RECENT ENGLISH DECISIONS.

High Court of Justice. Chancery Division.

WHEELDON v. BURROWS.

There will be no implied reservation of an easement, though it be a continuous and apparent easement, unless it be also an easement of necessity.

A vendor having conveyed a plot of land, part of his property, to A., without any reservation and subsequently another plot, part of the property retained and adjoining the first plot, to B.; upon B. claiming in right of his plot a right of light over A.'s plot, which, in the opinion of the court, was not an easement of necessity; *Held*, that though the easement claimed might be continuous and apparent, yet, not being one of necessity, there was no implied reservation of it by the vendor out of his conveyance to A., and B. was therefore not entitled to it.

THIS was an action whereby the plaintiff sought to restrain the defendant from pulling down a boarding, which the plaintiff had erected upon his own land, for the purpose of preventing the defendant acquiring by prescription a right to light through the windows of a wall belonging to the defendant, and which separated the land of the defendant from that of the plaintiff. There was no dispute as to the facts, and the plaintiff waived any claim for damages by reason of the defendant's trespass. The only question therefore remaining, was the question of law whether the defendant had or had not a right of light through the above-mentioned windows over the plaintiff's land.

The facts will be found fully stated in the judgment of the Vice-Chancellor, who delivered a written judgment.

Horton Smith, Q. C., and *Romer*, for the plaintiff.—The vendor conveyed our piece of land to us without any reservation of easements before the conveyance to the defendant, and therefore, on the rule of law that a grantor cannot derogate from his own grant, no right of light for the land of the vendor retained by him and the shed built upon it was reserved. The fact that such an easement as the right of light claimed in this case is an apparent and continuous easement, does not cause an implied reservation of such easement, except where the easement is one of necessity, which the evidence shows this is not. *Russell* v. *Harford*, Law Rep. 2 Eq. 507; Gale on Easements, 4th ed., c. 4; *Suffield* v. *Brown*, 4 DeG., J. & S. 185; *Pyer* v. *Carter*, 1 H. & N. 922; *Tenant* v. *Goldwin*, 2 Ld. Raym. 1093, 1 Salk. 360; *Palmer* v. *Fletcher*, 1 Lev. 122; *White* v. *Bass*, 7 H. & N. 722; *Curriers' Co.* v.

Corbett, 2 Dr. & Sm. 355, 4 DeG., J. & S. 764, 771; *Ellis* v *Manchester Carriage Co.*, Law Rep. 2 C. P. D. 13; *Crossley* v. *Lightowler*, Law Rep. 3 Eq. 279, 283, Law Rep. 2 Ch. 478; *Watts* v. *Kelson*, Law Rep. 6 Ch. 166; *Dodd* v. *Burchell*, 1 H. & C. 113; *Pearson* v. *Spencer*, 3 B. & S. 762; *Morland* v. *Cook*, Law Rep. 6 Eq. 265.

Sir *H. M. Jackson*, Q. C., and *F. H. Colt*, for the defendant.—The defendant is entitled to a right of light in respect of his shed, for though there was no express reservation of easements by the vendor out of his conveyance to the plaintiff, this right of light is an easement apparent and continuous, and is thus impliedly reserved without express reservation. *Pyer* v. *Carter; Wardle* v. *Brocklehurst*, 1 E. & E. 1058; Gale on Easements, 4th ed., c. 4; *Nicholas* v. *Chamberlain*, Cro. Jac. 121; *Pinnington* v. *Galland*, 9 Ex. 1; *Richards* v. *Rose*, 9 Id. 215; *Kay* v. *Oxley*, Law Rep. 10 Q. B. 360; Goddard on Easements 138; *Swansborough* v. *Coventry*, 9 Bing. 305; *Compton* v. *Richards*, 1 Price 27; *Ewart* v. *Cochrane*, 4 Macq. 117; *Dodd* v. *Burchell*, 1 H. & C. 113; *Davies* v. *Sear*, Law Rep. 7 Eq. 427; *Hinchliffe* v. *Kinnoul*, 5 Bing. N. C. 25; Dart's Vendor and Purchaser, 5th ed., p. 537.

Horton Smith, Q. C., in reply.

