon, 238 N.C. 523, 78 S.E.2d 323 (1953) (prior use theory); Packard v. Smart, 224 N.C. 480, 31 S.E.2d 517 (1944) (prior use theory or estoppel); Ferrell v. Durham Bank & Trust Co., 221 N.C. 432, 20 S.E.2d 329 (1942) (prior use theory).

Only in Carver v. Leatherwood, 230 N.C. 96, 52 S.E.2d 1 (1949), were both the easement by necessity and prior use theories raised. Dictum in the opinion implicitly recognizes the easement by necessity doctrine; the court suggested that on remand plaintiff should select one or the other of those theories. The way of necessity doctrine is alluded to in dicta in Green v. Barbee, 238 N.C. 77, 76 S.E.2d 307 (1953).

90. 221 N.C. 432, 20 S.E.2d 329 (1942).

that part."[91] An alternative statement of the necessity requirement found in many of these cases is derived from *Carmon v. Dick*:[92] the claimed easement must be "necessary to the beneficial use of the land granted or retained."[93]

Barwick v. Rouse[94] is the most significant of these prior use cases. There the court held that the prior use theory had been fairly presented to the jury with an adequate instruction.[95] Chief Justice Winborne collected the court's various statements of prior use theory law and described the necessity requirement variously as proof that the easement was "reasonably necessary for the use of the land," "reasonably necessary to the fair enjoyment" of the land, and "necessary to the beneficial enjoyment of the land."[96]

These statements of the necessity requirement for an easement implied from a quasi-easement were again approved in 1961 in *Smith v. Moore*.[97] In *Smith*, the plaintiff brought an action to enjoin defendants' alleged continuing trespass on a road across plaintiff's land. Originally, plaintiff's and defendants' land had been held in common ownership. In 1951, the owner conveyed the southern portion of his tract to plaintiff and the northern portion to intermediate grantees from whom defendants subsequently acquired title. Plaintiff's tract was bounded by a public road. Defendants' tract, bounded on the north by the Neuse River, had no direct access to a public road.[98]

Defendants alleged that in 1951, when the title was separated, there was a road crossing the southern portion of the land, which provided access to the northern portion now owned by defendants. Defendants claimed a right to use this way on grounds that the private

91. *Id.* at 435, 20 S.E.2d at 331, *quoted in, e.g.*, Barwick v. Rouse, 245 N.C. 391, 393, 95 S.E.2d 869, 871 (1957); Packard v. Smart, 224 N.C. 480, 484, 31 S.E.2d 517, 519 (1944). The same statement appeared in Carmon v. Dick, 170 N.C. 305, 306-07, 87 S.E.2d 224, 225 (1915).

92. 170 N.C. 305, 87 S.E. 224 (1915).

93. *Id.* at 309, 87 S.E. at 226, *quoted in, e.g.*, Bradley v. Bradley, 245 N.C. 483, 486, 96 S.E.2d 417, 420 (1957); Spruill v. Nixon, 238 N.C. 523, 526, 78 S.E.2d 323, 326 (1953) (without attribution to *Carmon* or *Ferrell* but instead, accurately, to 17 AM. JUR. *Easements* § 34 (1938)).

94. 245 N.C. 391, 95 S.E.2d 869 (1957).

95. *Id.* at 394, 95 S.E.2d at 872; *see* Smith v. Moore, 254 N.C. 186, 191, 118 S.E.2d 436, 439 (1961) (error in part of jury instruction not cured by later instructions "quoted from Barwick" giving "the correct rule").

96. 245 N.C. 391, 393-94, 95 S.E.2d 869, 871.

97. 254 N.C. 186, 118 S.E.2d 436 (1961). In the period between *Barwick* and *Smith* the court explicitly relied on the *Barwick* formulations in Bradley v. Bradley, 245 N.C. 483, 96 S.E.2d 417 (1957), and Potter v. Potter, 251 N.C. 760, 112 S.E.2d 569 (1960).

