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IMPLIED EASEMENTS OF LIGHT AND AIR.

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It is and for over two centuries has been a rule of the English Common Law, that when a person sells a house, one or more rooms of which are dependent for light and air entirely upon windows opening upon other land of the grantor, neither the grantor nor his heirs or assigns may ever thereafter erect upon such other land any structure which would in any way shut out light and air from those windows. This rule grew out of that principle of equity which is formulated in the maxim: "A grantor is presumed to have intended to convey whatever is necessary to the reasonable enjoyment of the thing granted."

This implied easement of light and air has been uniformly asserted by the courts of England from *Palmer v. Fletcher*, 1 *Living.* 122 (1664) to the present time, the last decision thereon being *Myers v. Catterson*, L. R., 43 Ch. Div. 481, in which case Lord Justice Bowen in his opinion speaks as follows:

"* * * If I sell a house which is standing on part of my land as a house with windows in it, to be used as a house, and the windows in it to be used as windows, the least that the law implies from the necessary reason of the thing is, that I am not upon the remainder of the land which I keep back, immediately I have sold the house and its windows, to do something which prevents all use of the house as a house, and all use of the windows as windows.

"The law implies that obvious duty in the form of what it calls an implied obligation or implied covenant, or contract on the part of the vendor, who is selling one part of his property, and retaining the other, under circumstances like this, that he will not on the property which he retains, use all his rights as owner with respect to the property which he retains, but will only use such of his rights of ownership, as can be used *consistently with the convenient and reasonable enjoyment* of the house which he has sold as a house."

This rule of law necessarily became a part of American common law in those States which formally adopted the common law of England, on the severance of the colonies from the mother country, and in many of the States which were never English colonies the courts have accepted this side as the law of the State simply because of the equitable and just principle on which the rule is founded.

The few decisions rendered by the courts of the older States, which have been cited as holding that this rule is not there in

force, simply illustrate the assurance with which some judges assert as law, what are merely their own individual notions of what the law should be, and the very curious manner in which precedents are cited in support of such opinions.

In *Maynard v. Esher*, 17 Pa. St. 222, one of the earliest of the decisions, cited as adverse to this implied easement, the *house*, and the *other land* were sold at one and the same time, the purchaser of the *other land* received his deed some time before the purchaser of the *house* received his. The latter claimed an easement of light and air over the land of the former but the court denied it, saying: "To be entitled to the relief sought, the plaintiff should have shown that he purchased his part of the whole premises first, etc."

In *Haverstick v. Sipe*, 33 Pa. St. 368, the common owner sold the *other land* seventeen years before he sold the *house*, and the general statement by the court that the rule under which the implied easement was claimed was not a part of the law of that State was merely *obiter*.

In *Parker v. Foote*, 19 Wend. 309, the easement of light and air was claimed because of previous long continued enjoyment thereof, but the court denied the claim for the reason that the common law right to easements by prescription was not in force in New York.

In *Myers v. Gemmel*, 10 Bart. 537, a store at the corner of Broadway and Reade streets was leased to the plaintiff. The landlord afterwards erected a building on Reade street in the rear of the leased store. The plaintiff claimed that his easement of light and air through the windows of the store was unlawfully interfered with, but no claim was made that it in any way diminished the profits derived from the business carried on by the plaintiff. The court denied the relief asked for by the plaintiff, on the ground that the common law of England regarding easements of light and air had never been adopted by the New York colony as a part of its common law.

In *Palmer v. Wetmore*, 2 Sandf. Sup. Ct. 316, the tenant of the house at 832 Broadway refused to pay rent, claiming that he had been evicted. This claim was based on the fact, as shown by the evidence, that the landlord had erected on another lot, and at a distance of fifteen to eighteen feet from the rear of the house leased to plaintiff, a building, the wall of which when it reached the height of two stories, so darkened the kitchen of the plaintiff that it was necessary to use lamps in the day time. Redress was denied the plaintiff, on the authority of *Myers v. Gemmel* and *Parker v. Foote*, above mentioned.

Mullen *v.* Stricker, 19 Ohio St. 135, is decided solely on the authority of Maynard *v.* Esher, 17 Pa. St. 222, and Haverstick *v.* Sipe, 33 Pa. St. 368, both of which so far as they deny the right to the easement *in toto*, are expressly overruled by Rennyson's Appeal, 94 Pa. St. 152, and Mullen *v.* Stricker is negated by the opinion of the court in Bank *v.* Cunningham, 46 Ohio St. 587.

