[HIGH COURT OF AUSTRALIA.]

HORSFALL . . . . . APPELLANT;
DEFENDANT,

AND

BRAYE AND ANOTHER . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 30; *Dec.* 1, 2, 3, 4, 15.

Griffith C.J., Barton and Isaacs JJ.

Vendor and purchaser—Sale of portion of a tenement—Easement over portion retained by vendor—Implied grant—Grant of rights, easements and appurtenances belonging to or commonly used in connection with the land—Alteration in nature of tenement sold—Extrinsic evidence to explain grant—Declarations of intention by vendor—Mistake—Rectification.

The rule that under a conveyance of portion of a tenement the purchaser is entitled to all easements necessary to the reasonable enjoyment of the portion granted, which have been used by the owner of the entirety up to the date of the grant for the benefit of that portion, does not apply where the tenement in respect of which the easement is claimed is carved out for the first time from the entirety by the deed relied upon, and is substantially different from that in connection with which the easement had formerly been enjoyed. Where the sale is part of a re-arrangement or re-distribution of occupation of the whole property without regard to the conditions of previous occupation, mere identity of boundary lines between an old tenement and part of the new one, or between the new tenement and part of an old one, does not necessarily or even *primâ facie* give rise to an inference that a quasi-easement attached to the old tenement continues to be attached to the new one, or that general words, not having in themselves a precise legal signification, used in the conveyance are used in a sense which would include such an easement. The fact that such a re-distribution or re-arrangement is being made to the knowledge of all parties is material in construing general words, and if it appears that all quasi-easements formerly existing were treated, either by express bargaining

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or by tacit consent, as extinguished before the contract, they should not be be held to fall within such general words.

In a contract for the sale of a piece of land the property sold was described as portion of an allotment having a frontage to a street and of a certain depth, "together with the buildings thereon recently occupied by B. & Co.," no mention being made of any easements over the portion retained by the vendor. The conveyance described the land with more particularity as to metes and bounds, though it made no express reference to buildings, but contained the words "together with all rights easements and appurtenances thereunto belonging or commonly used in connection therewith." The frontage sold coincided with that of the existing buildings, but the depth was somewhat greater. The purchasers removed the existing buildings and erected a new one with a door and windows at the side opening upon a lane which had been used for a number of years as a means of access to different portions of the old building and to other buildings on the back portion of the original allotment. The vendor having blocked the lane by a fence, and the door and lights by screens, the purchasers instituted a suit to have the obstructions removed and for an injunction. The defendant counterclaimed for rectification of the conveyance on the ground that if the way was included it was by mistake. The Court made a decree as prayed, and dismissed the counterclaim.

Held (*per Griffith* C.J. and *Barton* J. ; *Isaacs* J. dissenting) that it was clear from the circumstances surrounding the contract that the subject matter of the negotiations between the vendor and the purchasers was treated by both parties as if it had been vacant building land which the purchasers desired to buy for the purposes of building upon it, and that the tenement in respect of which the claim for an easement was made was substantially different from that in connection with which the easement had formerly been enjoyed, and, therefore, that there was no implied grant of the easement, even though it might have been necessary to the reasonable enjoyment of the tenement in its former state ; and

That, on the question whether any promise was made by implication, oral evidence was admissible of declarations made at the time of the sale by the vendor to the purchasers, of the vendor's intention as to the character which the whole tenement was to bear.

Birmingham Dudley and District Banking Co. v. *Ross*, 38 Ch. D., 295, and *Myers* v. *Catterson*, 43 Ch. D., 470, applied.

Held further, (*per Griffith* C.J. and *Barton* J. ; *Isaacs* J. dissenting) that, on the evidence, the land had never been "commonly used in connection with" the tenement sold, regarded as a single entity, nor was the right to use it as it had existed a "right easement or appurtenance" within the meaning of the words of the grant. Even if the deed ought to be so construed as to include a grant of the way claimed, it would be inconsistent with the actual agreement, and the vendor on his counterclaim would be entitled to a decree for rectification of the conveyance.

Per Isaacs J. By the express words of the conveyance whatever easements and quasi-easements were enjoyed in connection with the land conveyed passed to the purchasers, not only those enjoyed in connection with the whole parcel as one, but those enjoyed distinctly in connection with the portion covered by buildings as well as those enjoyed in connection with the rest of the land conveyed, and, the Judge of first instance having found that the right to use the lane had been in fact so enjoyed, and that the alteration in the buildings cast no greater burden upon the servient tenement, that finding should not be disturbed. Declarations of intention by the vendor during negotiations were not admissible to cut down the express words of the grant; and if the purchasers were bound to rely upon implication and not upon express grant, such declarations, though admissible as part of the surrounding circumstances, could not rebut the presumption in favour of the grant of easements, not having been assented to or acquiesced in by the purchaser so as to become part of the contract between the parties. The onus of proving such assent or acquiescence lay on the grantor, and there was no reason for overruling the finding of the Judge that the grantor had failed to discharge that onus. As to the counterclaim, there being no fraud or mutual mistake, it should be inferred that the parties intended to include in the grant what they there expressed, and, rescission being impossible, the purchasers were entitled to retain the grant they had obtained.

Decision of *A. H. Simpson* C.J. in Equity, (*Braye* v. *Horsfall*, (1908) 8 S.R. (N.S.W.), 258), reversed.

APPEAL from a decision of *A. H. Simpson*, Chief Judge in Equity of the Supreme Court of New South Wales.

The facts and the material portions of the contract and conveyance are fully set out in the judgments hereunder.

Irvine K.C. (of the Victorian Bar), *Harvey* with him, for the appellant. The plaintiffs relied upon both express grant and grant by implication. There was no express grant of the right of way. It does not come within the words of the grant, "rights easements and appurtenances . . . commonly used in connection" with the land. The words must be construed as they stand; surrounding circumstances can only be looked at for the purpose of identification, not in order to extend the meaning. It is only in considering whether there is a grant by implication that surrounding circumstance can be looked at for the purpose of construction: *Birmingham Dudley and District Banking Co.* v. *Ross* (1); *Gale on Easements*, 8th ed., pp. 83, 87.

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[ISAACS J. referred to *Godwin* v. *Schweppes Limited* (1); *Thomas* v. *Owen* (2); *Kay* v. *Oxley* (3); *Watts* v. *Kelson* (4); *Barkshire* v. *Grubb* (5).]

In *Bayley* v. *Great Western Railway Co.* (6), which was relied upon by the plaintiffs on this point, the question was rather one of identification than construction. Assuming that there was a right of way of some kind enjoyed by the occupants of the original building, it was not enjoyed in connection with the land as it is now occupied. The tenement has been altered, and the right of way claimed is not the same as that which was formerly enjoyed. The former user was limited and was only necessitated by the peculiar mode of occupation by the then tenants, whereas the plaintiffs now claim a general right to use the lane for access to the building in any part and for access to the rear portion of the tenement. The words of the conveyance, therefore, do not include the right claimed. What was conveyed was merely building land. If notice may be taken of the fact that there were buildings in existence, regard must also be had to the fact that they were old and were, to the knowledge of all parties, intended to be pulled down. The user of the lane was not an appurtenance within the meaning of the grant. Primarily an appurtenance means some right appurtenant to the land itself, and there is nothing in the deed to give it any wider meaning in this particular instance. [They referred to *Thomas* v. *Owen* (2); *Bolton* v. *Bolton* (7); *In re Peck and London School Board* (8); *Quicke* v. *Chapman* (9); *Ewart* v. *Cochrane* (10); *Gale on Easements*, 8th ed., p. 173.]

There is no implied grant of the right claimed. On this point the whole of the circumstances may be looked at in order to see what the purchaser was entitled, in view of the circumstances, to expect. The question is, what was the mutual intention of the parties. The mere statement of an intention by one of the parties may not be sufficient in itself, but it is admissible in evidence on the question of intention. The character of the

(1) (1902) 1 Ch., 926.
(2) 20 Q.B.D., 225.
(3) L.R. 10 Q.B., 360.
(4) L.R. 6 Ch., 166.
(5) 18 Ch. D., 616.
(6) 26 Ch. D., 434, at p. 438.
(7) 11 Ch. D., 968.
(8) (1893) 2 Ch., 315.
(9) (1903) 1 Ch., 659, at p. 671
(10) 7 Jur. N.S., 925; 10 Camp. R. Ca., 60; 4 Macq. H.L. Cas., 117.

entire tenement was to be changed in respect of mode of occupation. The purchasers themselves professed their intention to destroy the old buildings, and in effect to treat the tenement as vacant land. There could have been no reasonable expectation on their part that the right of user of the lane would be continued.

[They referred to *Birmingham, Dudley and District Banking Co.* v. *Ross* (1); *Myers* v. *Catterson* (2).

[ISAACS J., referred to *Broomfield* v. *Williams* (3); *Swansborough* v. *Coventry* (4)].

The right claimed casts a much greater burden upon the servient tenement than the previous user. The evidence establishes that it was not intended that the right to use the side doors, if it ever existed, should continue. As to the right of user of the lane as a passage or for access, it cannot be implied that that should continue for an entirely new building going much further back than the original one. The previous user of the lane arose wholly out of the peculiar mode of occupation of the upper portion of the floor of the old building, and moreover was merely a footway, whereas the purchasers now claim a carriage way. There was nothing to justify the inference that such an entirely new right was intended to be conveyed: *Goddard on Easements*, 5th ed., p. 529. In general an indefinite right of way will not be inferred. There should be a definite *terminus ad quem*: *Goddard on Easements*, 5th ed., p. 394. [They referred at length to the evidence.] The parties were dealing with the land as building land; what was sold was a frontage for building purposes, not a building with a frontage. If the evidence establishes that clearly, then irrespective of contradictions on minor points, the Court should reverse the finding of the Judge. [He referred to *Brown* v. *Robertson* (5); *McMahon* v. *Brewer* (6).] The question of lights does not arise on this appeal, though evidence was given on the point at the trial. The decree makes no reference to lights.

Knox K.C. and *J. J. Cohen*, for the respondents. The Court

(1) 38 Ch. D., 295.
(2) 43 Ch. D., 470.
(3) (1897) 1 Ch., 602.
(4) 9 Bing., 305.
(5) 17 V.L.R., 324; 13 A.L.T., 11.
(6) 18 N.S.W. L.R. (Eq.), 88.

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will not interfere with the decision of the Judge below on any point depending upon the credibility of witnesses.

[GRIFFITH C.J.—We can only take the evidence that is uncontradicted. If that is sufficient to establish either party's case we may act upon it.]

First, as to the nature of the lane. It was more than a footway. The street footpath had been cut through in order to allow vehicles to pass in and out of the lane, and it was paved in a manner which showed that it must have been intended for a carriage way. That was its condition at the time of the contract, and it had been continuously used up to that date, not only for access to the upper floor of the building on the land sold, but by the occupants of the ground floor for access by vehicles to the side and back of the building and the land at the rear. The building was one of the boundaries of the lane, and the user was of right.

[GRIFFITH C.J.—Yes, by a tenant over the land of his landlord. That is not the same thing as a servitude.]

It was a quasi-easement. At the time of the severance there must *ex necessitate rei* be one owner of the entirety, and the rights in question can only be the rights of his tenants as against him. The sale included land at the back of the former tenement. The rights, easements and appurtenances, &c., mentioned in the grant include this right. For the purpose of identifying the subject matter of the conveyance the contract may be looked at. In it the vendor agreed to sell the land with erections thereon, &c. Even on the question of express grant the purchaser was entitled to prove that there was a building on the land, as well as every other circumstance relating to the character and condition of the land. The grant passed, not the rights *de jure* appurtenant to the land, but those *de facto* used therewith. The latter class can only be established by extrinsic evidence. The fact that the land sold extends beyond the boundary of the original tenement does not exclude the rights used only in connection with that tenement. But here the right of way was used in connection with every part of the block sold. The construction should be against the grantor. "In connection with" the land should be construed as including "in connection with" the buildings on the

land. The expression "as commonly used," gives "appurtenances" a flexible meaning.