98. 254 N.C. at 187, 118 S.E.2d at 436.

way had become a public road,[99] and that they had acquired rights by prescription.[100]

The jury decided in favor of defendants. The trial judge then ordered the defendants' pleadings amended to conform to the evidence, it appearing that the verdict was, in effect, based on the finding of an easement by implication from prior use.[101] Plaintiff appealed and secured from the supreme court the order of a new trial because the jury instructions on the prior use theory had been confusing.[102]

At the beginning of its opinion the court described the nature of easements by implication from a prior use:

> The right to use a road or other easement may arise from the use of the word "appurtenant" or "appurtenance" because of conditions existing at the time of the grant so apparent and beneficial to the thing granted as to lead to the conclusion that the parties contemplated these physical conditions would continue as *reasonably necessary* to the enjoyment of the property conveyed.[103]

The court then digressed to describe—perhaps for purposes of contrast—the easement by necessity:

> If one conveys a part of his property entirely surrounded by other lands of the grantor and without any way to the property conveyed, the law, acting upon the assumption that grantor intended for his grantee to enjoy the thing granted, will imply an easement to provide access for a public way.[104]

The court noted, however, that the easement by necessity was not the theory relied on by defendants to establish their right to cross plaintiff's land. Defendants' theory was, instead, an easement derived from prior use.[105] In describing the prior use theory—the only theory truly

99. The court concluded that the evidence would support, but not compel, a finding that the road "served a public purpose" and was a "neighborhood road." *Id.* at 189, 118 S.E.2d at 438.

100. *Id.* at 188, 118 S.E.2d at 437 (citations omitted). Apparently the pleadings in the case were confusing and the trial court ordered that the defendants' pleadings be amended to conform to the proof. *Id.* The opinion of the supreme court does not deal with prescription; the trial court apparently treated the case as involving an easement claimed on a prior use theory. *Id.* at 190, 118 S.E.2d at 439.

101. *Id.* at 186, 188, 191, 118 S.E.2d at 437, 439.

102. *Id.* at 191, 118 S.E.2d at 439.

103. *Id.* at 190, 118 S.E.2d at 438 (citing Barwick v. Rouse, 245 N.C. 391, 95 S.E.2d 869 (1957)) (emphasis added).

104. *Id.* at 190, 118 S.E.2d at 438. There is ample internal evidence that the court intended the paragraph from which this quotation is taken to be a digression from the rationale of the case. The last sentence of the paragraph states that the "[d]efendants do not claim an easement by necessity." *Id.* The citations in this paragraph to *Hetfield v. Baum, Carmon v. Dick* and *Roper Lumber Co. v. Richmond Cedar Works* indicate that the court was quite conscious that it was here describing a theory distinct from the prior use theory described in its immediately preceding paragraph that formed the only basis for its resolution of the case.

105. *See* note 104 *supra.*

at issue in the case—the court said:

> To establish the right to use a road as appurtenant to the property granted, *it is not necessary to show absolute necessity. It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that grantor intended grantee should have the right to continue to use* the road in the same manner and to the same extent which his grantor had used it, *because such use was reasonably necessary* to the "fair" . . . "full" . . . "convenient and comfortable" . . . enjoyment of his property.[106]

With respect to the creation of an easement based on prior use, *Smith v. Moore* teaches that the test for necessity is not the test of "absolute necessity" but is instead whether the easement is "reasonably necessary" to the fair, full, convenient and comfortable enjoyment of the property.

