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**Easement of necessity:
Kellogg v Garcia, 2001
Roger Bernhardt**

Landlocked parcel gives rise to easement of necessity right-of-way over adjacent parcel, even if historical common owner of both parcels was federal government.

Kellogg v Garcia (2002) 102 CA4th 796, 125 CR2d 817

The federal government sold adjacent parcels to the predecessors of the Kelloggs and the Garcias. The Kelloggs' parcel was landlocked, requiring them to use a private road to cross the Garcias' property to gain access to their property. When the Garcias objected to the Kelloggs' use of the road, the Kelloggs sued to quiet title, claiming an easement over the Garcias' property. An easement of necessity arises when there is (1) a strict necessity for the right-of-way, and (2) common ownership of the servient and dominant tenements at the time of the conveyance giving rise to the necessity. The trial court held for the Garcias, ruling that an easement of necessity cannot arise when the only common owner of the two subsequently conveyed properties was the federal government, because ownership by the government does not constitute the necessary unity of ownership to support an easement by necessity.

The court of appeal reversed. The court found that the Kelloggs' evidence met both prongs of the two-part test: There was no plausible access to their property except over the Garcias' property, and the federal government was the historical common owner of both properties. Furthermore, the court concluded that the federal government should be treated the same as a private common owner. Accordingly, the Kelloggs were entitled to an easement by way of necessity through the roadway traversing the Garcias' property. The court noted that if the Kelloggs' necessity ever ceased, the Garcias could seek relief from the easement.

THE EDITOR'S TAKE: While it always seems odd to a city dweller like me to read about a couple discovering that their property is and has been landlocked for the past 100 years, those kinds of problems are probably quite familiar to those who are not confined to urban enclaves. Where parcels are large and the surroundings unpopulated, no one may be initially bothered enough by the lack of legally sanctioned access to feel the need to do anything about it. So, here, an 1878 conveyance of the landlocked Chino Quartz Mine caused no concern to its subsequent owners until sometime after 1987—over 109 years later. And because of the rather peculiar law governing easements of necessity, the effect of those 1878 events had to be determined by appellate judges in 2002—with no statute of limitations available to get the problem off their backs.

Access rights to land are generally not a problem in urban and suburban communities because local governments will not approve developers' subdivision maps unless they show proper access to all of the newly created parcels. Furthermore, the fact that the streets usually have to be put in before any parcels may be sold makes it even more likely that anyone interested in buying one of these new lots will see and use the road leading up to where the front door is going to be, even if the house itself isn't there yet. But in rural settings, large pieces of acreage may be carved up for nondevelopment purposes, making it

possible—especially when the federal government is patenting out its former public wilderness lands and there are few public roads around—for landlocked segments to be created without either party noticing.

What the government should have done in 1878 was to include in its original deed the additional words “together with a right of access to the public road,” thereby giving all successive grantees—including the Kelloggs as current owner-beneficiaries—an express easement that would have run with their parcel. The easement would have been effective only over the lands the government still retained, since it had no power to grant an easement in any other land except that which it still owned. And such an express burden would have run with the retained government land, including the property the neighboring Garcias took as servient tenants.

Landholders frequently forget to provide for all the necessary things in their deeds when they convey fractional parts of their holdings. Thus, we have the doctrine of implied easements to enable courts to cover up for transferors’ drafting mistakes by filling in the appropriate blanks. That doctrine has its own special requirements.

First, you can only imply an easement in a case where an expressly created easement would itself be valid. That means you have to have one parcel of land split into two parcels, because that is the only time the grantor of one of the parcels could have granted or reserved an easement over the other parcel. (After the lot split and conveyance, the grantor could not unilaterally impose an easement over the property already conveyed, since he would no longer own it. And before the lot split, the fact that the entire parcel was owned by the same person precludes an easement, because one cannot have an easement in his own property.)

Second, there has to be a prior use (a “quasi easement,” *i.e.*, an arrangement that would be an easement if the two parts were separately owned). That prior use has to be sufficiently obvious, permanent, and necessary to justify an inference by the court that the parties intended to include additional language in the deed granting or reserving an easement to that effect.

When the easement is claimed by necessity, the requirement of a previous lot split continues, but there is no longer any requirement of a prior use. That allows a court to give the landlocked owner a right of access even though there is no evidence to suggest that either party ever had any intention of allowing one landowner to start using the other’s land to get to a highway. If the result is going to be based on inferred intent, it will have to be the clearly fictional intent that each expected the other to have full use of his or her own parcel, rather than any concrete expectation that his land was going to be used as a passway for her to get to the road.

That fiction is valuable, because it helps to keep land accessible. Inaccessibility may be legitimate when voluntarily chosen, but not when it arises from lack of reachable public roads. Even policies favoring greenbelts and open space have not traditionally required that the land we are trying to preserve remain inaccessible (that is, until the new “roadless rule” of the Clinton Administration took effect; see *Kootenai Tribe v Veneman* (9th Cir, Dec. 12,

2002, No. 01–35472) 2002 US App Lexis 25467). The requirement of an original lot split, however, may still defeat the claim, if such a severance never happened.

From the perspective of accessible land, we would be better off if we simply had a policy of allowing all owners of landlocked parcels to be able to demand access, whether or not their present condition resulted from an original severance by a common owner. Had the original common grantor in this case been a private individual, no one would have denied that an easement of necessity arose when the Chino Mine was first conveyed. Because the government was the conveyor, however, that brought into the equation a line of cases holding that such easements are not created in those circumstances.

The logic was that there could be no necessity as long as the government had eminent domain power. Such a rule obviously makes sense only when what is necessary is an easement by reservation rather than by grant—*i.e.*, when the government has landlocked itself by virtue of what it has just conveyed. And it makes no sense in the reverse situation, where the grantee is the one landlocked and has no power to condemn. This decision puts that silly old argument to rest and rejects the older opinions that erroneously followed it.

An even better solution would be to eliminate entirely the requirement of an original lot split. Our legislature should do what many other state legislatures have done and give individuals the right of private eminent domain to acquire appurtenant access easements whenever they are landlocked, whether or not there was ever common ownership of the two parcels. Curiously, it has done so in CC §1001, but only with regard to water, gas, electricity, drainage, sewer, and telephone service, and not for what is most important of all—access.

“Service-denied” owners can acquire what they need, without having to prove an original lot split, by getting local approval and by paying for what they have to take; “landlocked” owners, however, either get access free if they win their claim of an easement by necessity or else must pay whatever their neighbor can extort from them (since the benefit is obviously worth so much more than the burden) if they lose. Adding access to the list of acquirable interests now authorized in the Civil Code would be simpler and fairer to everyone. *Roger Bernhardt*