BACON, V. C.—This action is brought by the plaintiff for the purpose of restraining the defendant from repeating a trespass committed by him upon the plaintiff's land, the defendant insisting that the alleged trespass had been merely the exercise of the right possessed by him, to prevent the erection on the plaintiff's land of any obstruction to the use of light through certain windows in a tenement, belonging to the defendant and adjacent to and over looking the plaintiff's land. [His lordship, after adverting to the facts as regards the trespass, which he said was admittedly trivial, and merely for the purpose of trying the right, continued:] The question to be decided is therefore one of law only.

In 1856, one Allen became the absolute owner of a piece of land in Derby, of which the portion now belonging to the plaintiff and lying towards the north, was divided from the rest by a dry brick wall. In 1858, Allen built upon the southern part of his land, close to this wall, a shed or workshop, which was lighted only by skylights. In 1861, Allen altered this shed, rebuilt and raised

the wall belonging to it and also raised the roof, abolished the skylights, and inserted four windows in the wall which he had so raised. Of these windows, one was afterwards covered by a workshop, built by Allen on that part of the land which has become the plaintiff's, but there remained and still remain in the wall of the shed built by Allen three windows, the subject of the present action. Allen continued to use and occupy the whole of the premises until 1867, when they were sold by him to one Woolley. In 1871, Woolley conveyed the premises to Tetley, who, in 1875, caused them to be advertised for sale by public auction. The plaintiff's immediate predecessor became the purchaser at the auction of lot 10, described in the printed particulars of sale as, "All that valuable piece of eligible building land, containing, &c., and having a frontage and depth, &c., together with the building thereon, now used and occupied by Mr. Wm. Wheeldon (the plaintiff's predecessor in title), as a millwright's shop. This lot is suitable for the erection of a factory or mill." By a deed dated the 6th of January 1876, Tetley conveyed the land to Wm. Wheeldon in fee, by the description of "All that piece or parcel of land or ground containing by admeasurement 600 feet," &c., "together with the buildings erected on a part of the said piece of land and now used or occupied as a millwright's shop, and which piece of land and hereditaments are bounded towards the east, &c., towards the west, &c., towards the north, &c., and on or towards the south, by other hereditaments remaining the property of the said Samuel Tetley, and which are now in the tenure or occupation of the said Wm. Wheeldon." Then came the usual general words, "Together with all walls, fences, lights, watercourses," and so on. The premises, now the property of the defendant, were thus described in the same particulars of sale as, "All that valuable silk-mill, situate on Monk street, consisting of a three-story mill, winding-room and other rooms, and high pressure steam-engine, and an elastic web manufactory situate in the rear, the whole forming one of the most complete establishments in Derby; the mill and gimp-shed are at present let. The whole machinery on this lot will be sold with the freehold, particulars of which will be furnished." This lot was bought in at the auction, and was afterwards purchased by private contract by the defendant, to whom it was conveyed by Tetley, by a conveyance dated the 7th of April 1871, by the description of "All that silk-mill and factory," and so on, and the boundaries,

"on other part by a piece of land and hereditaments lately sold and conveyed by the said Samuel Tetley to one Wm. Wheeldon, and on the south," by other premises, and so one; that clause contains the usual general words, among which are, "together with all houses, out-houses, gardens, passages, lights, waters, watercourses, privileges, emoluments and appurtenances whatsoever."

In January 1878, the plaintiff erected boardings near to the edge of her land, and facing the three windows of the defendant's shed, for the purpose of ascertaining her right to the uncontrolled use and possession of the whole of her land. Immediately thereupon, the defendant knocked down those boardings by means of crowbars or poles inserted through the windows of his wall. These facts are all clearly proved or admitted.