The definition of necessity was important in *Smith*. This is one of the few North Carolina cases in which there was some question whether the claimed easement actually was necessary. The plaintiff, denying the easement, introduced evidence of another road providing access for the defendants.[107] The trial judge instructed the jury "that whether there was another road or whether there was not is not an issue for you to pass upon here."[108] This instruction was erroneous because under the "reasonable necessity" test, the jury should have been permitted to consider whether the existence of the other road, perhaps an equally convenient means of access for the defendant, would tend to negate the inference of the grantor's intention to provide his grantee with the right to continue to use the quasi-easement.[109] This error was not cured by the trial court's subsequent quotations from *Barwick v. Rouse* that gave the jury a correct statement of the law.[110]

Smith's significance as precedent is limited to its statements about the issue before it—the prior use theory. In connection with that theory, the court concluded that the appropriate test for necessity is whether the claimed use is "reasonably necessary to the fair, full, convenient and comfortable enjoyment of the property."[111] There is no indication in the opinion itself that this test was intended to be used in

106. 254 N.C. at 190, 118 S.E.2d at 438-39 (emphasis added).
107. 254 N.C. at 191, 118 S.E.2d at 439.
108. *Id.*
109. *See id.* at 190, 118 S.E.2d at 438-39.
110. *Id.* at 191, 118 S.E.2d at 439.
111. *Id.* at 190, 118 S.E.2d at 439.

determining the existence of an easement by necessity.[112]

In the same year, the court decided *Pritchard v. Scott*,[113] a cartway proceeding. To determine whether petitioner was entitled to a cartway, the court was forced to consider whether petitioner might have acquired an easement by necessity against a contemporaneous devisee.[114] This required the court to decide directly whether *White v. Coghill* had properly held that the statutory cartway procedure superseded the common law doctrine of easement by necessity.[115] An analysis of the *White* opinion, its citations and its misplaced reliance on one phrase from *Mordecai* persuaded the court that *White*'s "exclusive remedy" theory enjoyed no support in North Carolina law. In *Pritchard*, the court once again expressly declared the easement by necessity doctrine to be recognized in North Carolina.[116]

Ten years later the court decided *Oliver v. Ernul*.[117] This was an action to restrain the defendant from obstructing a claimed right of way over the defendant's land to a public road. Plaintiffs' evidence was that defendant Ernul owned, and then divided, a rectangular shaped tract of land near Morehead City that fronted on Route 70 to the south. In 1954, Ernul conveyed the northern portion of his land to Mansfield and the center portion of the land to Oliver. Ernul retained ownership of the southern portion of the land abutting on Route 70. At the time of

112. The *Smith* opinion does not advert to the language of *Carmon v. Dick* that arguably states the "reasonable necessity" test in connection with the easement by necessity.

113. 254 N.C. 277, 118 S.E.2d 890 (1961).

114. Petitioner was the widow of Pritchard Sr., who had devised the northern portion of his farm to his wife and the southern portion to his son by a former marriage, Pritchard Jr. Petitioner's land did not abut on a public road; Pritchard Jr.'s land abutted a road. Petitioner brought a cartway proceeding against Pritchard Jr. and several other nearby landowners. Defendants Scott, owners of the land across which a cartway most probably would be laid, answered and alleged that petitioner had an easement, by necessity or on a prior use theory, across the lands of Pritchard Jr. This, asserted the Scotts, constituted an adequate means of access and thus disabled petitioner from claiming a cartway. *Id.* at 278-79, 118 S.E.2d at 891-92.

The trial court found that petitioner had not acquired an easement across the lands of Pritchard Jr. The Scotts appealed. Justice Bobbitt, writing for a unanimous court, concluded that if petitioner was entitled to a way of necessity over the land of Pritchard Jr., she would not be entitled to a cartway. But the justice added that the court had found no decision in its reported cases in which a claimant had established an easement by necessity. *Id.* at 283, 118 S.E.2d at 815.

115. Justice Bobbit also conceded that there was some support in *White v. Coghill* for the assertion that the common law way of necessity had been superseded by the cartway procedure. The court concluded, however, that *White* was wrong: the statement by Mordecai about the cartway, a "peculiar way of necessity," was in a separate paragraph, following Mordecai's discussion of the common law easement by necessity, and did not support the holding of the case. *Id.* at 284-85, 118 S.E.2d at 896.

