Whether one or the other of these methods of declaring be adopted, the rule of pleading that the proof must correspond with the allegations, is still complied with. For if, first, the plaintiff declares on a judgment which, *under the special circumstances which he sets forth*, only amounts to a separate judgment against A., he proves those special circumstances accordingly, and if, secondly, he declares as on a joint judgment against A. and B., the record sustains him by showing *on the face of it* a joint judgment, and the court rejects A.'s offer to point out any irregularities *as to B.*, which might make it other than a joint judgment.

FREDERICK J. BROWN.

BALTIMORE.

RECENT ENGLISH DECISIONS.

High Court of Justice; Chancery Division.

CORPORATION OF LONDON v. RIGGS.

A way of necessity is limited to a way necessary for the use of the close as it is at the time.

Where a man, reserving a close, grants the surrounding lands, the right of way to the close implied to have been reserved or re-granted, is an easement of necessity, and limited to a way necessary for using the close in the condition in which it then is.

Semble, it would be the same if the close were granted and the surrounding land reserved.

BY an indenture of April 6th 1877, the defendant, Heathcote, granted to the plaintiffs certain waste lands in Chingford and Epping Forest, in Essex.

These waste lands entirely surrounded an old enclosure of about two acres, called Barn Hoppet, which also belonged to Heathcote, and had always been used exclusively for agricultural purposes.

There was no regular road across the waste from Barn Hoppet to the high-road, and no right of way was reserved to Heathcote by the aforesaid indenture.

In 1879 the defendant, Riggs, as tenant of Heathcote, began preparations for erecting on Barn Hoppet a house and other buildings for the supply of refreshments to the public, and for that purpose had been carting timber and building materials across the plaintiffs' waste lands.

Thereupon the plaintiffs commenced this action, claiming a declaration that the defendants were not entitled to a greater or

other way to and from Barn Hoppet across the lands conveyed to the plaintiffs as aforesaid, than a way of necessity sufficient for the use of Barn Hoppet for agricultural purposes only; and they asked that, if necessary, the position, dimensions and other particulars of the said way of necessity might be set out and defined, and for an injunction and damages.

The defendants claimed to be entitled to a way of necessity for all purposes, and not for agricultural purposes only; and they accordingly demurred to the whole statement of claim, except so far as it claimed to have the position and dimensions of the way of necessity set out and defined.

Davey, Q. C., and *Giffard*, for the defendants, submitted that the right was the same whether the person claiming it was a grantor reserving an enclosed piece or was the grantee of the close: *Pomfret* v. *Ricroft*, 1 Wms. Saund., ed. of 1871, p. 571; *Clark* v. *Cogge*, Cro. Jac. 170; *Pinnington* v. *Galland*, 9 Ex. 1. The right was equally taken to be granted, and was, therefore, to be construed in the manner most favorable to the grantee. Unlike a prescriptive right of way, which was limited by the user proved (*Wimbledon and Putney Commons Conservators* v. *Dixon*, Law Rep. 1 Ch. Div. 362), this was the same as if expressly granted by deed, and, therefore, might be used for all purposes: *United Land Company* v. *Great Eastern Railway Co.*, Law Rep. 10 Ch. 586; *Newcomen* v. *Coulson*, Law Rep. 5 Ch. Div. 133; *Finch* v. *Great Western Railway Co.*, 28 W. R. 229.

Chitty, Q. C., and *Fisher*, for the plaintiffs, admitting that this right must be regarded as a grant, argued that, as it was a way of necessity, it could not be increased, but must be limited by the need at the time of the supposed grant: *Holmes* v. *Goring*, 2 Bing. 76. This case was an exception to the rule that a man cannot derogate from his own grant, and must, therefore, not be extended further than necessary: *Wheeldon* v. *Burrows*, Law Rep. 12 Ch Div. 31. *Wood* v. *Saunders*, Law Rep. 10 Ch. 582, and *Gayford* v. *Moffatt*, Law Rep. 4 Ch. 133, showed that the use at the time of the grant was the limit of the easement; and *Williams* v. *James*, Law Rep. 2 C. P. 577, was an authority that the right could not be increased.

JESSEL, M.R.—I am afraid that whatever I may call my decision

in this matter it is in reality a making of new law; for it appears that the point has never been decided, nor even discussed, in any reported case.