Numerous authorities have been referred to on both sides, but the principles of law insisted upon by the plaintiff are, that the defendant's vendor, not being entitled to any prescriptive right to the lights in question, and no mention having been made of them in the conveyance to the plaintiff's predecessor in title, an absolute, unqualified, unrestricted right to the land passes by the conveyance to him; and that to hold the contrary would be repugnant to the well-established principle of law, that a grantor cannot derogate from his grant. The defendant, on the other hand, asserts and insists that the three windows in question constituted a continuous easement, and that it was open and notorious, and that although no mention is made of it by way of reservation or otherwise in the conveyance through which the plaintiff claims, it must in point of law be held that a reservation of the vendor's rights to it must be implied, and that such implication is as extensive and effectual as if the reservation had been in terms and unequivocally expressed in the conveyance under which the plaintiff claims. [His lordship then remarked upon the number of cases cited and the differences between them, and continued:] It is enough if a conclusive and clear principle of law is deducible from them, and must be recognised in every case to which it is applicable. [His lordship then referred to *White* v. *Bass*, and part of the judgment of Mr. Baron MARTIN therein, as follows: "The plaintiff's counsel contends that notwithstanding the grant of the land in the most general terms, the purchasers are restricted in their use of it, so that they cannot make any erection upon it, which obstructs the light and air of the

plaintiff's house; I know of no authority for that position," and continued:] In *Suffield* v. *Brown*, Lord WESTBURY in his judgment says: "The effect of this (that was the judgment appealed from) is, that if I purchase from the owner of two adjoining freehold tenements, the fee-simple of one of them, and have it conveyed to me in the most ample and unqualified form, I am bound to take notice of the manner in which the adjoining tenement is used or enjoyed by my vendor, and to permit all such constant or occasional invasions of the property conveyed as may be requisite for the enjoyment of the remaining tenement in as full and ample a manner as it was used and enjoyed by the vendor at the time of such sale and conveyance. This is a very serious and alarming doctrine; and I believe it to be of very recent introduction, and it is, in my judgment, unsupported by any reason or principle when applied to grants for valuable consideration." Then Lord WESTBURY'S attention seems to have been drawn to the passages to which I have been referred in Gale on Easements, and he says: "I cannot agree that a grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements, enjoyed by an adjoining tenement, which remains the property of him, the grantor." In the course of his judgment, Lord WESTBURY expressed his dissent from the judgment of the Court of Exchequer in *Pyer* v. *Carter*; and the Lords Justices having, in a subsequent case of *Watts* v. *Kelson*, expressed a contrary opinion, being satisfied with the decision in *Pyer* v. *Carter*, it has been suggested that some doubt is thrown upon Lord WESTBURY'S judgment in *Suffield* v. *Brown*; but I think there is no ground for such a suggestion, for whether *Pyer* v. *Carter* was rightly decided or not does not affect Lord WESTBURY'S decision in the case before him. I am not under the necessity of expressing any opinion on the subject; but Lord CHELMSFORD, in *Crossley* v. *Lightowler* speaking of Lord WESTBURY'S view of *Pyer* v. *Carter*, said, "I entirely agree with this view," and further, "It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for *non constat* that the grantor does not intend to relinquish it, unless he shows the contrary by expressly reserving it. The argument of the defendants would make in every case of this kind, an implied reservation by law, and yet the law will

not reserve anything out of a grant in favor of a grantor except in case of necessity."

That seems clearly to be the law, though Lord CHELMSFORD in that case, says, if carried to excess it would produce great and startling injustice. [His lordship then referred to *Ellis* v. *Manchester Carriage Co.*, which followed the cases he had previously referred to, and continued:] Now, this being the state of the law, the defendants have relied upon the case of *Pyer* v. *Carter*, and several other cases, as showing that with respect to continuous easements, the absence of any mention in the conveyance of any reservation is not inconsistent with a reservation by implication; but all the cases in which a reservation has been implied, are cases in which the necessity of the case required such an implication. Why? Because the thing sold and conveyed could not be enjoyed by the grantee in the manner and to the extent which it was plainly by both parties intended that it should be, unless such implication were made. I take it that the rule of implication is founded upon the mere necessity of the case and the impossibility of admitting that the contract, and the intention of the parties to it would be complete without the implication. The subject of the implication is held to have been involved in the terms of the contract, and the justice and honesty of the transaction require that the law should supply that, which by the inadvertence of the parties, has not been expressed in words. Upon this principle every one of the cases referred to is founded and all are reconcilable, and no case has been cited, nor do I believe that any can be found in which an implication has been made not based upon necessity and the justice that necessity imperatively calls into active operation. It cannot, I think, be said that any such necessity exists in the present case as renders it expedient or proper that the vendor of lot 6 should reserve to himself any right in lot 10 which would exclude or restrict the grantee of lot 6 from using and enjoying it without qualification or restriction. It was not necessary that the windows in the shed should exist; it is not suggested that there is any particular manufacture carried on in the shed, or that any peculiar position of windows or condition of the light are requisite for the full enjoyment by the vendor of that portion of his property, which he retained after he conveyed the land to the plaintiff without reservation. Windows might have been inserted by the

vendor on the other side of his shed, or he might have reverted to his former contrivance of lighting it by skylights.