116. Justice Bobbitt pointed out that in a number of cases after *White* the court had "stated and recognized" the common law of easement by necessity. *Id.*

117. 277 N.C. 591, 178 S.E.2d 393 (1971).

Ernul's division of his tract, a narrow dirt road running along the eastern edge of the land provided access to Route 70. After the land was divided, the only other way out from the northern or center portions of the land was across railroad tracks to the north.[118]

Ten years after the land was divided, the owners of the lots drafted a legal instrument they called a "Rightaway Deed."[119] The "Rightaway Deed" purported to create rights in all the parties to use the dirt road. The instrument described the easement in language approximating legal jargon and left some uncertainty as to its exact location. Ernul denied that he executed the instrument.[120]

Five years after execution of the "Rightaway Deed," the landowner adjoining the lands to the east erected a fence along the boundary. This fence narrowed the dirt access road. Shortly thereafter, Ernul, or his tenant, Stamps, blocked the dirt road by placing a post in its center at the point where the road passed the dwelling house owned by Ernul and occupied by Stamps. This forced the plaintiffs to exit from their property across the railroad tracks to the north, resulting in damage to their cars.[121]

After plaintiffs' presentation of evidence at trial, defendant successfully moved for nonsuit. The court of appeals reversed, holding that although the "Rightaway Deed" was poorly drafted, it was legally sufficient to create an express twenty-foot easement extending from Highway 70 along the eastern line of the land originally owned by Ernul and serving each of the three tracts.[122] The supreme court allowed certiorari.[123]

Justice Huskins' stated that the "Rightaway Deed" was legally insufficient to grant an easement because it failed to identify with reasonable certainty the location of the easement and the dominant and servient tenements.[124] The court, however, affirmed the decision of the court of appeals on a theory of "way of necessity by operation of law."[125]

Had the evidence been properly developed, plaintiffs in *Oliver v. Ernul* might have established that when Ernul separated his tract into

118. *Id.* at 594-96, 178 S.E.2d at 394-95.
119. *Id.*
120. *Id.*
121. *Id.* at 596, 178 S.E.2d at 395.
122. 9 N.C. App. 221, 175 S.E.2d 618 (1970), *aff'd*, 277 N.C. 591, 178 S.E. 2d 393 (1971).
123. 277 N.C. at 596-97, 178 S.E.2d at 395-96.
124. *Id.* at 597, 178 S.E.2d at 396.
125. *Id.* at 599, 178 S.E.2d at 397.

three distinct parcels, there was an apparent, continuous and permanent dirt road used as a "quasi-easement," which would have given rise to an easement by implication from prior use. Despite plaintiffs' allegation that the road existed at the time of the severance, however, the court's opinion reveals no evidence that the road actually had been in continuous use before separation of title.[126] The court, therefore, was forced to consider the implied easement issue exclusively on an easement by necessity theory.

In analyzing the case on this theory, the court made an error in its discussion that did not affect the result in the case but does affect the strength of the opinion as a statement of the operative rule. The court described the elements of proof for an easement by necessity with a citation to *Smith v. Moore*:

> Furthermore, to establish the right to use the way of necessity, it is not necessary to show absolute necessity. It is sufficient to show such physical conditions and such use as would reasonably lead one to believe that the grantor intended the grantee should have the right of access.[127]

The court correctly stated that the basis for an easement by necessity is the implementation of the inferred intention of the parties.[128] The court's statement about the degree of necessity required to establish such an easement, however, is the result of a significant distortion of the language from which it is drawn in *Smith v. Moore*. Recall that *Smith v. Moore* was decided solely on the basis of implication from prior use. In its discussion of the prior use theory, the *Smith* court did not purport to state the necessity requirement for the easement by necessity.[129] *Oliver v. Ernul* took language from *Smith*[130] expressly dealing with the prior use theory and mistakenly applied it to the easement by necessity.