[ISAACS J., referred to *Kavanagh* v. *Coal Mining Co. of Ireland* (1).]

The words are quite wide enough to include the right of way. [They referred to *Thomas* v. *Owen* (2)]. The fact that the demolition of the buildings was contemplated cannot affect the construction of the grant. Extrinsic evidence can only be admitted for the purpose of identifying the rights commonly used in connection with the land sold. There is no ambiguity. It was not bare land that was sold, but "land, hereditaments and premises." That includes buildings, and speaks from the date of the conveyance. The use of the land was necessary for the comfortable use of the premises in their then condition and had been so enjoyed. [They referred to *Barkshire* v. *Grubb* (3); *Ewart* v. *Cochrane* (4); *Broomfield* v. *Williams* (5).] The way claimed is not substantially different from that previously enjoyed by the occupants of the old buildings: *Barnes* v. *Loach* (6). That is a question of fact which the Judge has found in favour of the purchasers, and there was abundant evidence to support the finding. Even if evidence of intention as regards the user of the land retained by the vendor was admissible, there was evidence from which the Judge might infer that the vendor intended to leave the lane as it was for access to the rear of the original tenement. Even if there is no express grant there is a grant by implication. When a party agrees to sell land, all advantages attaching to the land over adjoining land of the vendor and reasonably necessary for the enjoyment of the land sold pass to the purchaser unless there is some provision to the contrary in the contract. All depends upon the terms of the contract. Parol evidence of intention cannot affect the implication. The presumption is in favour of the purchaser, and can only be rebutted by evidence of circumstances known to the purchaser which would prevent any expectation on his part that the right in question should be granted. [They referred to *Bank of New Zealand* v. *Simpson*

(1) 14 Ir. C.L.R., 82.
(2) 20 Q.B.D., 225.
(3) 18 Ch. D., 616.
(4) 7 Jur. N.S., 925; 4 Macq., H.L. Cas., 117.
(5) (1897) 1 Ch., 602.
(6) 4 Q.B.D., 494, at p. 498.

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(1).] If the vendor wishes to exclude the implication he should expressly reserve the right which he desires to withhold. The lane in this instance was reasonably necessary to the convenient use and enjoyment of the premises as they were at the date of the contract, and there was no reservation by the vendor. The evidence as to intention did not establish an agreement between the parties that the land was to be treated as mere building land and sold as such. The destruction of the buildings by the purchasers for the purpose of erecting new buildings was not evidence of intention to treat the land as vacant building land. They would naturally expect to enjoy the same rights both of way and of light over the rest of the vendor's land as had been enjoyed by the former occupants. [They referred to *Brown* v. *Alabaster* (2); *Ford* v. *Metropolitan and Metropolitan District Railway Cos.* (3); *Wheeldon* v. *Burrows* (4); *Union Lighterage Co* v. *London Graving Dock Co.* (5); *Wilson* v. *Queen's Club* (6): and dealt at length with the evidence.]

There is no ground for rectification. The conveyance is strictly in accordance with the written contract. There can be no rectification unless there is mutual mistake, or the words of the conveyance are not in accordance with the contract. Here, there is at the most only unilateral mistake. As to mutual mistake there was a conflict of evidence, and the Judge has accepted the version of the respondents. There was no fraud or misrepresentation by the respondents. [They referred to *Stewart* v. *Kennedy* (7); *May* v. *Platt* (8); *Powell* v. *Smith* (9).]

The plaintiffs should have been allowed to amend by adding a claim that the lane was a public way, in order that they might tender evidence on the point. There is no necessity to join the Attorney-General; there was evidence of special injury: *Cook* v. *Bath (Mayor and Corporation)* (10); *Police Offences Act* 1901, No. 5, sec. 49.

Irvine K.C., in reply, referred to *Woodyer* v. *Hadden* (11);

(1) (1900) A.C., 182.
(2) 37 Ch. D., 490.
(3) 17 Q.B.D., 12.
(4) 12 Ch. D., 31.
(5) (1902) 2 Ch., 557, at p. 572.
(6) (1891) 3 Ch., 522.
(7) 15 App. Cas., 108.
(8) (1900) 1 Ch., 616.
(9) L.R. 14 Eq., 85.
(10) L.R. 6 Eq., 177.
(11) 5 Taunt., 125.

Robson v. *Palace Chambers, Westminster, Co. Ltd.* (1); *Dobbyn* v. *Somers* (2).

[ISAACS J. referred to *Barlow* v. *Rhodes* (3); *Worthington* v. *Gimson* (4); *Minton* v. *Geiger* (5).]

Cur. adv. vult.

The following judgments were read:—

Dec. 15.

GRIFFITH C.J. This suit was brought by the plaintiffs (respondents) to assert a right to an easement of a way as appurtenant to a piece of land forming part of a larger block owned by the defendant (appellant) and conveyed by him to the plaintiffs by a deed which granted the land "together with all rights easements and appurtenances thereunto belonging or commonly used in connection therewith." The plaintiffs relied alternatively on an implied grant. The case was presented throughout as one of a continuous and apparent easement, *i.e.*, to use the words of *Thesiger* L.J. in *Wheeldon* v. *Burrows* (6), an easement which is necessary to the reasonable enjoyment of the property granted and which has been and is at the time of the grant used by the owner of the entirety for the benefit of the part granted. A great number of authorities were referred to, which would be very relevant if the case were really one of that kind. But I remark at the outset that in all these cases the tenement in respect of which the easement was claimed was identical with that in connection with which it had been formerly enjoyed. No case was cited in which the tenement in respect of which the claim was made was a tenement carved out for the first time from the entirety by the deed relied upon, and was substantially different from that in connection with which the easement had formerly been enjoyed.

To avoid misconception, I should say that I use the word "identical" in a sense which is not necessarily satisfied by mere identity, total or partial, of superficies, and is not necessarily excluded by the mere fact that a part only of what might have become on severance the dominant tenement is granted, or by the mere fact that the grant includes land in addition to what

(1) 14 T.L.R., 56.
(2) 13 Ir. C.L.R., 293, at p. 299.
(3) 1 C. & M., 439, at p. 445.
(4) 2 El. & E., 618; 29 L.J.Q.B., 116.
(5) 28 L.T., 449.
(6) 12 Ch. D., 31, at p. 49.

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might have become on severance the dominant tenement or part of it. I use it as meaning that the substantial identity of the dominant tenement is continued, notwithstanding subdivision or addition.

It often happens—perhaps oftener in newly settled countries than in old ones—that a rearrangement or redistribution of occupation is made of a parcel of land forming an entirety, without any regard being paid to the conditions of previous occupation. In such cases mere identity of boundary lines or of superficies between an old tenement and part of a new one, or between a new tenement and part of an old one, does not necessarily or even *primâ facie* give rise to any inference that a quasi-easement attached to the old tenement continues to be attached to the new one, or that general words not having in themselves a precise legal signification used in a conveyance of a new tenement are used in a sense which would include such an easement. When words are used in a written instrument which are susceptible of more than one meaning evidence is admissible to show what were the facts which the contracting parties had in their minds: *Bank of New Zealand* v. *Simpson* (1). In such a case as I have mentioned, the fact that the redistribution or rearrangement is being made, and is notorious to all parties, is in my judgment a relevant fact to be taken into consideration in construing such general words, and if it be manifest that all quasi-easements formerly existing were treated, either by express bargaining or by tacit consent, as extinguished before the contract, they should not be held to fall within such general words. It is not material whether they were so extinguished a day or a year before the contract, although the fact might be easier of proof in one case than in the other. The question in every case is one of fact.

In the view which I take of the facts of the present case in both aspects these considerations are all important. To my mind the real question to be determined is whether the land sold by the defendant to the plaintiffs, and in respect of which they claim the right of way as an appurtenance, was substantially a new tenement created for the first time or an old tenement con-

(1) (1900) A.C., 182.

veyed with its existing appurtenances. With these prefatory observations I proceed to the facts of the case.

The land in question is described in the conveyance as a block measuring 26 feet by 80 feet, bounded on one side by a street and on the other by lines of which the magnetic bearings are given. It formed part of allotment 64 in the City of Newcastle. The contract of sale is dated 20th October 1906. Allotment 64 is situated on the west side of Bolton street, which runs approximately north and south, sloping downwards to the north, and has a frontage to that street of about 60 feet with a depth of about 160 feet. It has been built upon for 40 or 50 years or more. On the southern part of the frontage stood a two-storied building, which in early days was occupied by a Dr. Bowker, the then owner of the land, and which had a frontage of 26 feet to the street by a depth of about 50 feet. The southern side of the back part of the allotment was occupied by a row of four small cottages having their backs to the southern boundary, and which covered a space extending about 80 feet from the rear or western boundary. On the northern part of the frontage to Bolton street there stood at the time of the contract two shops, which were erected about 20 years ago, and had a frontage of 23 feet 9 inches. Between these shops and the first mentioned building there was, consequently, a space about 10 feet wide, which had been used by the tenants of the buildings fronting Bolton street and of the cottages as a means of access to their respective tenements. This space, which is the way in question, and which I will call the "lane," was paved many years ago, and was always open to the street. Unity of title to allotment 64 continued until the conveyance to the plaintiffs.

The house which I have spoken of as occupied by Dr. Bowker had for many years before 1906 been used as a warehouse, and for some years before October of that year was occupied by a firm called Bull & Co. It is spoken of in the suit as Bull's Buildings. The land at the rear of the building was not enclosed from the lane. Bull & Co. had at some time put up a shed upon this land, and used it for storing empty cases, and sometimes as a stand for a horse and buggy, but they removed it before they left. They had, with the consent of their landlord,

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cut off all communication between the ground floor and the first floor, and placed stairs on the outside of the building at the back. Then they let the first floor to a Mrs. Callinan who used the lane as a way of access to the stairs. She also used the shed, while it stood, as a washhouse. For some time there was a fence between this open land and the cottages, but it had fallen into decay. On the side of the building which abutted on the lane there were two doors with fanlights over them, which were available for communication with the lane, but had for years been blocked up by removable shelves put up by Bull & Co., who had on two occasions removed them for a temporary purpose and replaced them. Thus stood the premises at the date of the contract. Bull & Co. had shortly before that date vacated Bull's Buildings, but Mrs. Callinan remained in occupation of the first floor as tenant to the defendant. The cottages had been vacant for about 6 years, except one of them which was used for a short time before the sale as a painter's store. On the land at the rear of the shops on the northern part of the frontage were closets which were used by all the tenants of allotment 64.

The lane had consequently been used (1) as a means of access to the land at the rear of the shops on the northern part of the frontage, (2) at one time as a means of access to the side doors in Bull's Buildings, (3) as a means of access to the shed at the rear of those buildings, (4) as a means of access to the first floor of those buildings, (5) as a means of access to the cottages, (6) as a means of access to the closets. Upon this state of facts it may be conceded that, if the owner of allotment 64 had demised "Bull's Buildings, together with all rights easements and appurtenances thereunto belonging or commonly used in connection therewith," some right of way over the lane would have passed to the lessee: *Brown* v. *Alabaster* (1); *Thomas* v. *Owen* (2). Probably a conveyance couched in the same terms would have the same effect.