In Lampman *v.* Milks, 21 N. Y. 512, Judge Selden commenting upon Parker *v.* Foote, 19 Wend. 309, says: "This case has no bearing on the rule, that where a man sells a house with windows opening upon other land belonging to him, an easement of light and air for those windows is implied from the grant."

This line of authority antagonistic to the rule in question, culminates in the case of Keats *v.* Hugo, 115 Mass. 204, in which the question whether the easement arose by implication from the grant of a dwelling house, was fairly before the court. In denying that in Massachusetts the easement is so implied Ch. J. Gray pretends to rest his decision upon previous adjudications of the courts of that State, but the premises hardly warrant the conclusion. The first case cited upon this part of the case is Atkins *v.* Boardman, 20 Pick. 291, where a grantee being restricted by his deed as to the breadth of the building he might erect, was allowed by the decision of the court to build as high as he chose.

Ch. J. Gray next cites Collier *v.* Pierce, 7 Gray 18, of which case he says: "The purchaser acquired no easement although the sale to him preceded the sale of the other lot." What the court really said was: "The sale was much more like a partition, than a grant by a proprietor of a part of his estate, retaining the residue. * * * In the present case the windows are not necessary to the convenient enjoyment of the house."

Of Fifty Associates *v.* Tudor, 6 Gray 255, Ch. J. Gray says: "The court treated an easement of light and air derived from use and enjoyment, or implied grant as governed by the same rule." The court in deciding that case used these words: "We think the rule is well settled that in a city tenement, an easement of light and air derived from use and enjoyment or implied grant, can only extend to a reasonable distance, so as to give to the tenement entitled to it, such an amount of light and air as is reasonably necessary to the comfortable and useful occupation of the tenement for the purposes of habitation, or business, not the amount which under some circumstances would be agreeable and pleasant, nor the full amount which the tenement has been accustomed to receive, but the amount reasonably necessary."

Judge Gray then cites Randall *v.* Sanderson, 111 Mass. 106,

of which case he says: "It was held that the grantee of the house took no easement of light and air over the adjoining land, and *there is no intimation in the opinion that the decision would have been different if the deed of the land had not contained such covenants and had been made after the deed of the house.*"

The case in question was one in which heirs were dividing among themselves the estate of an ancestor. In this division they executed between themselves warrantee deeds. The heirs to whom the house was granted executed deeds containing covenants of warranty against incumbrances of the land adjoining the house, and afterwards claimed an easement of light and air over that land. The court in denying this right, says: "The two deeds were executed simultaneously, and must be considered as parts of one transaction. The question whether the deed to Arza and David granted an easement of light and air over the other estate is one of intention. No such easement is expressly granted, * * * and when we consider that the grantees and grantors in that deed are joint grantors in the deed to Sprague, and therein expressly covenant that the estate conveyed is free from all incumbrances, it seems clear that it was not the intention of the parties to create by a simultaneous act an easement of light and air in favor of the adjoining estate. The windows in the house sold to Arza and David though convenient, were not necessary, * * * and we think it was not the intention of the parties to those deeds to create a servitude upon one estate in favor of the other.

In *Paine v. Boston*, 4 Allen 168, next cited in *Keats v. Hugo*, the owner of the house which it was alleged contained ancient windows, was not a party to the suit, made no claim, offered no evidence, was in no way interested in the judgment, and the decision was simply that the law of ancient lights was not in force in Massachusetts.

In *Brooks v. Reynolds*, 106 Mass. 31, the grantor has covenanted to keep open an alley at the side of the house granted. He afterwards attempted to occupy a part of the alley, and the decision of the court forbade him to do so.

In *Royce v. Guggenheim*, 106 Mass. 201, the question at bar was whether the erection of a structure by a landlord so near the leased premises as to darken some of the windows used by the tenant, constituted an eviction.

The point was not decided, the decision being given against the landlord, because he (the landlord) had not shown that the rooms darkened could be used for any other purpose, or that the new structure was not on part of the leased premises, or what was

his motive in erecting it. These were the Massachusetts cases upon which Ch. J. Gray bases his ruling that, "In the grant of a dwelling house, an easement of light and air over adjoining land of the grantor is never implied."