If the preceding quotation from *Oliver v. Ernul* is compared with the language in *Smith v. Moore* from which it is drawn, the only reasonable conclusion is that, when Justice Huskins drafted *Oliver v. Ernul*, he borrowed and modified language from *Smith v. Moore*.[131] Both the modification of the text and the difference in context, however, change the meaning of the language borrowed from *Smith*.

126. *Id.* at 593-96, 178 S.E.2d at 393-95.
127. *Id.* at 599, 178 S.E.2d at 397 (citing *Smith v. Moore*).
128. *Id.; accord*, Carmon v. Dick, 170 N.C. 305, 87 S.E. 224 (1915).
129. *See* text accompanying notes 106-12 *supra*.
130. *See* text accompanying note 106 *supra*.
131. *Compare* text accompanying note 106 *supra with* text accompanying note 127 *supra*.

While it might be true that to establish a right derived from necessity alone a claimant need not show "absolute necessity," *Smith v. Moore* does not support this position. The holding of *Smith v. Moore* is only that the absolute necessity standard does not apply when it is shown that there was prior use. Indeed, when Justice Huskins transplanted the language from *Smith v. Moore* to *Oliver v. Ernul*, he retained the phrase "and such use" as an element of proof.[132] Prior use was relevant in *Smith*, but legally inconsequential in *Oliver*.

There was no real need for the *Oliver* court to decide on a verbal formulation of the "extent of necessity" required in easement by necessity cases. The facts of the case were such that, unless plaintiffs could somehow have secured a crossing from the railroad to the north, the only way in and out of their land was across the land of defendant. In short, a right of way was essential or "absolutely necessary." This makes it somewhat difficult to know just what the court intended in *Oliver*. Perhaps the court feared that the evidence that plaintiffs did drive across the tracks to the north made their necessity less than "absolute." Whatever the verbal formula, the result seems correct. What is troublesome is the court's use of a doctrinal description of "necessity" in the easement by necessity context drawn from its earlier formulation in connection with the prior use theory. If we are to take the court at its word,[133] it apparently has overlooked the desirability of an "extent of necessity" concept in implied easement law.

Perhaps the best explanation for the court's treatment of the implied easement issue in *Oliver* is that it was sloppy in its use and understanding of its own precedent on a point that was not especially important in the *Oliver* case itself. It is not clear that any appreciable or irreparable harm has been done by the court's failure to define the necessity requirement differently in connection with each of the two types of implied easements. The result in *Oliver v. Ernul* is unexceptionable on the facts. The court properly held that an easement by necessity was created when Ernul divided his property, thereby creating two landlocked parcels with highway access available only over Ernul's land.[134]

Ultimately, however, a case will arise in which the supreme court's

132. *Compare* text accompanying note 106 *supra with* text accompanying note 127 *supra*.

133. The *Oliver* definition of "necessity" probably should not be taken literally. The court was not required to engage in any real analysis of the necessity issue as it decided the case, and it therefore seems unlikely that the language was chosen with the highest degree of care.

134. 277 N.C. at 593-96, 178 S.E.2d at 397-98.

use of only one definition of "necessity" in both implied easement situations might make a difference in the outcome.[135] The court's opinions to date provide no basis for understanding whether or how the court expects trial judges to distinguish the meaning and application of the necessity requirement in the case of an easement by necessity from the meaning and application of that requirement in the case of an easement implied from prior use. Since *Oliver*, the court of appeals has been asked to decide two implied easement cases. Each case required more than a superficial look at the "extent of necessity" question. In these cases the court accepted the "reasonable necessity" test in each of the two implied easement contexts.