Newcastle is a progressive city, and its conditions have greatly changed in the last 50 years. In September 1905 allotment 64 was put up for sale by public auction in two blocks. It is admitted that these blocks were advertised as having an equal

(1) 37 Ch. D., 490. (2) 20 Q.B.D., 225.

frontage of 30 feet 4 inches. The plaintiffs were present at the auction. It is manifest that the intention of the then owner was to sell the whole of the land regardless of the lane. The land, however, was not sold at the auction, but was afterwards bought by the defendant in one lot, apparently at the price bid by him at the auction.

Some time after the sale to the defendant the plaintiffs desired to acquire a part of the land for offices and residence, and entered into communication with the defendant with that view. There is a considerable conflict of evidence as to the details of what took place between them. The learned Judge of first instance on a question of rectification of the conveyance (to which I will afterwards refer) was "not satisfied on the evidence that the defendant had made out that the plaintiffs did not think that they were acquiring a right of way over the lane."

But, with all respect, this was not the matter to be determined. The real question on this point was whether the actual contract between the parties included either expressly or by implication any such right of way. It is therefore quite uncertain what view he took of the accuracy and weight of the defendant's evidence. If that evidence is accepted it is overwhelming.

I will assume, however, that he accepted the plaintiffs' version rather than the defendant's of the facts relevant to the matter now in question, so far as those versions are inconsistent.

It is not in controversy that before the sale to the plaintiffs the defendant had plans prepared of a building which was to extend over the whole frontage occupied by Bull's Buildings and the lane, and that he told the plaintiff Cohen that he had had a design from an architect, whom he named. Cohen says that he made some criticisms of this design, but did not see it. The defendant says that he showed Cohen the plans.

Early in October 1906 Cohen met the defendant, who asked him if they (the plaintiffs) were still "open for a deal." (This Cohen explained by saying that a firm of D. Cohen and Co., who had contemplated buying the land from Dr. Bowker, had agreed with plaintiffs that if they bought they would either put up a building for the plaintiffs or sell them a portion for them to build on, and that before the auction sale he had told the

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defendant that he (Cohen) intended to go in for "a bit" of Dr. Bowker's land and that D. Cohen and Co. would finance him). I quote now from Cohen's evidence :—"I said, 'Yes, what portion of the property are you talking about?' He said, 'Where Bull's Building is.' I said, 'What is the frontage?' He said, 'Twenty six feet.' I said, 'What depth?' He said, 'Seventy feet or so.' I said, 'I think the frontage would be all right, but I can't say as to the depth because it would be necessary to have plans of the buildings prepared to see what depth the building would take, as I will want to use some of the land at the back as a yard. Do you make 70 feet a *sine qua non?*' He said, 'I wouldn't be particular to a few feet.'"

Cohen further said that after this the defendant came into his office and told him that on thinking the matter over he would rather build for plaintiffs and lease than sell the land, and would be willing to build to meet their reasonable requirements. He added that in the event of selling the price would be £1,400. At this conversation Cohen said that they (plaintiffs) had had a plan prepared which showed buildings 60 feet deep, so that they would want a depth of 80 feet.

It is clear from this evidence that the subject matter of the negotiations was treated by the parties as vacant building land in the City of Newcastle which the plaintiffs desired to buy for the purpose of erecting buildings upon it.

A few days later defendant's agent, a Mr. Creer, came to the plaintiffs' office, and after some conversation on the subject of the proposed sale said to Cohen :—"Write us a letter stating the frontage and depth you want and the price you will give." This confirms the view that the matter in debate related to an area of land regarded as vacant land, and that the frontage to be acquired was regarded as having no connection with the extent or conditions of the existing buildings.

Plaintiffs accordingly on 19th October wrote to defendant's agents as follows :—"We beg to inform you that we are prepared to purchase from Dr. Horsfall land in Bolton Street upon which are at present the premises recently occupied by Henry Bull and Co. Limited. The land to be purchased by us is to have a frontage of 26 feet by a depth of 80 feet and the price therefor (for) £1,400.

We shall be glad to hear from you whether Dr. Horsfall is agreeable to sell the above land at this price." I note in passing that no reference is made to the frontage occupied by Bull's Buildings, which are only mentioned by way of description or identification.

Creer's firm replied as follows:—" In answer to yours of 19th instant we beg to advise that your offer of £1,400 cash for that land situate Bolton Street recently occupied by Henry Bull and Co. Ltd. having a frontage of 26 feet to Bolton Street by a depth of 80 feet has been accepted." The depth of 80 feet had no reference to Bull's Buildings.

As a matter of fact the extent of the frontage occupied by Bull's Buildings was exactly 26 feet. The depth of 80 feet included a small part of one of the four cottages already mentioned.

The defendant, however, does not appear to have been aware that the building occupied 26 feet of the frontage. On the contrary it appears that a gentleman whom he employed as a surveyor made the frontage of the building extend for a distance of 26 feet $2\frac{3}{4}$ inches from the South Eastern corner of allotment 64.

The point was strenuously contested at the trial, and a great deal of evidence was given upon the subject. The learned Judge found as a fact that the frontage of the building was exactly 26 feet, and this must be accepted as correct. There is no evidence that any measurement was made by the plaintiffs before the purchase. According to the plaintiffs' evidence the subject of a right of way over the lane was never mentioned during the negotiations. According to the defendant's evidence it was mentioned, and was expressly excluded from the subject matter of negotiation.

A formal contract of sale was then drawn up, in which the land was described as follows:—" Block of land situate City of Newcastle being portion of lot 64 having a frontage of 26 feet to Bolton Street by a depth of 80 feet together with the erection recently occupied by Messrs. Henry Bull and Co. Ltd. being part of the Southern portion of the lot immediately adjoining the *Newcastle Herald* office." The contract did not contain any reference to any easements to be included in the sale.

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The conveyance, which was dated 21st January 1907, described the premises conveyed as :—"All that piece or parcel of land situate . . . commencing at a point being the South east corner of allotment 64 and bounded thence . . . "(the boundary on the north being described as "other part of said allotment being a line bearing" &c.) "Together with all rights easements and appurtenances thereunto belonging or commonly used in connection therewith."

The plaintiffs proceeded to put up a three-storied building on the land with doors and windows opening upon the lane. The defendant asserted his right to obstruct both the access and the light, and this suit was begun.

The statement of claim alleges that the plaintiffs are a firm of solicitors at Newcastle, and that in 1906 they were desirous of erecting offices for the purposes of their business and a residence for one of them, that the defendant entered into negotiations with them with a view to the sale by him to them of a portion of allotment 64, and that they informed him "that they required the same for the purposes of erecting offices for themselves on the ground floor and rooms on the first floor for a residence of one of the plaintiffs, and that at the time of the sale and conveyance it was fully known to the defendant that the plaintiffs required the land for these purposes."

After setting out the facts they submit their legal contentions thus :—"Prior to and at the date of the said indenture the said way or passage was necessary for the proper enjoyment of the part of the said land and houses conveyed thereby and for which it had been previously used: without the said way or passage egress or ingress for parts of the houses could not and cannot be made. The said way or passage was always well defined and apparent and was necessary for the comfortable enjoyment of the part of the said allotment granted by the defendant to the plaintiffs and the plaintiffs submit that by the said conveyance the said defendant passed the right of way over the said way or passage to the plaintiffs.

"The plaintiffs further submit that the said way or passage was incident to the defendant's grant under the said indenture or

that at the time of making the said indenture there was an implied grant of the way or passage to the plaintiffs."

The defendant contends that a right of passage over the lane was not an appurtenance commonly used with the actual tenement conveyed, that the circumstances of the case exclude any implied grant, and further that if the words of the conveyance can be construed as including such a right it was not in accordance with the contract between the parties, and he claimed rectification.

During the trial the plaintiffs amended their statement of claim by a submission that the obstructions should be removed "both because they interfere with the use of the said way and with the access of light."

The plaintiffs' whole case rests upon the fact that Bull's Buildings had in fact a frontage of exactly 26 feet, and that the lane, which was not mentioned during the negotiations nor in the contract, bounded them. If, in reply to Mr. Creer's letter, Cohen had asked for 25 or 27 feet, and the defendant had accepted the offer, the plaintiffs would not have had the shadow of a case.

There was much discussion at the bar on the question of the admissibility of evidence of the surrounding circumstances for the purpose of interpreting the contract and the conveyance.

First with respect to the contract:—That document is silent as to any incorporeal rights. It is clear, therefore, that any rights which can be founded upon it are based upon implication. Now the foundation of the doctrine of implied contract or grant is that the stipulation set up must necessarily have been intended by the parties, so that without the implication their manifest intention would be defeated. If, then, it appears from admitted or proved facts that the implication set up is inconsistent with the actual circumstances attendant upon the making of the contract the implication is excluded. This is very clearly pointed out in the case of *Birmingham, Dudley and District Banking Co.* v. *Ross* (1). (I shall have to refer to this case again in connection with the construction of the conveyance.)

In that case the question was as to an express or implied grant of an easement of light. *Cotton* L.J. said (2): "But when the

(1) 38 Ch. D., 295.

(2) 38 Ch. D., 295, at pp. 308-9.

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question is as to an implied obligation we must have regard to all the circumstances which existed at the time when the conveyance was executed which brought the parties into that relation from which the implied obligation results; I quite agree that we ought not to have regard to any agreement during the negotiations entered into between the plaintiffs and the corporation; except in this way; if we find that any particular space in fact was left open at the time when the lease was granted, and that that open space was contracted to be left open during the negotiation which took place, and is not referred to in the lease, we must have regard to the fact of that open space being left, and we must have regard to the fact that by agreement between the parties the lessor had bound himself not to build upon that space; and also we must, in my opinion, in determining what obligation results from the position in which the parties have put themselves, have regard to all the other facts which existed at the time when the conveyance was made, or when the lease was granted, and which were known to both parties."

Lindley L.J. said (1):—"Now, if we look at Daniell's lease, which is the important document in this case, we do not find in it any express words creating any new easement over the land retained by the corporation. There is nothing express about that; it is a grant of a house, and so on, as Lord Justice *Cotton* has mentioned more in detail, but we do not find any express words creating any new easement.

"That being so, we must proceed to consider what was the state of things existing at the time that lease was granted. I think Sir *Horace Davey* was quite right in saying that we are not to go into the preliminary negotiations which resulted in the final lease. They might be important, and perhaps would be necessarily important, if we were considering whether the lease should be rectified or not, but for the purpose of construing the lease all such considerations as those ought to be disregarded. But the state of the property is all important, and what was being done with it is all important."

Bowen L.J. said (2):—"The obligation which is created under such circumstances is not to my mind an express obligation at

(1) 38 Ch. D., 295, at p. 311.

(2) 38 Ch. D., 295, at p. 314.

all. It is not an obligation which arises simply from the interpretation of the deed as read by the light of the circumstances outside. It is a duty that arises from the outside circumstances having regard to the relation of grantor and grantee which the deed creates. Supposing you take the deed alone, no amount of construction could evolve from the deed itself the protection which the grantee of the deed desires. It does not appear from the deed that the grantor had the power of giving the protection which is necessary for the enjoyment of that which he grants; it is only by looking outside the deed that you see that such a power of protection on the part of the grantor in favour of the grantee exists. It is only by looking outside the deed that the implication of a duty arises. . . . Now if it is an obligation which arises from such an implication, it must be measured by all the surrounding circumstances. The presumption that arises in favour of the ordinary measure can be rebutted by showing that the circumstances are not ordinary circumstances, or, to speak more accurately, it is not a case of rebutting a presumption, it is a question of the proper inference to be drawn from a consideration of all the facts. I do not think that any hard and fast line can be laid down beyond which you are not to admit evidence to rebut the presumption, or rather—as I should prefer to say—to measure the implication itself."