Continuing his argument, Judge Gray says: "Light and air are universal and flow through no defined channels," etc. But it seems reasonable to assert that when a person erects a house on his land, and places windows therein, he by that act creates defined channels, through which light and air are to flow, and if he sells the house with those channels open, he certainly should be forbidden afterwards to obstruct them.

His Honor also advances these curious propositions: "The use and enjoyment of adjoining lands are no more subordinate to those of the house, where both are owned by the same person, than where the owners are different." "The reason upon which it has been held that no grant of a right to light and air can be implied from any length of continuous enjoyment are equally strong against implying a grant of such right from the mere conveyance of a house with windows overlooking the land of the grantor." The former proposition needs no answer. The latter is answered by saying that the grant was implied in both cases until 1852, when by Ch. 144 of the acts of that year, the right of prescription was abolished.

Judge Gray, to further fortify his opinion, cites *Palmer v. Wetmore*, *Myers v. Gemmel*, *Haverstick v. Sipe*, *Mullen v. Stricher*, heretofore considered, and *Morrison v. Marquardt*, 24 Iowa 35. This latter case, in which a party having sold a store in a large city in Iowa retaining another store between which and the store sold there was an alley eleven-feet wide, reserved in the deed an alleyway four feet wide, and afterwards claimed an easement of light and air over the whole alley. This right was denied by Dillon Ch. J., because the reservation of the lesser easement, forbade the implication of a greater easement of the same kind, and because the easement claimed was not shown to be necessary. In this case Judge Dillon expressed his opinion that the doctrine of implied easement of light and air should not be adopted in Iowa, but that one who purchases a house, if he desires to use light and air coming across adjoining land, should purchase the right so to do.

Of *Keats v. Hugo*, no more need be said, than that in *Brandt v. Grace*, 154 Mass. 212, it is cited as holding "that the necessity must be pretty plain in order to warrant the implication of a grant." In *Case v. Minot*, 158 Mass. 584, in which *Keats v. Hugo*

is not mentioned, the court says, "It is true that the doctrine of implied grants of easements and privileges connected with real estate, is applied with some strictness in this commonwealth, but in this case it might well be found that the right to light and air was necessary to the beneficial enjoyment of the demised premises, * * * and the general doctrine that there is an implied grant of whatever is necessary to the beneficial enjoyment of the thing granted is familiar. The facts show a nuisance or substantial interruption of the plaintiff's quiet enjoyment of the premises," thus practically overruling *Keats v. Hugo*.

Yet *Keats v. Hugo* has been often cited as a "well considered case."

The early New York cases of *Myers v. Gemmel* and *Palmer v. Wetmore* (*supra*), were in turn overruled by *Doyle v. Lord*, 64 N. Y. 432, to the decision of which the court adds a dictum based upon *Maynard v. Esher*, *Haverstick v. Sipe*, *Mullen v. Stricker*, and *Morrison v. Marquardt* (*supra*).

Turning now to the cases affirming the English doctrine, we find two early cases which assert that doctrine as a part of the common law of this country, to wit: *Story v. Odin*, 12 Mass. 157 (1818) and *U. S. v. Appleton*, 1 Sumner 492 (1833). We find also that Judge Swift, in his digest Vol. 1, p. 165, declares this doctrine to be a part of the Connecticut common law.

At intervals of a few years follow those Massachusetts cases cited in *Keats v. Hugo*, which, if they discuss the doctrine at all uniformly, confirm the rule with the modification appended, as in the late English case cited above, "that the easement claimed shall be reasonably necessary to the beneficial enjoyment of the premises granted."

In 1862, the Connecticut court expressed its opinion in what has been called a dictum, that the rule was, "well settled law," citing *Russell v. Prior*, 6 Mod. 116, which case forbade the former owner of the house from doing any act which would be a "nuisance to those lights."