In *Wilson v. Smith*,[136] the trial judge ruled that plaintiffs were entitled to an easement by necessity across the land of defendant, and the court of appeals affirmed. The *Wilson* court described a way of necessity as an easement arising "when one grants a parcel of land surrounded by his other land, or when the grantee has *no access* to it except over the land retained by the grantor or land owned by a stranger."[137] The court then quoted the language in *Oliver v. Ernul* derived from *Smith v. Moore*.[138] In short, the court said, on the one hand, that a way of necessity arises when a grantee from common ownership has "no access" but, on the other hand, following the language of *Oliver*, said that it is "not necessary to show absolute necessity."[139]

Plaintiffs in *Wilson* had acquired their parcel from defendant and claimed to have "no legally enforceable right-of-way to the public highway."[140] Evidence showed that plaintiffs did have a "permissive right-of-way" to the highway across the lands of strangers.[141] Despite this license, plaintiffs had no right that would guarantee their continued ability to get to their land from the public road. The significance of this state of affairs was demonstrated by plaintiffs' inability to obtain a mortgage loan to finance the construction of a home on their property. The court quite properly characterized plaintiffs' situation as one in

135. *See* note 38 *supra*. *See also* Carver v. Leatherwood, 230 N.C. 96, 52 S.E.2d 1 (1949): "As there are substantial differences between the [easement by necessity and easement implied from prior use], it might be well for plaintiffs to decide upon which right they rely. This would greatly facilitate the trial and lessen the possibility of error." *Id.* at 98, 52 S.E.2d at 3.

136. 18 N.C. App. 414, 197 S.E.2d 23, *cert. denied*, 284 N.C. 125, 199 S.E.2d 664 (1973).

137. *Id.* at 414, 417, 197 S.E.2d at 23, 25 (emphasis added).

138. *See* text accompanying notes 106 & 127 *supra*.

139. 18 N.C. App. at 416, 417, 197 S.E.2d at 23, 25.

140. *See id.* at 418, 197 S.E.2d at 26.

141. *Id.* at 418, 197 S.E.2d at 26.

which they "[did] not have full beneficial use of their property."[142]

Wilson v. Smith is the paradigm for the proposition that the necessity requirement for the easement by necessity cannot realistically be defined as "strict" or "absolute" necessity. What the court must have meant was that a way of necessity should be found in any circumstance in which an estate in land is created by the separation of title previously held by one person and in which that estate does not have, as an additional incident of ownership, a legally enforceable right, of greater dignity than a license, of access to and from a public road that can be exercised by reasonable means. In short, *Wilson* confirms the accuracy of the *Smith/Oliver* statement that "absolute necessity" is not the test, either in connection with an easement implied from prior use (*Smith*) or an easement by necessity (*Oliver*). On this basis it is not unreasonable to argue that the extent of necessity requirement in the easement by necessity case can be stated as that of "reasonable necessity." This conclusion, however, leaves the courts with the difficulty of defining the necessity requirement for the easement implied from prior use if, as is proper, the "extent of necessity" required in that context should be different than in the context of the easement by necessity.[143]

McGee v. McGee,[144] a prior use theory case decided by the court of appeals in 1977, suggests the not surprising conclusion that the North Carolina courts will use "reasonable" as the modifying adjective in the prior use theory cases. In *McGee*, the evidence showed that the claimant had a means of access to his property in addition to the easement claimed to be implied from prior use. The question raised on appeal was whether there was sufficient evidence to support a finding that the claimed easement was "reasonably necessary to the full and fair enjoyment of the land."[145] This, of course, was the test stated in *Smith v. Moore* and nearly all of the earlier prior use theory cases. Applying this test, the *McGee* court held that the presence of the alternative right of way to the plaintiff's property was not, in itself, conclusive proof that the claimed easement was not "reasonably necessary."[146]

142. *Id.*

143. *See* text accompanying notes 47-51 *infra*.

144. 32 N.C. App. 726, 233 S.E.2d 675 (1977).

145. *Id.* at 728, 233 S.E.2d at 676.

146. "The presence of a second or alternate way onto the property is not conclusive proof that an implied easement is unnecessary." *Id.* at 729, 233 S.E.2d at 677.