In that case the main circumstance which was held to be relevant was that the land in question had been acquired by the Birmingham Corporation for the purpose of building upon it. The circumstances in the present case are that the land in question had been, so far as could be done without actual demolition, dissociated from the buildings upon it, and treated as vacant building land to be sold at a price dependent upon frontage and area, so that the buildings upon it were regarded not as additions to the value of the land, but as encumbrances to be removed before it could be put to its destined use. On this point some observations of *Bowen* L.J. in the case of *Myers* v. *Catterson* (1), may be referred to by way of illustration:— "The truth is that the law in such a case, where the parties have entered into the relation of vendor and purchaser, assumes

(1) 43 Ch. D., 470, at p. 481.

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from the circumstances an obligation on the part of the seller not to do anything with his own land which would defeat the known mutual intention of both parties upon the sale. Now apply that to a house. Suppose I have a large piece of land, on one part of which is standing a house; that house may be a mere congeries of bricks, never intended to be used as a house; but which may be pulled down and carted away so as to be sold as bricks. If I sell a house merely as bricks, of course the transaction would be different, but 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 my 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 window as windows." I take leave to add "*Et e converso.*"

In my opinion the character or quality already impressed by the vendor upon the whole tenement of which a part is sold, and made known to the purchaser of the part at the time of sale, is a relevant fact which may be proved by oral evidence for the purpose of considering whether any promise arises by implication. *A fortiori*, it may be proved that it was the common intention of both parties to contract on that footing.

In the present case not only does the plaintiffs' own sworn testimony (which is strongly corroborated by the defendant) establish that the buildings in respect of which the right is now claimed were regarded as encumbrances upon the land, a mere "congeries of brick and stone," to be got rid of before it could be put to its intended use, but they insist upon that point in their statement of claim. Under these circumstances it is, in my opinion, impossible to imply a promise of a grant of a continuous and apparent easement as defined by *Thesiger* L.J., whether of way or light, and which, if it existed at all, existed only as appurtenant to Bull's Buildings. I think, therefore, that the plaintiffs were not entitled under the contract to the right now claimed.

I pass now to the conveyance, the language of which I have

already read. The learned Judge was of opinion that the right of using the lane, to the depth at least of Bull's Buildings, was a right of easement used in connection with Bull's Buildings, and passed with the conveyance. He came to the same conclusion with regard to the right of access of light across the lane. The decree was, however, drawn up without any reference to a right of access of light. That there had previously been a quasi-easement of use of the lane for Bull's Buildings is beyond doubt, but the material words to be considered do not include any reference to Bull's Buildings or to the tenement which they constituted. The material words are "commonly used in connection therewith," *i.e.*, with the tenement created by the deed of conveyance. Upon the bare facts of the case it cannot be said that the lane had ever been used in connection with that tenement regarded as a single entity. It could not, of course, have been used in connection with that entity before it was created. A quasi-easement had been enjoyed in connection with Bull's Buildings, but when those buildings were vacated under circumstances showing an intention to demolish them, it could no longer be asserted in any intelligible sense that that easement was "commonly used" in connection with them, except, perhaps, as to the first floor. The tenant of that floor had, perhaps, a quasi right of way of necessity over the lane; and the grant of a right to continue to use that lane so long as she continued a tenant, or until some other way was provided for her, might perhaps be implied. So far as regards the easement of right of way to the cottages, it is absurd to suggest that the inclusion in the new tenement of a small part of the land occupied by one cottage carried a right to use the lane as appurtenant to it.

In my opinion, therefore, the words relied upon do not, when applied to the facts, bear the interpretation put on them by the learned Judge.

Assuming, however, that they are capable of that construction, other considerations arise. It is, of course, impossible to ascertain whether an alleged easement or appurtenance is within the language of a conveyance without first ascertaining the principal subject matter of the deed, and then ascertaining the relevant facts as to its condition, occupation and enjoyment at the date of

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the conveyance. On this point I refer again to the *Birmingham Bank Case* (1), in which one question considered by the Court was as to the effect of sec. 6 (2), of the *Conveyancing and Law of Property Act* 1881, which enacted that a conveyance of land having houses or buildings thereon should be deemed to include and should operate to convey with the land "houses, or other buildings, all out houses, . . . privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance . . . . occupied, or enjoyed with, or reputed or known as . . . . appurtenant to, the land," &c.

The deed in question was, therefore, to be construed as if these words had been inserted in it. The right under consideration was of light claimed to be "enjoyed" with the house conveyed. On this point, *Cotton* L.J., said (2):—"The house had only recently been erected . . . The light did in fact at the time come over that building; but it came over it under such circumstances as to show that there could be no expectation of its continuance. It had not been enjoyed in fact for any long period; and in my opinion it was enjoyed under such circumstances, known to both parties, as could not make it light enjoyed within the meaning of that section. That expression must mean not light which a person has a right to under the Statute, but that which he has enjoyed under circumstances which would lead to an expectation that the enjoyment of that light would be continued, and that it would not be simply precarious."

I do not think that the use of the word "commonly" makes any difference. The word "enjoyed" must mean "commonly enjoyed," *nec vi nec clam nec precario*, and the words "commonly used" in the present case are to the same effect. Applying, then, the words of *Bowen* L.J., in the passage first cited from this case, the obligation, whatever it is, arises from the extrinsic circumstances, having regard to the relation of grantor and grantee created by the deed. When we look at the relevant extrinsic circumstances, we find that there was on the land conveyed a building, the frontage of which was in fact exactly

(1) 38 Ch. D., 295. (2) 38 Ch. D., 295, at p. 307.

26 feet, although the vendor did not think so, or at least, did not know whether it was so or not. The right is claimed as having been enjoyed with this building. We inquire then—what was the building? The answer is that it was a building which both parties regarded as an encumbrance upon the land which would have to be removed before the land could be put to the use to which by the common intention of both parties it was destined. Then, to adapt the words of *Cotton* L.J., was this a right enjoyed under circumstances which would lead to an expectation that the enjoyment would be continued? It is impossible to give an affirmative answer, and equally impossible to say that the right of Mrs. Callinan to access to the first floor by stairs at the rear of the building was enjoyed under circumstances which would lead to an expectation that that enjoyment would be continued.

In my opinion, therefore, the right claimed does not fall within the words "commonly enjoyed" used in the conveyance.

Nor do I think that it was a "right easement or appurtenance" within the proper construction of those words. It is not contended that it was a right. I have already dealt with it as an easement. The word "appurtenance" is not a word of fixed meaning. It is not apt to describe an easement of a way, but it is capable of including such an easement if the context of the deed and the circumstances so require, as was held in *Bayley* v. *Great Western Railway Co.* (1); which was a case of construction of a particular deed as applied to the particular facts then in question. In the present case there is no context and there are no circumstances which help the plaintiffs. On this ground also I think that the plaintiffs' case fails.

Assuming, however, that the deed ought to be construed as including a grant of the way claimed, the defendant says that, so construed, it is inconsistent with the actual agreement between the parties, and in this I agree. The plaintiffs contend that, even so, there is no case for rectification, since the words in the conveyance were accepted, whatever their meaning, by both parties, and rely on *May* v. *Platt* (2). If that case was well decided (as to which see the observations of *Neville* J. in *Thomp-*

(1) 26 Ch. D., 434. (2) (1900) 1 Ch., 616.

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son v. *Hickman* (1)), I do not think that it has any bearing on this case. The question in that case was not of rectifying a conveyance to bring it into accord with the contract, but of rectifying the contract itself. Here the question is of rectifying the conveyance to make it accord with the actual contract. So far as the case goes, it is rather in favour of the appellants, for the learned Judge (*Farwell* J.) pointed out that if the conveyance was not in accord with the actual agreement in writing it should be rectified. The question here is one of parcel or no parcel. If by mutual mistake the words of the conveyance include a parcel which was no part of the subject matter of the contract, I can see no reason why the deed should not be rectified by confining it to the actual subject matter. It is not a question of making the plaintiffs take something less than they bought, but of confining the conveyance to the property actually bought. I think, therefore, that the conveyance should be rectified if necessary, but I do not think it necessary.

In my opinion the plaintiffs fail on all points, and the suit should have been dismissed.

An application was made during the trial of the case to amend by setting up that the lane in question had been dedicated as a highway, and reliance was placed on the Act No. 5 of 1901 (*Police Offences*) sec. 49. Assuming that the case could be brought within the terms of that Act, which is, to say the least, extremely doubtful, I think that the case thus sought to be made was an entirely new one, which, if set up at all, should be set up in another suit. I think, therefore, that the application was rightly refused.

BARTON J. I have come to the same conclusions, and having had the advantage of reading the judgment of the Chief Justice, in the reasoning of which I fully agree, I do not deem it necessary to deliver a separate opinion.

ISAACS J. In my opinion, the judgment of the Chief Judge in Equity is correct, and should be affirmed. As I am differing from my learned colleagues on extremely important aspects of

(1) (1907) 1 Ch., 550.

the law, I feel constrained to state my reasons with some particularity.

To begin with, the learned primary Judge has found as a fact that the parcel of land as described in the grant by the appellant to the respondents includes with other lands the whole of the land which is occupied by Bull's Buildings. That finding is not now challenged. Not only is there no reason for disturbing it, as having been shown to be wrong, but it seems plainly right. So far as actual intention goes, the defendant's own evidence as to Cohen's statement that he wanted the portion of the property where Bull's Buildings was seems decisive. The "frontage" there referred to cannot well mean anything but the frontage of Bull's Buildings.

The grant "of all rights easements and appurtenances thereto belonging or commonly used in connection *therewith*," consequently applies to that parcel of land.

Under that express grant the respondents claim an easement of light and an easement of way. These easements are not specifically named, and if they are to be held as being comprised in the general words it must be upon proof *dehors* the deed that they were "appurtenances" within the meaning of the instrument, "belonging to or commonly used in connection" with the land sold.

As both the land sold and the land over which the easements are claimed were held in united ownership by the appellant, the alleged easements were not strictly speaking easements or appurtenances, and not legally incident to the enjoyment of the property: *Worthington* v. *Gimson* (1); *Barlow* v. *Rhodes* (2); *Gayford* v. *Moffatt* (3); *Bolton* v. *Bolton* (4).

But the word "appurtenances" may easily receive a wider meaning either from the context of the deed itself: *Barlow* v. *Rhodes* (2); *Kavanagh* v. *Coal Mine Co. of Ireland* (5); or from the surrounding circumstances, such as the condition of the land, the existence of the leases, the nature of the occupation, &c.: *Thomas* v. *Owen* (6).

(1) 2 El. & E., 618.
(2) 1 C. & M., 439.
(3) L.R. 4 Ch., 133.
(4) 11 Ch. D., 968.
(5) 14 Ir. C.L.R., 82.
(6) 20 Q.B.D., 225.

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As to the context, the words "commonly used" are for this purpose similar in effect to the expressions "usually enjoyed" and "usually occupied" found in the judgment of *Fry* L.J., in *Thomas* v. *Owen* (1). In *Barlow* v. *Rhodes* (2), Lord *Lyndhurst* C.B., said:—"In modern deeds, the words 'therewith used and enjoyed' are generally inserted, because conveyancers find that the words 'appertaining and belonging' are not sufficient."

In the same case, *Bayley* B., speaking of a quasi-easement, says (3):—"If you will only insert the words 'or therewith used and enjoyed' the right would pass." See also *per Lefroy* C.J. in *Kavanagh* v. *Coal Mining Co. of Ireland* (4); and *per Willis* J. in *Simpson* v. *Dendy* (5). Even the mere addition of much less expressive words has assisted the Court to arrive at the wider meaning. In *Doidge* v. *Carpenter* (6) Lord *Ellenborough* C.J. said:—"'Thereunto belonging or in any wise appertaining,' which are the words of the conveyance in fee, seem as if they were studiously selected in order to constitute a grant *de novo*, to subsist in enjoyment as before." Upon the words of the grant in this case, there would therefore pass to the plaintiffs whatever quasi-easements were enjoyed in connection with the land covered by Bull's Buildings, and the rest of the land conveyed.