The plaintiff is therefore entitled to his injunction.

How generally the American courts deny the acquisition of a right to light and air by prescription, as allowed in England, was shown in the note to *Stein* v. *Hauck*, 17 Am. Law Reg. 440, but on the point involved in *Wheeldon* v. *Burroughs*, they are much divided. Four different views seem to prevail. The first is that upon the severance of a tenement, a right to light and air is generally implied in favor of the grantee over the remaining land of the grantor, and apparently without reference to the question of its actual necessity for the full enjoyment of the estate granted. The second is that such right is implied only when it is actually necessary, and not where it is only convenient, though highly so, to the purchaser. Third, that such right is never implied, however necessary to the enjoyment of the estate purchased. Fourth, that such right is never impliedly reserved in favor of a grantor, as against an absolute and unconditional grantee, free from encumbrances, even if under similar circumstances it might be implied in favor of a grantee against his grantor.

1. The right is implied whether necessary to the estate or not.

The earliest reported case on this point is *Story* v. *Odin*, 12 Mass. 157, which, though subsequently shaken if not overruled in its own state, has yet been so often approved and followed elsewhere, that an impartial consideration of the authorities seems to require its citation as a leading case on this side of the question.

In that case Story bought, in 1795, a lot of land of the town of Boston situated in Dock square, with a store upon it, having a door and two or three windows looking out over the adjacent vacant lot also owned by the town, and which the town subsequently, in 1812, sold to Odin, who erected a building upon it, covering the whole ground, and adjoining the back wall of the store, and thus obstructed the light and air thereto. The deed to S. was with all the privileges and appurtenances, and without any exception or reservation of a right to build on the adjoining lot, or to stop the lights in the store so sold. It was held to be "clear that the grantors themselves could not afterwards lawfully stop those lights, and thus defeat or impair their own grant; and as they could not do this themselves, so neither could they convey a right to do it to a stranger." And a verdict for S. was sustained.

This case has not only been often cited with apparent approbation in the same state (see 17 Mass. 448), but also by such distinguished judges elsewhere, as STORY, SELDEN and others. See 1 Sumn. 503; 21 N. Y. 513.

Next after *Story* v. *Odin*, and much relying upon it, came *Robeson* v. *Pittenger*, 1 Green's Ch. Rep. 57, in the Court of Chancery of New Jersey, in 1838. There S. owning two lots, built a dwelling-house on one "immediately on the line of" the other, with six windows, which opened and received light and air from the other. The house came into the possession of the plaintiff, and the other lot into that of the defendant, who purposed to erect a building thereon which would darken the plaintiff's windows. The plaintiff obtained an injunction against the same, partly upon the ground that the windows had existed for more than twenty years, and partly because "the adjoining lot was owned by the man who built the house and subsequently sold it to the plaintiff."

But the most direct, and apparently the best considered recent American authority upon this side of the question is that of *Janes* v. *Jenkins*, 34 Md. 1 (1870). In this case A., the owner of two adjoining lots, called the east and west lots, leased the east lot for ninety-nine years, with a covenant that the lessee might make openings, and place lights in the wall which he contemplated erecting on the west line of said lot. The wall was erected and lights placed in it overlooking the west lot, which A. subsequently conveyed to B. Subsequently to the erection of the wall, and the last deed to B., A. sold the east lot to C., by a deed containing this clause: with, "all and every the rights, alleys, ways, waters, privileges, appurtenances *and advantages* to the same belonging, *or in any wise* appertaining." The deed of the west lot to B. contained a special covenant of warranty, and in an action thereon for an alleged breach by reason of the existence of the wall on the east lot, overlooking the other, whereby the grantee was prevented from building on the same, it was clearly held that the owner of the east lot had acquired by his grant a right to maintain the wall and windows, and overlook the other lot, and the case of *Story* v. *Odin*, was cited and approved. Perhaps the peculiar phraseology of the grant in this case may have aided in arriving at the conclusion, but the court seems to fully adopt the broad English doctrine.