III. An Attempt At Diagnosis and Prescription

The North Carolina implied easement cases indicate that the North Carolina courts never have expressly accepted the notion that implied easement law involves an "extent of necessity" concept in which there is a difference in the "extent of necessity" required for creation of an implied easement with proof of prior use, on the one hand, and when "necessity" alone supports the claim of the easement, on the other. Indeed, the language of the opinions suggests that in North Carolina the required "extent of necessity" does not vary according to the presence or absence of other factors from which the easement might be implied. In all cases the stated test is a variation on the theme of "reasonable necessity."[147]

This probably does not represent a conscious judicial choice. It is more likely that the relative simplicity of the cases appealed, and judicial inattention to the significance of the language in the opinions, account for this situation. The problem, moreover, is not earthshaking. There is little reason to predict that the supreme court and the court of appeals are likely to make significant mistakes in deciding cases because of lack of clarity in the language of the existing implied easement case law.

It is clear, however, that attorneys analyzing disputes and preparing litigation strategy, and trial judges testing the sufficiency of pleadings, ruling on questions of admissibility, and instructing juries, would benefit from a clarification of the rule of necessity in implied easement doctrine. There are several obvious steps the courts might take to improve the statement of the doctrine.

The first would be to accept Professor Powell's suggestion that, in a case in which there is evidence of prior use, the element of proof related to the utility of the easement should be stated in terms of "importance" rather than "necessity."[148] This would leave the "reasonable necessity" formulation available for the true easement by necessity situation. A rule formulation in terms of "importance" would help lawyers, judges and juries focus on the ultimate issue in the quasi-easement

147. There is, however, support for the proposition that the North Carolina courts will depart from the "reasonable necessity" formulation in a case in which the implied easement is claimed by the grantor rather than by the grantee. In Goldstein v. Wachovia Bank & Trust Co., 241 N.C. 583, 86 S.E.2d 84 (1955), the court said that implied easements would not be reserved in favor of a grantor unless there is a showing of "strict or imperious necessity." *Id.* at 588, 86 S.E.2d at 87. This position is not unique to the North Carolina courts. *See, e.g.*, 2 G. THOMPSON, *supra* note 3, §§ 353, 362.

148. R. POWELL, *supra* note 2, ¶ 411; *see* text accompanying notes 52-53 *supra*.

case: is it likely the grantor and grantee intended to create the easement but neglected to document that intention?

While Professor Powell's suggestion seems to improve slightly the description of the prior use theory doctrine and avoids duplicate use of "reasonable necessity," it does little to clarify the profession's understanding of the easement by necessity. To accomplish that, the court should return again to an explicit understanding of the easement by necessity as a doctrine based on land utilization policy rather than fulfillment of inferred intent.[149] This would require the North Carolina courts to discard persistent but ultimately unimportant statements about the doctrine.[150] It would, however, avoid the fiction that was lost as the rule developed in the nineteenth and twentieth centuries.[151] The easement by necessity is recognized by the courts primarily to ensure the beneficial use of land and thus to fulfill a social policy that is inferior only to a policy of effectuating a clear expression of the parties that they do not wish to create an easement in the course of a land transaction.[152]

If the easement by necessity were expressly based on public policy and effected by operation of law, the courts could articulate the doctrine in terms more clearly satisfactory for most of the situations in which the doctrine would be invoked. A claimant would be entitled to an easement by necessity whenever the evidence showed that, as a result of separation of title, his land was left without an irrevocable right of ingress and egress useful to him without extraordinary inconvenience and expense.[153] This probably is the law in North Carolina; the rule, however, is stated in less concrete terms. We are told that the test is not "absolute necessity" but, by implication, "reasonable necessity," the test also used in the prior use theory cases.

149. This suggestion is also, at least, implied in Professor Powell's treatise. *See* 3 R. POWELL, *supra* note 2, ¶ 410.

150. *See, e.g.*, Smith v. Moore, 254 N.C. 16, 118 S.E.2d 436 (1961); Carmon v. Dick, 170 N.C. 305, 87 S.E. 224 (1915).

151. *See* text accompanying notes 14-20 *supra*.