What were those quasi-easements? First it was contended that none could be included that were not enjoyed by the whole parcel as an entirety—in other words, if the portion occupied by Bull's Buildings had certain quasi-easements of light and ways, &c., and the remainder had other distinct quasi-easements of light and ways, none of these would pass by the express grant, because "therewith" means the whole parcel *in globo* and not separate parts of it. The doctrine of indivisibility was urged in the converse case of *Newcomen* v. *Coulson* (7) and rejected, *Jessel* M.R. saying (8):—"Where the grant is in respect of the lands, and not in respect of the person, it is severed when the lands are severed, that is, it goes with every part of the severed lands." But if so, if the grant of way for the benefit of the whole parcel,

(1) 20 Q.B.D., 225.
(2) 1 C. & M., 439, at p. 444.
(3) 1 C. & M., 439, at p. 448.
(4) 14 Ir. C.L.R., 82, at p. 89.
(5) 8 C.B.N.S., 433, at p. 468.
(6) 6 M. & S., 47, at p. 49.
(7) 5 Ch. D., 133.
(8) 5 Ch. D., 133, at p. 141.

means also a grant for each portion of it, how can the contention of indivisibility in the present case be supported ?

It seems to me unreasonable to interpret the united grant of two separate tenements, with a combined grant of appurtenances as commonly used therewith, as applying only to such appurtenances as were used for the benefit of both tenements in conjunction, a most rare case. The construction I give to the express grant would not impose any additional burden on the quasi-servient tenement. In *Williams* v. *James* (1) *Bovill* C.J. said :— " Where a person has a right of way over one piece of land, he can only use such right in order to reach the latter place. He cannot use it for the purpose of going elsewhere." And see *Milner's Safe Co. Ltd.* v. *Great Northern and City Railway Co.* (2). What would be an excess in such a case as the present does not arise.

The next point for consideration is what is the meaning of the expression " commonly used in connection therewith."

Where an easement granted is defined by user its nature and extent, if disputed, depends upon evidence of the user. (See *per Mellish* L.J. in *United Land Co.* v. *Great Eastern Railway Co.* (3) ; *Milner's Safe Co. Ltd.* v. *Great Northern and City Railway Co.* (4), and cases there cited. There is evidence here as to the nature and extent of the way and of the light claimed, and I shall deal with this later.

But besides the user which in fact commonly prevailed up to the time which determines the rights of the parties, it is strenuously urged that the meaning of the words " commonly used " may be affected by a mere parol statement on the part of the vendor to the purchaser not amounting to a term of the contract, for that was here reduced to writing, as to the vendor's intention to use the land he retains at some time for the purpose of building. In the view I take of the facts in this case such a contention is immaterial, but on the assumption that the statement was distinctly made to the purchaser so as to give him notice of the owner's intention as a fact at that time, it gives rise to a question of law of the greatest general importance in the construction of contracts.

(1) L.R. 2 C.P., 577, at p. 580.
(2) (1907) 1 Ch., 208, at pp. 226, 227.
(3) L.R., 10 Ch., 586.
(4) (1907) 1 Ch., 208, at p. 220.

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It is urged that such a statement is part of the "surrounding circumstances," so as to identify the subject matter of the contract. The only part of the subject matter relevant to this branch of the case consists of "appurtenances commonly used," &c. That plainly and necessarily means as used up to the critical time, whether the date of the conveyance or the time the contract is signed. But the argument is that *before* that contract was signed there was a statement of future intention as to the use of the retained land, which *ipso facto* altered the character of the appurtenance, and changed it from one which might be expected to continue, to one which no one could expect to continue. That appears to me, with great deference to the contrary opinion, to be fallacious. The question, as I understand it, is what quasi-easements were "commonly used," not what might in the future be commonly used. The test is to look at the facts as they existed during the user, and inquire as to the nature and extent of that user, and among other things to inform the mind as to whether the nature of the user was such, having regard to all the then surrounding circumstances including duration, as to lead to the belief it was not merely a personal licence but in connection with the property sold. If, on the whole, up to the critical moment the user can be said to have substantially existed, and was of a character that showed that it was for the benefit of the severed land, it would, in my opinion, answer to the description in the grant. It is always in such case a question of fact as to the nature and extent and continuance of the user. An illustrative instance is found in *Collins* v. *Slade* (1), where the grant was of a right of way "as at present used and enjoyed by the said William Slade." It is quite immaterial whether the appurtenances commonly used were so used as of right. In *May* v. *Belleville* (2) for instance, *Buckley* J. had to determine what were "all rights of way hitherto exercised by them in respect of Coxhill," and that learned Judge said (3) that he was entitled to inquire whether there were rights of way exercised, not as being legal rights of way, but *in fact*."

It is true that "all deeds and writings are to be taken

(1) 23 W.R., 199.
(2) (1905) 2 Ch., 605.
(3) (1905) 2 Ch., 605, at p. 613.

secundum subjectam materiam," *per* Lord *Mansfield* C.J. in *Morris* v. *Edgington* (1), or as *Blackburn* J. expressed it in *Burges* v. *Wickham* (2), "not *simpliciter*, but *secundum quid*."

Lord *Wensleydale* in *Waterpark* v. *Fennell* (3), said:—"In deeds, as well as wills, the state of the subject at the time of execution may always be inquired into." In *Duke of Devonshire* v. *Pattinson* (4), the *primâ facie* presumption arising from the words of a conveyance was held to be rebutted by the surrounding circumstances in relation to the property at the time the deed was executed. *Sir James Wigram*, in his work on Extrinsic Evidence, par. 76, says that "the words of a testator, like every other person, *tacitly refer to the circumstances* by which at the time of expressing himself he is surrounded." To the same effect Lord *Halsbury* L.C. for the Privy Council in *Van Diemen's Land Co.* v. *Marine Board of Table Cape* (5), said:—"The time when, and the circumstances under which, an instrument is made, supply the best and surest mode of expounding it." But declarations are not surrounding circumstances. They are in proper cases admissible as *evidence* of surrounding circumstances, as for instance to identify something of which the written document has left the identification to depend on some extrinsic proof. But the declarations are not substantive circumstances, and cannot modify unambiguous words (see also *Wigram*, pars. 124 and 125). Preliminary negotiations are no part of the surrounding circumstances. *Inglis* v. *Buttery* (6), is distinct as to that. Lord *Blackburn* (7), after referring to the judgment of Lord *Giffard* that the written contract alone must be appealed to in order to find the bargain of the parties, said:—"Quite consistently with that, I think you may while taking the words of the agreement, look at the 'surrounding circumstances,' as Lord *Ormidale* expresses it, and see what was the intention. You do not get at the intention as a fact, as *Sir James Wigram* in his treatise on Extrinsic Evidence calls it, but you see what is the intention expressed in the words, used as they were with regard to the particular circumstances and facts with regard to

(1) 3 Taunt. 24, at p. 30.
(2) 3 B. & S., 669, at p. 699.
(3) 7 H.L.C., 650, at p. 684.
(4) 20 Q.B.D., 263.
(5) (1906) A.C., 92, at p. 98.
(6) 3 App. Cas., 552.
(7) 3 App. Cas., 552, at p. 577.

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which they were used. The intention will then be got at by looking at what the words mean in that way, and doing that is perfectly legitimate." Lord *Hatherley* and Lord *O'Hagan* were equally distinct. If I might choose I would refer particularly to the latter (1), where the learned Lord said:—"I need say no more than has been said already as to the impossibility of allowing the class of evidence of what is called 'communings' that is to say, negotiations, to be admitted *at all*, whether those negotiations or 'communings' occurred before the contract was completed or afterwards. That contract must stand by itself: and must be construed according to *its own words*, and the provisions contained within its own four corners."

In *Bank of New Zealand* v. *Simpson* (2), Lord *Davey* for the Judicial Committee said:—"Extrinsic evidence is always admissible, not to contradict or vary the contract, but to *apply* it to the *facts* which the parties had in their minds and were negotiating about. The rule is thus stated in *Taylor on Evidence*, 8th ed., vol. II., sec. 1194: 'It may be laid down as a broad and distinct rule of law that *extrinsic evidence* of every *material fact* which will enable the Court to *ascertain the nature and qualities of the subject matter* of the instrument, or, in other words, *to identify the persons and things* to which the instrument refers must of necessity be received.' In *Grant* v. *Grant* (3) *Blackburn* J. quoted judicially the following passage from his valuable work on Contract of Sale, p. 49:—'The general rule seems to be that all facts are admissible which tend to show the sense the words bear with reference to the *surrounding circumstances* of and concerning which the words were used, but that such facts as only tend to show that the writer intended to use *words bearing a particular sense* are to be rejected.'"

There are examples in point to which I referred during the argument. One is *Doe d. Norton* v. *Webster* (4), where Lord *Denman* C.J. used language very apposite to the present case. Others are *Williams* v. *Morgan* (5); *Robinson* v. *Grave* (6); *Minton* v. *Geiger* (7); *Wheeldon* v. *Burrows* (8); *Leggott* v.

(1) 3 App. Cas., 552, at p. 572.
(2) (1900) A.C., 182, at p. 187.
(3) L.R., 5 C.P., 727, at p. 728.
(4) 12 A. & E., 442.
(5) 13 App. Cas., 238.
(6) 21 W.R., 569
(7) 28 L.T.N.S., 449.
(8) 12 Ch. D., 31, at p. 60.

Barrett (1); *Birmingham, Dudley and District Banking Co.* v. *Ross* (2); *Bailey* v. *Icke* (3); *Greville* v. *Hemingway* (4); *Greswolde-Williams* v. *Barneby* (5).

The principle thus deeply rooted is so often sought to be evaded that as is seen it has required the Courts to firmly enunciate it on repeated occasions and in various forms, in order to indicate that supposed exceptions are merely attempted violations of the rule.

Now, great reliance has been placed upon some observations of *Cotton* L.J. in *Birmingham, Dudley and District Banking Co.* v. *Ross* (6) to justify the contention that to prove the statement of intention to build on the retained lane is no breach of the rule, because that mere declaration of *intention* prevents the way, which up to that time may for the purposes of the argument be assumed to have been commonly used, from being thenceforth a way commonly or at all *used* in connection with the severed property.

No other case that I am aware of offers any support to the view presented, except that it was suggested some observations of *Bowen* L.J. in *Myers* v. *Catterson* (7) looked the same way. This I do not agree with, and will revert to the passage later. I am unable to see that *Cotton* L.J. in any degree countenanced the argument relied on. Of the three learned Lords Justices—*Cotton, Lindley* and *Bowen*—who determined the case, *Cotton* L.J. was the only one who in any way regarded the case as raising the question of an express grant (see *per Rigby* L.J. in *Broomfield* v. *Williams* (8). Counsel of the highest eminence did not suggest, and no argument arose upon, the point.

Indeed in the last mentioned case, *Lindley* L.J. pointed out what was really decided in the *Birmingham Case*. The grantor, he said, had not sold or conveyed a house built by himself, with windows for the admission of light. The house had been *built by the grantee on vacant land* which he had agreed to buy, and the conveyance came afterwards, when the *vendor had no equitable interest* in the property conveyed. The question then arose

(1) 15 Ch. D., 306, at p. 309.
(2) 38 Ch. D., 295, at p. 311.
(3) 64 L.T.N.S., 789.
(4) 87 L.T., 443.
(5) 49 W.R., 203.
(6) 38 Ch. D., 295, at p. 307.
(7) 43 Ch. D., 470.
(8) (1897) 1 Ch., 602, at p. 606-7.

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what light the purchaser was entitled to. In the *Birmingham Case* the circumstances showed that the purchaser had bargained for and obtained special protection against obstruction and was entitled to no more.