The English rule seems also to prevail in Louisiana: *Dazel* v. *Boisblanc*, 1 La. Ann. 407 (1846); but this may be expressly secured by the civil code, there prevailing. See especially Articles 707, 711, 712, 713.

2. The second view is that such implied grant exists, where the existing light and air is substantially *necessary* for the enjoyment of the house or building conveyed, but not where it is only *convenient*.

On this subject Judge WASHBURN, after a review of several authorities, says (Wash. on Easements, c. iv., sect. 6, p. 618): "So far as weight of authority, both English and American, goes, it would seem that if one sell a house, the light *necessary* for the reasonable enjoyment whereof is derived from and across adjoining land, then belonging to the same owner, the easement of light and air over such vacant lot would pass as incident to the dwelling-house, *because necessary to the enjoyment thereof;* but that the law would not carry the doctrine to the securing of such easement, as a mere convenience to the granted premises."

It may be that the above is a just and reasonable rule to prevail, but it is not easy to see that it is positively determined by the authorities referred to by the learned author. It has, however, some supposed analogies to support it, and it has recently been cited and approved in several cases. It was quoted with approbation in *Turner* v. *Thompson*, 58 Ga. 268 (1877), although that state denies the doctrine of any *prescriptive* right to light and air; 49 Ga. 19.

So, in *Powell* v. *Sims*, 5 West Va. 1 (1871), it was held that an implied grant of an easement of lights will be sustained only in cases of real and obvious necessity; and will be rejected when the person claiming the same can, at a reasonable cost, substitute other lights to his building; each case being determined on its own facts as to the *degree* of necessity requisite for a foundation of the rights.

In like manner in *White* v. *Bradley*, 66 Me. 263 (1876), it seems to be impliedly admitted that there may be cases falling under Judge WASHBURN'S rule of necessity, though that particular case was decided against the right, on the ground that it was a "mere convenience" to the granted premises.

3. The right is *never* implied. There is certainly some room for argument that if light is absolutely necessary

to enjoy the estate granted, a right to its free passage might be implied, in the same manner as a right of way arises where no other means of access exist to the estate conveyed; but the current of modern authorities seems to set against applying the analogy to light and air; especially in those states which repudiate the English doctrine of a prescriptive right of light.

One of the most striking illustrations of this view may be found in the recent elaborately considered case of *Keats* v. *Hugo*, 115 Mass. 204 (1874). The defendant had sold the plaintiff a dwelling-house, by a warranty-deed, with all the "privileges and appurtenances." The house stood on the line *adjoining* other vacant land of the defendant, with a door and windows in that side. After the conveyance the defendant erected a structure and woodshed on his vacant lot against the dwelling-house, *and within about eight inches of the same.* The plaintiff brought an action for obstructing his right to light and air, and the question of an implied grant was the only point involved in the case. Two other cases involving similar questions between other parties were also argued by eminent counsel, and the whole were carefully considered together, and the same result reached in each by the whole court. Chief Justice GRAY, in an elaborate review of the authorities, establishes, first, that in that state no right of light and air could be obtained by prescription; and second, that the same considerations lead to the position that the doctrine of implied grant (which is there recognised in some other easements), does not apply to this claim. "By nature," he says, "light and air do not flow in definite channels, but are universally diffused. The supposed necessity for their passage in a particular line or direction to any lot of land, is created not by the relative situation of that lot to the surrounding lands, but by the manner in which that lot has been built upon. The actual enjoyment of the air and light by the owner of the house is upon his own land only. He makes no tangible or visible use of the adjoining lands, nor indeed any use of them, which can be made the subject of an action by their owner, or which in any way interferes with the latter's enjoyment of the light and air upon his own lands, or with any use of those lands in their existing condition. In short, the owner of the adjoining lands has submitted to nothing which actually encroached upon his rights, and cannot, therefore, be presumed to have assented to any such encroachment. The use and enjoyment of the adjoining land are certainly no more subordinate to those of the house where both are owned by one man, than where the owners are different. The reasons upon which it has been held that no grant of a right to air and light can be implied from any length of continuous enjoyment, are equally strong against implying a grant of such a right from the mere conveyance of a house with windows overlooking the house of the grantor. To imply the grant of such a right in either case, without express words, would greatly embarrass the improvement of estates, and by reason of the very indefinite character of the right asserted, promote litigation. The simplest rule, and that best suited to a country like ours, in which changes are continually taking place in the ownership and the use of lands, is that no right of this character can be acquired without express grant of an interest in or covenant relating to, the lands over which the right is claimed."