The real question is this—Whether on a grant of land wholly surrounding the grantor's remaining land, the implied grant of a right of way by the grantee to the grantor to enable the latter to get to his reserved close is a general right of way, or only a right sufficient for the use of the close in its then state. Now it was laid down in early times that such a right of way is an exception to the ordinary rule that a man cannot derogate from his own grant; and also that the man who grants the land surrounding his close is in the same position as if he had granted the reserved close and retained the surrounding land. The right of way is the same; it is a way of necessity; and that is what is meant by saying that it must be pleaded as a re-grant. Well, then, what is the extent of the re-grant? That has not been even discussed anywhere; there is not a scintilla of authority on the point, except, perhaps, in the judgment of Lord CAIRNS in *Gayford* v. *Moffatt*, where he says, with reference to Mr. Serjeant Williams's note: "Now, that is exactly the interpretation of the words used in this grant, 'with all ways to the premises appertaining.' It means, in such a way as the law would hold to be necessarily appertaining to premises such as these, that is, a way of necessity. Therefore, immediately after this lease was granted, this tenant occupying the inner close became entitled to a way of necessity through the outer close, and that way must be a way suitable to the business to be carried on on the premises demised—namely, the business of a wine and spirit merchant." Therefore he apparently thought that a way of necessity meant a way suitable at the time when the right was created That is all the authority to be found.

Then, on principle, ought this right, which is an exception, to be treated as a larger exception than the nature of the case warrants? The object of implying a re-grant is stated to be that if the owner of the enclosed piece has no right of way, he cannot use or derive any benefit at all from his close. But is he entitled to say, I have reserved to myself more than I really want now at the time of the grant? It appears to me that the right of way must be confined to what is necessary at the date of the grant; that is, the owner takes such a supposed re-grant as will enable him to enjoy the reserved thing as it is. If more is to be implied, you give him not

only that which is enough to enable him to enjoy his property, but that which enables him to enjoy it as fully as if he had reserved a general right of way for all purposes. I do not think that is the fair meaning of a way of necessity. It must be limited by the necessity at the time of the grant, and a man not taking the precaution to reserve any actual right is not entitled to more than is necessary at the time.

It may be objected to this view that where the grant is of the enclosed piece, the grantee is entitled to use the land for all purposes, and therefore must have a general right of way. But as the grantee has not chosen to take an express grant, he is only entitled to that which would enable him to enjoy the property as it was granted to him. It is not necessary to give him any greater right. If it were so, the principle to be applied is not the same, and it is possible that a grantee might get a greater right than a grantor takes under an implied re-grant; but I do not think so.

Demurrer overruled.

The point involved in this case seems equally new on this side of the Atlantic; and it is, therefore, uncertain how it might be decided; but it may safely be said, that the tendency of the American law is rather in the contrary direction from that indicated by the Master of the Rolls. A few general propositions will show the drift of the American decisions on this subject.

1. In the first place, our courts incline to apply the same rule of implied easements of necessity to grantor retaining part of an estate, as to grantee to whom a part is granted. The English seem to hold that a grantee may often acquire an implied easement, upon the severance of an heritage, when a grantor, under the same circumstances, would not retain such a right in his own favor; for to allow him to claim such a right in the land granted, they hold to be allowing a grantor to derogate from his own grant, as it is called. Thus, they hold that if a man sells land knowingly for building purposes, he cannot afterwards use his remaining adjoining land for any purpose, which conflicts with the purpose of the purchaser: *Siddons* v. *Short*, 2 C. P. Div. 572.

It is on this ground that the English courts say that the grantor of a house with windows looking out upon his adjoining land, cannot afterwards build upon the latter, so as to darken the windows in the house sold: *Coutts* v. *Gorham*, Moo. & Mal. 396; *Palmer* v. *Paul*, 2 L. J. Ch. 154. And see *Caledonian Railway Co.* v. *Sprot*, 2 Macq. 449; *Cox* v. *Matthews*, 1 Vent. 239; *Palmer* v. *Fletcher*, 1 Lev. 122; *Popplewell* v. *Hopkinson*, Law Rep., 4 Ex. 248.

Whereas, in America, the inclination is to hold that the grantor has the same right to use his remaining land to the detriment of the land granted (in the absence of any stipulation to the contrary), as the grantor has to enjoy that granted. Both have an absolute, unqualified fee. The same maxim—*cujus est solem ejus est ad cœlum*—applies to both. See *Morrison* v. *Marquardt*, 7 Am. Law Reg. N. S. 336, 24 Iowa 35; *Palmer* v. *Wetmore*, 2 Sandf. 316; *Mullen* v. *Stricker*, 19 Ohio St. 135; *Keats* v. *Hugo*, 115 Mass. 204.