And *Rigby* L.J. (1) said :—"The case of *Birmingham, Dudley and District Banking Co.* v. *Ross* (2) needs some examination. There, as in *Myers* v. *Catterson* (3), and in *Rigby* v. *Bennett* (4), the house in respect of which an easement was claimed was *erected, not by the grantor, but by the grantee.* The grantor, the Corporation of Birmingham, sold, *not a house*, but *the site only* of a house."

Now those facts and observations are all important in understanding what *Cotton* L.J. was talking about on the point of express grant. At the moment of conveyance, he said, the light did in fact come over the building ; but not in such circumstances as to show there could be any expectation of its continuance. He pointed to the recency of the house and enjoyment of light, and to the fact that from the first moment of enjoyment the purchaser knew it was precarious, and without expectation of its continuance. In other words, there never was a moment in the existence of the house, when it belonged in equity to the vendor of the land; there never was a moment, previous to the equitable ownership of the purchaser, when light was enjoyed by the house, and therefore there was nothing which the vendor could convey as an easement, or rather quasi-easement, of light, for he never built the house or used the light, and so his other land was never for an instant subject to it even as a quasi-servient tenement. And therefore, says the learned Lord Justice in effect, such a right never was at the moment of conveyance "enjoyed," that is within the meaning of the Statute, during the ownership of any person who was at once legal and equitable owner. At the date of the conveyance, consequently, the purchaser, who did in a physical sense enjoy the access of light—for the light came over the house—did so not as legal owner, and knowing it was in the strongest sense precarious. The vendor never had it as equitable owner, and the

(1) (1897) 1 Ch., 602, at p. 616.
(2) 38 Ch. D., 295.
(3) 43 Ch. D., 470.
(4) 21 Ch. D., 559.

vendor never undertook to give it; the land was affected with what *Cotton* L.J. calls a duty in the part of the Corporation—really a public trust—and was *in law* building land, and consequently the continuance of the access of light might have been stopped at any instant without breach of contract.

In the recent case of *International Tea Stores Co.* v. *Hobbs* (1), *Farwell* J. had to consider the effect of the *Conveyancing Act* in circumstances much more closely approximating the present case, because there was in fact a user of way while the vendor remained the absolute owner of the granted land. In relation to the express grant which by the Act is deemed to be included, the learned Judge said (2):—"I am, therefore, thrown back on the inquiry whether it is or is not the fact that at the date of the conveyance the way in question was a way used and enjoyed with the property conveyed. If it was so in fact used and enjoyed, then it passed to the plaintiffs by the very words of the grant." His Lordship went through the evidence and found that during his ownership the vendor had leased the granted land, and had from time to time allowed the tenants, by repeated express permission to various managers of the lessee, to use a roadway over the defendant's adjoining property. The tenant assigned to the plaintiffs and then a like permission was obtained to use the road. Then said the learned Judge (3):—"Down to this point, therefore, I find that there was a way used in fact, and used for several years, by the plaintiffs before and at the date of the conveyance. But then Lord *Coleridge* says that such use was wholly permissive. Cases such as the present necessarily arise where the defendant is the owner of the property which he has conveyed to the plaintiffs in the action, and is also the owner of other property adjoining which he does not convey, over which the right in question is claimed. If the plaintiff has himself been the owner in occupation of both properties, the point taken by Lord *Coleridge* cannot arise, but the question is one of the mere fact, was there a roadway which was in fact used for the convenience of the particular tenement? But in the case before me there is unity of title but not unity of possession,

(1) (1903) 2 Ch., 165. (2) (1903) 2 Ch., 165, at p. 169.
(3) (1903) 2 Ch., 165, at p. 170.

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because the plaintiffs themselves were in possession as tenants of the adjoining tenement. The use of the road by them was not of right, because the lease did not give it to them. They must, therefore, have used the road either by licence or without licence. Unless I am prepared to say that in no case can a tenant obtain under the *Conveyancing Act* 1881, a right of way unless he has enjoyed it as of right, I must hold in this case that the fact of licence makes no difference. In all these cases the right of way must be either licensed or unlicensed. If it is unlicensed it would be at least as cogent an argument to say, 'True you went there, but it was precarious, because I could have sent a man to stop you or stopped you myself any day.' If it is by licence, it is precarious of course in the sense that the licence, being *ex hypothesi* revocable, might be revoked at any time; but if there be degrees of precariousness, the latter is less precarious than the former. But, in my opinion, precariousness has nothing to do with this sort of case, when a privilege which is by its nature known to the law, namely a right of way — has been in fact enjoyed." At page 172 he reiterates this point —"The real truth is that you do not consider the question of title to use, but the question of fact of user; you have to inquire whether the way has in fact been used, not under what title has it been used, although you must of course take into consideration all the circumstances of the case as appears from the *Birmingham Banking Co's. Case* (1) and *Goodwin* v. *Schweppes, Ltd.*" (2). And further on, in observing upon a quotation of *Blackburn* J. in *Kay* v. *Oxley* (3), he repeats the principle in other words.

Now this to my mind effectually disposes of the argument of the defendant based upon the words of *Cotton* L.J. in the *Birmingham Case*. If the appellant had himself in fact commonly used the way up to the date of the conveyance, how could the mere circumstance of his informing the respondents that he intended to build upon the lane affect the question of fact of user? Such a user would of course have been precarious in one sense because he might of his own volition have discontinued it at any moment, and

(1) 38 Ch. D., 925.

(2) (1902) 1 Ch., 926, at p. 933.

(3) L.R. 10 Q.B., 360.

yet, as it seems to me, it must have passed. So if the tenant had used it; how could a declaration of intention to a proposing purchaser affect the quality of the tenant's user? There would still have been a way "commonly used." When once the point adverted to by *Lindley* L.J. in *Broomfield* v. *Williams* (1) is grasped, namely, that in the *Birmingham Case*, the vendors never had the house and so no house of the vendor ever enjoyed the light, the irrelevancy of the observations of *Cotton* L.J. to the present case becomes apparent. *Goodwin* v. *Schweppes Ltd.* (2) is another instance of the *Birmingham Case* which *Joyce* J. followed. The key to the case is found at p. 933:—"Upon consideration I think that the present case is governed by the decision in *Birmingham, Dudley and District Banking Co.* v. *Ross* (3). The adjoining ground, as well as the site of the mansions, was the subject of the pre-existing agreement between the grantor and the grantee in the conveyance. The mansions had been *built by the grantee*, and their respective rights were to be looked for in the binding agreement: see judgment of *Rigby* L.J. in *Broomfield* v. *Williams*" (1).

To take the converse case; supposing Horsfall had sold the lane and not Bull's Buildings, but expressly reserving to himself all ways commonly used, &c., would the mere fact of an intimation by the purchaser that he intended to build on the lane have limited the express grant and so deprived the vendor of the right of way? I apprehend not. *May* v. *Belleville* (4) shows that the reservation would lead merely to an inquiry of what ways were in fact used.

The same principle is at the bottom of the observations of *Westbury* L.C. in the practically fundamental case of *Suffield* v. *Brown* (5), where he says, "I must entirely dissent from the doctrine on which his Honor's decree is founded, that the purchaser and grantee of the coal wharf must have known at the time of his purchase that the use of the dock would require the bowsprit of the large vessels received in it should project over the land he bought, and that he must be considered, therefore, to

(1) (1897) 1 Ch., 602.
(2) (1902) 1 Ch., 926.
(3) 38 Ch. D., 295.
(4) (1905) 2 Ch., 605.
(5) 33 L.J. Ch., 249, at 261

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have bought with notice of this necessary use of the dock, and that the absolute sale and conveyance to him must be cut down and reduced accordingly."

The argument is also presented in a slightly different form by reference to the passage in the judgment of *Bowen* L.J. in *Myers* v. *Catterson* (1), to which I have already alluded. That passage is—"Suppose I have a large piece of land, on one part of which is standing a house; that house may be a mere congeries of bricks, never intended to be used as a house; but which may be pulled down and carted away so as to be sold as bricks. If I sell a house merely as bricks, of course the transaction would be different, but 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 my 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."

Now it is argued from that passage that a party to a written contract for the sale of land, or the grantee of the land with a house upon it of whatever character that house may be, is at liberty to qualify the express contract or grant by showing a verbal intimation that the house was sold merely as bricks, and that, for the purpose, it is said, of identifying the subject matter of the contract. I am distinctly of opinion that contention is wrong. Identification is complete when the land with the erections mentioned in the contract is marked out as they existed in fact. The argument suggests contradiction, not identification.

Bowen L.J. has, so far as I can see, said nothing to support the contention. Said he, "that house may *be* a mere congeries of bricks." Of course, if it is, that fact when proved determines the subject matter so far as the house is concerned. And when he says "If I sell a house to be used as a house," I apprehend that he means that the intention is to be gathered from the *words of the contract* as applied to the actual things sold. And as said by *Smith* L.J. in *Neale* v. *Neale* (2), "the intention of the parties

(1) 43 Ch. D., 470, at p. 481. (2) 79 L.T., 629, at p. 630.

cannot be taken into account for the purpose of construing the plain words used by the parties in a deed."

The case of *Shore* v. *Wilson* (1), referred to by the learned Lord Justice, seems to me decisive. Lord *Lyndhurst* cites Lord *Brougham* in *Guy* v. *Sharpe* (2), who observed: "On the reception of extrinsic evidence, with a view to aid the construction and give explanation, not to alter or control the sense —a purpose for which it can never be received—there is a manifest difference between the *declarations*, whether verbal or written, of a testator, and the proof of *facts and circumstances*, by the knowledge of which the Court, when called upon to construe, may be placed in the same situation with the party who made the instrument, and may thereby be the better able to understand his meaning." Then Lord *Lyndhurst* adds for himself:—"Though most of the reported cases turn upon the construction of wills, the same principle of construction applies to deeds: there cannot be any difference in this respect between deeds or other writings and wills." And see the opinions of the Judges given to the House.

The result so far is to leave to the words of the express grant their natural and ordinary signification, and to require only that the respondents should establish by evidence that the way they claim as expressly conveyed, viz. a way along the lane to the property, and the lights they claim as expressly conveyed, viz. the lights from the lane, existed and were commonly used at the date of the conveyance.

It was suggested—rather faintly as it appeared to me—that because the purchasers intended to demolish the existing buildings and replace them with a newer structure more modern and better suited to their requirements, it was equivalent to buying the land as vacant land, and treating the building in the light of the "congeries of bricks" of *Bowen* L.J. To me that sounds novel. If a person desiring to purchase a business site for a warehouse or a residence site finds a structure there that is or has become insufficient, or unsuitable, or obsolete, and even insecure, he surely cannot be deprived of the approach to the land for the purpose of entering the building which would otherwise by law

(1) 9 C. & F., 355, at p. 486. (2) 1 Myl. & K., 602.

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attend the grant of the land as an accessory follows the principal. More particularly is this so, when he actually announces that his purpose in purchasing the land is to erect on it a new building in place of the old. It seems strange that that very intimation which is usually considered potent to protect him—see *per Cotton* L.J. in *Bayley* v. *Great Western Railway Co.* (1); and *Aldin* v. *Latimer, Clark, Muirhead and Co.* (2); and *Caledonian Railway Co.* v. *Sprot* (3)—should in this instance work to his detriment and deprive him of the necessary way and light for his proposed new building. The vendor must of necessity have thoroughly understood that—apart from specific statements to the contrary—the new building was in a state of "necessary dependence" on the lane for light, and convenience of access to the back. The written contract itself went out of the ordinary way in specially referring to the buildings as part of the purchase which would have impliedly passed with the land. The description of the property was in these terms:—"Block of land situate City of Newcastle being portion of lot 64 having a frontage of 26 feet to Bolton Street, by a depth of 80 feet *together with the erections thereon* recently occupied by Messrs. Henry Bull and Co. Ltd., being part of the southern lot immediately adjoining the *Newcastle Herald* Office."