Not to extend this article too far, I will simply cite the cases which affirm what may be said to be the American rule on this subject, to wit, that the purchaser of a house has a right to continue to receive through the windows of the house as erected by his grantor, such a supply of light and air over other land of his grantor, as is necessary to enable him to use the rooms in the same manner and for the same purpose that those rooms were used by his grantor, unless perhaps, that if by slight changes in the structure he can continue that use by means of light derived from win-

dows opening upon his own land, it is his duty by so doing to avoid injustice to his grantor. *Rennyson's Appeal*, 94 Pa. St. 152; *Turner v. Thompson*, 58 Ga. 273; *Berkeley v. Smith*, 27 Grat. (Va.) 896; *Sutphen v. Therkelson*, 38 N. J. Eq. 318; *James v. Jenkins*, 34 Md. 1; *Warren v. Blake*, 54 Me. 286; *Dillman v. Hoffman*, 38 Wis. 572; *White v. Bradley*, 66 Me. 263; *Clausen v. Primrose*, 4 Del. Ch. 666; *Ware v. Chew*, 43 N. J. Eq. 493.

Any other conclusion would operate to deprive a grantee of a part of that which the law presumes that he has bought and paid for, for no rule of law is more firmly settled than that "parties are presumed to contract in view of the property as it then existed, and to take with the benefits or burdens as they appear at the time of the sale to belong to it." *Henry v. Koch*, 80 Ky. 391; *Dunkles v. Wilton, &c. R. R.*, 24 N. H. 495; *Ingalls v. Plomondon*, 75 Ill. 123; *Burns v. Gallagher*, 62 Md. 473; *Ins. Co. v. Patterson*, 103 Ind. 589; *Atkins v. Boardman*, 2 Met. (Mass.) 463; *Morrison v. King*, 62 Ill. 35.

A suggestion which may somewhat diminish the apparent contradiction between some of the early cases cited as adverse to the easement and the later decisions, is this: In several of the former cases the wrong complained of was by occupants of stores, but in none of them was any loss of profits alleged or proved.

Lord Eldon, in the comparatively ancient case of *Atty. Genl. v. Nichols*, 16 Vesey Jr. 337, announced the rule in such cases to be, "that the privation must be such as to render the occupation of a house more uncomfortable, or of a place of business less beneficial." As instancing this distinction, two New York cases decided at about the same date are of interest.

In *Shipman v. Beers*, 2 Abb. N. C. 435, two lots of land, Nos. 1 and 3, 5th Avenue, in New York City, owned by the same person, with buildings thereon, used for business purposes, the building on lot No. 1 extending the whole depth of the lot, and having windows opening on lot No. 3, in the rear of the building standing on lot No. 3, which extended but a short distance back from the street. Both lots and buildings were conveyed, the conveyance of lot No. 1 being prior to that of lot No. 3. The grantee of lot No. 3 proposed to extend his building back so as to shut up the side windows in the building on lot No. 1. The owner of lot 1 brought suit, but the court on the authority of *Myers v. Gemmel*, and *Keats v. Hugo*, refused relief, declaring that the question whether the easement should be sustained was one of intention, and the situation and nature of the property forbade the conclusion that the common owner intended to restrict himself or his grantee, from extending

a building occupying the whole front of the lot on which it stood directly back on his own land as far as he wished.

In *Havens v. Klein*, 51 How. Pr. 82, a person owning land in the residence portion of New York City, erected two dwellings fronting on streets at right angles to each other. One of these dwellings covered the entire lot, the other had a yard in the rear of it, upon which the rear windows of the first dwelling opened. The common owner sold the dwelling to which the yard belonged, and shortly afterward sold the other dwelling. The owner of the yard proceeded to erect a structure which obstructed the access of light and air to the windows of the other dwelling. Upon action brought, Ch. J. Daly, in his decision says, "It is settled in this State that no right to the use of light and air in a building overlooking the land of another, is acquired by use, enjoyment or prescription. It can only pass by express grant or covenant, and will not pass by implication of a grant, unless it was necessary to the enjoyment, and was clearly intended from the circumstances existing at the time when the conveyance was made. But it is evident that in this case, the common owner when he placed those windows, intended that the rooms into which they opened should receive light and air through those windows, and that he had no intention to grant to anyone, a right to shut out that light and air, and render those rooms useless."

Much might be added by way of argument to show that the right to the easement in question rests on a just and equitable basis, and that many of the reasons advanced by judges for repudiating that right are fallacious.

Judicial legislation, of which some of the earlier cases above cited are instances, is always retrospective, and effect that no man can know what the law is until his cause is determined.

Right should always be, but in many cases is not, law.

J. A. Robinson.

NEW HAVEN, CONN.