Story v. *Odin* was criticised and distinguished but was not expressly declared to be overruled, as apparently it might safely have been.

The courts of New York also deny the doctrine of an implied grant, especially between lessor and lessee; and they

allow a landlord who owns land adjoining the demised premises to build upon it, even though thereby he seriously darkens the light in the buildings leased. *Palmer* v. *Wetmore*, 2 Sandf. 316 (1849); *Myers* v. *Gemmel*, 10 Barb. 537 (1851); and Ohio is to the same effect; *Mullen* v. *Stricker*, 19 Ohio St. 135 (1869); even if the use of the windows be actually necessary for the estate granted; and Pennsylvania *inclines* the same way: *Maynard* v. *Esher*, 17 Penn. St. 222 (1851); 33 Id. 371. Indiana, in *Keifer* v. *Klein*, 51 Ind. 316 (1875), in an elaborate opinion, adopted the same rule.

4. Even if the doctrine of an implied grant be applied in favor of a *grantee* there is much less reason to apply it in favor of the *grantor*, and it may be safely asserted that nowhere, in England or America, can a grantor who has sold a vacant lot without restriction or reservation, having his dwelling-house adjoining, retain any implied right to prevent his grantee from erecting any building or structure on the land granted, even though it should interfere with lights and windows of his own house. The contrary rule would clearly derogate from his grant, since he conveys a fee unrestricted, and *cujus est solum ejus est ad cœlum*.

This was the point really involved in the elaborate and well-considered case of *Morrison* v. *Marquardt*, 7 Am. Law Reg. N. S. 336; 24 Iowa 35 (1867), although the court inclined to apply the same rule conversely, certainly unless it be clear from the deed that the parties intended differently.

And this is undoubtedly the English law; the grantee in the case of an absolute conveyance has a right to use the land in any lawful way, for if the grantor fear an injury to his lights and air, he should make a restriction in the deed of conveyance: *Tenant* v. *Goodwin*, 2 Ld. Raym. 1893, Ld. HOLT; *White* v. *Bass*, 7 H. & N. 722 (1862). *Carriers' Co.* v. *Corbett*, 2 Dr. & Sm. 355 (1865).

This point was more fully considered in the late case of *Ellis* v. *The Manchester Carriage Co.*, 2 C. P. Div. 13 (1876). There the plaintiff, in 1867, bought nine houses in Manchester, the rear of which abutted on a street or way, on the opposite side of which were certain cottages. In 1868, he bought the cottages also, but by a different title. Both estates had existed in their then condition for over twenty years. In 1870 the plaintiff sold the cottages to D., without any reservation, who afterwards conveyed to the defendants; they pulled down the cottages and erected a large building upon the site, and also upon a portion of the intervening street or way, and so obstructed the plaintiff's windows. It was held, that although the plaintiff's houses had acquired an "absolute and indefeasible," right to light, under stat. 2 & 3 Wm. 4, c. 71, s. 3, the defendants were not guilty of any wrongful obstruction of the plaintiff's lights, since his own deed to D. was without any reservation. And see *Warner* v. *McBride*, 36 Law T. 360 (1877).

Hence it will be seen that although in cases of some easements, such as a right of way, an implied reservation exists in favor of the grantor over or upon the land granted, especially when reasonably necessary for the use of the estate retained; this doctrine is not applied to an easement of light and air even by those courts which, as in England, most firmly support such right in favor of a grantee against his grantor, under like circumstances.

EDMUND H. BENNETT.