So that there can be no real ground from which to deduce the intention on the part of the purchasers to renounce any rights of way or light which naturally attached to the property as building land and land already built on. This is the test. And the inference is particularly devoid of foundation when the express grant of "appurtenances commonly used" is borne in mind. The cases of *Ecclesiastical Commissioners for England* v. *Kino* (4); and *Scott* v. *Pape* (5), are two authorities which in principle are strongly adverse to this branch of the appellant's case. The "character of the ground," as *Cotton* L.J. in *Bayley* v. *Great Western Railway Co.* (6), expresses it, has not been altered. In that case it was argued for the vendor that both parties intended, though the stables were expressly mentioned in the

(1) 26 Ch. D., 437, at p. 448.
(2) (1894) 2 Ch., 437, at p. 447.
(3) 2 Macq., H.L. Cas., 449.
(4) 14 Ch. D., 213.
(5) 31 Ch. D., 554.
(6) 26 Ch. D., 434, at p. 449.

conveyance, that the premises should be used for the purposes of the railway and not as a stable, that the user of the stable as such was contrary to the purposes of the *Railway Company's Act*, yet the Court of Appeal held that the express words of the grant could not be cut down, and as long as the character of the land was not altered, the easement of way previously enjoyed passed to the purchaser, and could not be obstructed by the vendor. So long as the character of the ground is preserved and no greater or different burden placed on the servient tenement the right subsists, although a new building is erected in place of the old, *Wimbledon and Putney Commons Conservators* v. *Dixon* (1), *Williams* v. *James* (2). What was the character of the ground and the buildings upon it?

The land sold to the plaintiffs was situate in Bolton street, Newcastle. The buildings then standing on the land had been erected some 40 years before and consisted of a two story structure in rubble stone, the walls 20 inches thick above the surface and resting on broad solid foundations. In front there was a central door, with a window on either side of it. On the south side of the building was the *Herald* office entirely precluding passage way or light from that side. The building went back about 50 feet. It had on the ground floor two doors, a large and a small one, which faced and could open on the 10 feet lane to the north, and which had fanlights above them. There was also a ground floor window towards the western end of the north side of the building. On the first floor there were three windows facing the lane. There was at the back a staircase and door, forming the only means of entrance to the first floor. A weatherboard washhouse stood against the lane, and against the back wall of the building. It was small and stood between the back porch and lane. Behind the building and some few feet back, stood some dilapidated cottages which were unoccupied for years except one utilised as a painter's store room. On the other side of the lane were two shops belonging to defendant and facing Bolton street. They had a yard at the back. A thick retaining wall ran from the back of the southern of these two shops in a line with its southern wall till just about opposite the end of

(1) 1 Ch. D., 362. (2) L.R. 2 C.P., 577, at p. 582.

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Bull's Buildings, and then it curved to the north and ran west for about 30 feet more, making the western part of the lane about 17 feet wide. The retaining wall was to support the surface of the lane at a level of between 5 and 6 feet higher than the level of the yard behind the two shops. The lane which has existed over 40 years was entered from Bolton street and over the footway was pitched with metal cubes, put down by the Council from 12 to 20 years ago; it was metalled at least twice for a distance of about 80 feet from the building line. A public lamp was placed at the entrance to it, and I assume from its being public and from its position that it was so placed by the Council, to light the lane.

No means of access to the rear of Bull's Buildings existed except by way of this lane, with its pitched entrance, its made and metalled surface and its entrance lamp. As far as the first floor was concerned the lane was the only means of access. This was the character of the property, its state and condition. No leases or other obligations affected it; and the defendant being the unfettered owner of the retained land had the unquestioned power to grant the way claimed. The land being granted carried with it the buildings as they stood: *Newcomen* v. *Coulson* (1); *Union Lighterage Co.* v. *London Graving Dock Co.* (2).

The buildings, it was at first suggested in the evidence, were condemned by the public authorities. But that was afterwards admitted not to be so. The appellant also—as it was alleged in the pleadings—said his architect condemned them, but no one was called to say they were in such a condition as to be merely a congeries of material, so as to meet the illustration of *Bowen* L.J. Indeed the appellant stated that his architect said that to repair and alter Bull's Buildings, to make them suitable for plaintiffs, would cost £600 or £700, but that the architect also said he would not be responsible if the whole building collapsed while he was trying to alter it. That might mean much or little. No one suggested that the place was uninhabitable as it stood; and Mrs. Callinan was up to the conveyance the appellant's tenant. The appellant said he regarded Bull's Buildings in

(1) 5 Ch. D., 133, at p. 142. (2) (1902) 2 Ch., 557, at pp. 570, 573.

October 1906 as worthless. He adds that in fact it would cost something to remove them. But Hall, one of appellant's skilled witnesses who could have testified on the point, said nothing about it. And Braye said:—"When we got the land the outer walls were in good solid condition." I can see no reason for classifying Bull's Buildings as anything but a house, which passed as such by the grant of the land.

With regard to the existence of the way, the learned primary Judge has definitely found in favour of the respondents. There was abundant evidence upon which to base his finding, and I can see no ground for impeaching it. He found in these words:—"The *occupants* of Bull's Buildings had access down the lane to the rear of their buildings." That finding covers, as I think it was intended to cover, the whole of the evidence as to the ground floor as well as the first floor. His Honor certainly goes further, and as to Mrs. Callinan finds that it, the lane, formed her only means of access—making hers an *a fortiori* case.

It is quite plain, however, that the mere special mention of Mrs. Callinan is in addition to his general finding previously stated, because the general finding applies to the "occupants of Bull's Buildings," and those went back and included Bowker, Toohey, Sparke, Mason, Bull & Co., Shae, Cook and Callinan. The Callinan reference therefore is only supplemental. And then the learned Judge says:—"Under these circumstances I can only find that the right of using the lane (to a depth at least of Bull's Buildings) was a right or easement commonly used with Bull's Buildings and passed by the conveyance to the plaintiffs."

He also thinks there was access from the lane through the side door, and does not think this particular mode of access was abandoned—in other words, it was a mode of access commonly used at the date of the conveyance. I do not think this at all necessary to consider, nor did the learned Judge apparently think so either: it was merely additional to what was said before.

The findings, however, have also been challenged on the ground that on the evidence for the respondents, even if accepted as correct, they are not sustainable—and this necessitates a brief examination of the testimony.

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There were various occupants of Bull's Buildings as I have said. First Dr. Bowker had his surgery there, and then at different times the persons mentioned were Toohey, Sparkes, Mason, Cook, the three last mentioned occupying different parts at the same time, Sparkes having the front shop, Mason a fancy goods sample room at the back consisting of an iron shed, and Cook (the foreman) occupying the first floor.

Then Bull & Co. for some years, until 15th October 1906, five days before the contract. Mrs. Shae was a tenant to Bull & Co. of the first floor for two years. Then came Mrs. Callinan, who occupied the first floor for over 5 years as tenant first to Bull & Co., and then to defendant, who transferred her tenancy to the plaintiffs.

For all these years, over 40, the lane was the only source of light to the northern side of the buildings, and the lane was the invariable approach, for business and domestic purposes, to every part of the building except the front shop. For some years the side doors were used, even the first floor tenants using the small western door, but later when Fleming closed up the doors as a rule, opening them only on three occasions, the way down the lane went on, to provide access from the back. There was a fence across the yard some years ago, and 12 feet or more behind the buildings—rather more I should say, as the witness Creer said that it was pretty close to the cottages. But there was no restricted path in the lane to the rear of the buildings. The whole width of the lane was used by carts and horses and foot passengers for business and domestic purposes. Cases after being emptied were carted down a considerable distance, the carts turned round in the wide 17 feet space, and the cases were taken into the yard, behind Bull's Buildings. Coal, provisions, Fleming's horse and buggy, tradesmen, &c., all came down the lane to reach the destination of the back of Bull's Buildings. (See *International Tea Stores Co.* v. *Hobbs* (1). The lane, paved and lighted as I have said, is strong indication that at night as well as during the day the traffic went on.

Mr. *Irvine* laid stress on the fact that the entrance now is some feet further back than Mrs. Callinan had it before. I

(1) (1903) 2 Ch., 165, at p. 170.

think the position of the gate quite immaterial. I regard the evidence as a whole, and do not think that there were two or three different and separate ways commonly used, one leading through the western door, and one to the first floor, and one to the back of the ground floor; but there was one way, namely down the lane from the street as the terminus *a quo*, to the back of Bull's Buildings, as the terminus *ad quem*, and entry was made from any convenient point of the lane on to the curtilage of the tenement according to the part of the tenement it was desired to enter. See *Wimbledon and Putney Common Conservators* v. *Dixon* (1).

This continued in actual operation to 15th October 1906 for Bull & Co., and until after the conveyance in respect of Mrs. Callinan. The fact that Bull & Co. left on 15th October 1906, did not in my opinion put an end to the character of the way as being one "commonly used" in connection with the land sold, and certainly not with regard to the lights which were enjoyed for over 40 years, and belonged to the land granted.

As to the lights no defence has been raised, and no contention addressed to the Court with respect to extinguishment by abandonment. As to some portion of the light the new openings present the same apertures as the old; and as no question is raised as to the identity, I say nothing about it.

It is raised on the pleadings, though not urged at the bar, that by reason of the rebuilding the right of way if any was destroyed altogether. On the authority of *Crossley* v. *Lightowler* (2), I do not assent to that argument.

Upon the express grant therefore I am of opinion the respondents should succeed, unless the appellant can obtain rectification of the conveyance.

There was, however, considerable argument as to the respondents' rights to implied easements of light and way—the first, as an apparent and continuous easement, the second, as that in effect —on the authority of *Bayley* v. *Great Western Railway Co.* (3); *Brown* v. *Alabaster* (4), and the cases there cited; *Thomas* v.

(1) 1 Ch. D., 362.
(2) L.R. 2 Ch., 478.
(3) 26 Ch. D., 434, at p. 456.
(4) 37 Ch. D., 490.

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Owen (1); *Baring* v. *Abingdon* (2); *Clancy* v. *Byrne* (3), and the recent and authoritative case of *Donnelly* v. *Adams* (4), before a very powerful Court of Appeal. I think that, having regard to the character and state of the property as already indicated, the way as well as the light passed by implication. There was the "necessary dependence" relied on by *Erle* C.J. in *Pearson* v. *Spencer* (5), and reiterated in *Milner's Safe Co. Case* (6); also *Ewart* v. *Cochrane* (7), and *Hall* v. *Lund* (8). *Gale on Easements*, 8th ed., p. 156, says quite correctly in my opinion "a formed road or way over one tenement, for the apparent use of the other, such road or way being necessary for the reasonable and convenient occupation and enjoyment of the quasi-dominant tenement, will pass, by implied grant, upon a severance of the tenements."

Then again it is claimed on the part of the appellant, assuming of course that the express grant does include the light and way, that the statement as to his intention to build on the lane is *per se* sufficient on the ground of simple knowledge to prevent the implication of a grant of the way and the light arising in this case. As to the light, it seems to me that *Swansborough* v. *Coventry* (9), and that class of cases are a conclusive answer, even taking the particular facts at their strongest against the respondents.

But as to both light and way—and for the moment assuming it to be satisfactorily proved that the statement was made—the question remains how far any such declaration in whatever terms is a valid defence. In this connection the evidence is on a totally different footing from that in relation to the construction of the express grant.