152. The generally accepted rule is that an express statement of an intention not to create an easement will result in a judicial decision denying an easement by necessity even when the proof would otherwise support the finding of an easement and even when the easement is recognized as being based on public policy. *E.g.*, 3 R. POWELL, *supra* note 2, ¶ 410 at 34-58 to -72; *cf.* RESTATEMENT OF PROPERTY § 476(b) & Comment d at 2977, 2980 (1944) (term in conveyance expressing intent not to create easement may prevent easement by necessity).

153. *See, e.g.*, 3 R. POWELL, *supra* note 2, ¶ 410. The language of a rule applied to other types of easements would, of course, vary from the text. The right of way is sufficiently common to have resulted—at least in the North Carolina cases—in the terminology "way of necessity."

It might be desirable to adopt both these suggestions. This would leave the law roughly in the following position:

(A) Whenever the claimant shows a separation of title with no right of access for the parcel conveyed, an easement by necessity would be appropriate whether or not there was prior use of a claimed easement. Evidence of prior use might be useful in locating the easement[154] but would have no significant bearing on the decision to recognize the easement.

(B) Whenever the evidence shows a separation of title but no prior use and, in addition to the claimed easement, another similar right, useful by the claimant without extraordinary inconvenience or expense, no easement should be implied.

(C) Whenever the claimant shows a separation of title, an apparent, continuous and permanent prior use, and another similar right useful by the claimant without extraordinary inconvenience or expense, an easement may be implied if the jury finds that the claimed easement is so important to the use of the claimant's land that the importance, together with the proof of prior use and the parties' awareness of the prior use, supports an inference that the parties intended to create the easement.[155]

These suggested doctrinal statements are concededly more cumbersome than the "reasonably necessary" or "necessary to the beneficial use" language commonly used in the North Carolina opinions. Doctrinal clarity and precision, however, are not always achieved by the use of apparently simple statements that have a way of becoming judicial cliches.[156] If, as suggested in *Smith v. Moore* and *McGee v. McGee*, the existence of an alternative right of access is not an impediment to a jury finding of "reasonable necessity," and if the supreme court seriously intends to follow the suggestion of *Oliver v. Ernul* that "reasonable necessity" is the test even in the easement by necessity

154. The North Carolina courts follow the rule that the right to choose the location of a way of necessity belongs, in the first instance, to the owner of the claimed servient estate, provided, however, that the right is exercised in a "reasonable manner." *E.g.*, Pritchard v. Scott, 254 N.C. 277, 283, 118 S.E.2d 890, 895 (1961); Winston Brick Mfg. Co. v. Hodgin, 190 N.C. 582, 585, 130 S.E. 330, 331 (1925).

155. *See generally* McGee v. McGee, 32 N.C. App. 726, 233 S.E.2d 675 (1977); Dorman v. Wayah Valley Ranch, Inc., 6 N.C. App. 497, 170 S.E.2d 509 (1969).

156. North Carolina Civil Pattern Jury Instruction § 840.25, designed for use in the easement by necessity case, uses neither "necessity" nor "necessary" in defining the proof that is sufficient to imply that type of easement. Instead the instruction requires the jury to find that plaintiff has proved the absence of a "legally enforceable right of access to a public road." *See* NORTH CAROLINA CONFERENCE OF SUPERIOR COURT JUDGES, COMMITTEE ON PATTERN JURY INSTRUCTIONS, NORTH CAROLINA PATTERN JURY INSTRUCTIONS FOR CIVIL CASES § 840.25 (Supp. 1979).

case, it is at least theoretically possible in North Carolina for a "properly" instructed jury to imply an easement without proof of prior use and in the face of proof of another right of access. If, as one must strongly suspect, this is not the law of North Carolina, it is both absolutely and reasonably necessary for the North Carolina courts to break away from the simplistic patterns of doctrinal description that have crept into the implied easement cases. The courts instead should use more precise, albeit more complex, statements of the law that expressly reflect the "extent of necessity" concept in implied easement law.