Bowen L.J. in the *Birmingham Case* (10) said, and his observations were repeated with approval by *Cozens-Hardy* L.J. in *Quicke* v. *Chapman* (11), that the obligation of implied grant is not one "which arises simply from the interpretation of the deed as read

(1) 20 Q.B.D., 225.
(2) (1892) 2 Ch., 374.
(3) 11 I.R. C.L., 355.
(4) (1905) 1 I.R., 154.
(5) 2 B. & S., 761, at p. 767.
(6) (1907) 1 Ch., 208.
(7) 4 Macq. H.L. Cas., 117.
(8) 1 H. & C., 676.
(9) 9 Bing., 305.
(10) 38 Ch. D., 295.
(11) (1903) 1 Ch., 659, at p. 672.

by the light of the circumstances outside. It is a duty that arises from the *outside circumstances* having regard to the relation of grantor and grantee which the deed creates. Supposing you take the deed alone, no amount of construction could evolve from the deed itself the protection which the grantee of the deed desires."

Therefore you must look at the "surrounding circumstances" relevant to the question (see *per Romer* L.J. in *Quicke* v. *Chapman* (1), and *per Martin* and *Wilde* B.B. in *Hall* v. *Lund* (2)). It is now settled law that the circumstances so to be considered are those existing at the time of making the contract, not of the conveyance. See *per Rigby* L.J. in *Broomfield* v. *Williams* (3); *per Joyce* J. in *Mappin Brothers* v. *Liberty & Co.* (4); *Hart* v. *McMullen* (5). But how far are you at liberty to take into consideration such a statement as is for this purpose assumed?

That is by no means a question easy to answer off hand, but the authorities when carefully considered appear to satisfactorily determine it.

Cotton L.J. in *Myers* v. *Catterson* (6), speaking of a vendor who sells one plot of land, with a house on it, and keeps the other, says:—"From the position in which he has placed himself towards the purchaser there is the implied obligation, or contract, or covenant (call it which you will) on his part not to interfere with the lights of the house which he has sold."

Kekewich J. in *Corbett* v. *Jonas* (7), as to the intention of the parties respecting the use to which the property was to be put, and not included in the written agreement, was of opinion that it cannot affect the matter unless it really is part of the *contract* between grantor and grantee. By that he means, of course, a a mutual assent or agreement as to the future use of the property. So in the *Birmingham Case* (8) *Cotton* L.J. says:—"If we find that any particular space in fact was left open at the time when the lease was granted, and that that open space was *contracted* to be left open during the negotiation which took place, and is not referred to in the lease, we must have regard to the fact

(1) (1903) 1 Ch., 659, at p. 671.
(2) 1 H. & C., 676.
(3) (1897) 1 Ch., 602, at p. 616.
(4) (1903) 1 Ch., 118, at p. 127.
(5) 30 S.C.R. Canada, 245.
(6) 43 Ch. D., 470, at p. 477.
(7) (1892) 3 Ch., 137, at p. 146.
(8) 38 Ch. D., 295, at p. 309.

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of that open space being left, and we must have regard to the fact that by *agreement* between the parties the lessor had bound himself not to build upon that space;" &c.

So far as mere negotiations are concerned, *Lindley* L.J. (1) is clearly of opinion that they cannot be taken into consideration for this purpose.

Bowen L.J. says (2):—"It is a question of the proper inference to be drawn from a consideration of all the facts." He adds:—"I do not think any hard and fast line can be laid down beyond which you are not to admit evidence *to rebut the presumption*, or rather—as I should prefer to say—to measure the implication itself."

The conclusion I draw is this: Apart from any implication arising out of the construction of an express grant, an implied grant depends *primâ facie* on the surrounding circumstances. If on a proper consideration of existing circumstances no implied grant arises, then apart from any implication by construction of the terms of the express grant, there is no implied grant; if, however, these circumstances considered by themselves fairly lead to the inference of an implied grant, *primâ facie* there is one. It rests then on the party seeking to disturb this *primâ facie* relation to show an *agreement* to alter the presumption. The law assumes against a grantor the ordinary result of granting such property in such circumstances. In *Broomfield* v. *Williams* (3), *Lindley* L.J. said—"the grantee had a *primâ facie* unrestricted right to light as against the grantor, and that the burden of setting limits to such right lay on the grantor." *A. L. Smith* L.J. (4) said—"*Primâ facie* a grantee in *circumstances* such as exist in the present case has the right to have the light coming to his windows over the lands of the grantor unobstructed by the grantor." Clearly there the Lord Justice in using the expression "circumstances" was excluding negotiations.

Then he said what appears to me decisive (5):—"There being this *primâ facie* right of the grantee, in circumstances such as exist in the present case, not to have his lights inter-

(1) 38 Ch. D., 295, at p. 311.
(2) 38 Ch. D., 295, at p. 315.
(3) (1897) 1 Ch., 602, at p. 610.
(4) (1897) 1 Ch., 602, at p. 612.
(5) (1897) 1 Ch., 602, at p. 613.

rupted by his grantor, how, when the grantee brings an action against the grantor for derogating from this right, can the grantor show that what he is doing does not give a cause of action to his grantee, when a material interruption to his lights is established? In my opinion it can only be by the grantor showing that the *primâ facie* right of the grantee is in some way limited and restricted. The burden of proof is upon the grantor; and if he does not show that this *primâ facie* right which the grantee has is in some way cut down, and if a material diminution of the grantee's light by what the grantor has done upon his own land is established by the grantee, he is entitled to judgment."

The learned Lord Justice also goes on to show that the *Birmingham Case* (1) and *Myers* v. *Catterson* (2) were quite in accordance with this view.

On principle it seems manifest that a bare statement of the vendor's intention as to the use he intends to make of his retained land cannot in all cases rebut the *primâ facie* presumption against him. If, for instance, the purchaser made it clear that he on his part entirely objected to that use, and announced that he would use the granted property in such a manner as to be fatal to the use to which the vendor proposed to put the retained land, the vendor's statement clearly would not prejudice the purchaser. But the only weight that can attach to such a statement as the appellant relies on, in any case is as a step in the proof of a collateral agreement, express or implied, to alter the *primâ facie* rights of the purchaser. If hearing the statement of intention he acquiesces or does not object, an assent may or may not be deduced; and if deduced there is a corresponding restriction on the purchaser's *primâ facie* right. But unless it amounts in effect to a mutual agreement, I am of opinion it constitutes no derogation of the ordinary rights which such a purchaser would *primâ facie* have in respect of the property he purchased, considered in its relation to the retained property.

The case of *Robson* v. *Palace Chambers, Westminster, Co. Ltd.* (3), may be reconciled with all the other cases by the circum-

(1) 38 Ch. D., 295. (2) 43 Ch. D., 470. (3) 14 T.L.R., 56.

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stance that the facts constituted an implied agreement that the vendor's intention might be carried out.

Now applying that rule to the present case, the learned primary Judge has said that the evidence shows no common mistake, that though in his opinion there is a mistake on the appellant's part as to the rights of easement, yet it fails to establish any on the respondents' part. The respondents, if they affirmatively agreed to take no rights over the lane, must have either shared the mistake of the appellant or been guilty of fraud.

The learned Judge has by his findings excluded not only such an agreement by the respondents, but also the fact that they were informed by the appellant of his alleged intention—because upon the evidence given by and for him such information, if given, must have left them under no possible mistake as to his proposed use of the lane.

No reason has been or could well be suggested for overruling the learned Judge on his findings of the facts.

The question is entirely one of credibility, and the appellate Court cannot take into account the many circumstances in the course of a trial which would weigh with the primary tribunal in such a point blank contradiction of testimony. It is not, therefore, my province to re-determine the facts, though if I had to, deprived of all the advantages of seeing and hearing the witnesses, but aided by all the observations of learned counsel, I should say that the appellant had failed to discharge the onus he undertook.

The one remaining question is as to rectification of the conveyance. The only suggested ground is that stated in par 15 of the statement of defence, namely, the appellant's statement to the respondents that he was not granting a right of way over the passage, and his intention to erect buildings on the passage. The learned Judge has disbelieved that such a statement was made to the respondents; and the fact that at the same time the appellant was negotiating with some one else may account for his own belief that it was.

But no word of evidence has been given by the appellant's solicitor as to any mistake in inserting the express grant in the

conveyance. The document was not rushed through; the provision was not "snapped"; no explanation is given to show surprise or error on the solicitor's part, or what instructions he got, or what communication took place between him and his client on the subject. Not a single step has been proved in my opinion towards showing the mutual mistake necessary to bring the conveyance into conformity with some other agreement, unless the mere mistaken belief of the appellant is such a step, and unless the fact that no mention of the right of way in the written agreement is another step. Mr. *Knox* urged that it was not contended there was any disconformity between the written agreement and the conveyance. That is true; but still I do not see why the Court should ignore whatever disconformity exists. It is clear that the written agreement makes no express mention of any such way, or of the light from the lane. Nor are the respondents in the position of being able to point to any express verbal agreement or negotiations as to these behind the written agreement, and establish thereby at least a belief on their part that the way and light were agreed by the appellant to be included in the bargain. Cohen says in his evidence that "up to the conveyance 'lane' was never mentioned." Therefore whatever advantage the appellant is entitled to from the absence in the prior agreement of any express reference to these "appurtenances," he should have. Still that does not conclude the matter. For all that appears, the inclusion of the express grant of the appurtenances in the conveyance itself may have been deliberate; and, as I have said, evidence that might have been given was not.

So far as the appellant rests his case, as to rectification, on the alleged verbal agreement *not* to include the rights in question, he is met by the finding of the learned Judge and by the law laid down in *Davies* v. *Fitton* (1), and *May* v. *Platt* (2).

The matter then rests thus. The conveyance which is the formal sale and grant of the land under seal, and in which the former agreement to sell legally merges—apart from collateral stipulations and the effect of the actual date of the agreement—contains the express grant. At law the respondents have the right to what they claim. Then the agreement itself contains

(1) 2 D. & W., 225. (2) (1900) 1 Ch., 616.

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no reference to the way and light, and strictly speaking, they are not appurtenances. But not only is it possible that between the agreement and the execution of the conveyance the parties with their eyes open determined to include the express grant, but I think in the absence of distinct testimony to the contrary they should be taken to have done so. The idea of fraud is not suggested in the pleadings or throughout the evidence; it is negatived by the primary Judge, and indeed the fact that both as to Braye and Cohen the appellant objected to a statement as to their actual belief, places any contention as regards fraud out of the question. But the cases I have cited on the point of implied grant of way of a formed and paved road, upon which the granted land is in a state of necessary dependence for its convenient and reasonable use, show that even if the express clause were struck out these would subsist by implication. And it is not suggested that the express clause covers more than these. Again, the matter may be even taken to a point beyond this on the question of common mistake. No one could say that in the face of the existing circumstances, and in the absence of any agreement to the contrary, a person would not naturally expect to have such rights as are claimed. The action of the appellant in putting up the notice on Bull's Buildings that he would either let the land at the back on building leases or put up suitable buildings—to which there was no possible access except through the lane—shows his view of the necessity of leaving the lane untouched, at all events until after his sale to the respondents. And when the Court is considering the question of mutual mistake, it is not concluded by the exact legal result of the terms actually agreed to, but the Court may be helped to its findings, whether the party resisting rectification *bonâ fide* intended what is written, by considering whether he could reasonably entertain the belief he alleged. For this *Ricketts* v. *Bell* (1) is an authority. Vice-Chancellor *Knight Bruce* in dealing with a case of specific performance—and the principle here is the same—said "In my judgment, fair and reasonable men, in the circumstances in which they were placed might, without supine ignorance, without gross

(1) 1 De G. & S., 335, at p. 346.

negligence, have well entertained it" (the belief), "whether erroneously or not erroneously. If so, and if (as I have said that I think) they ought, for the purposes of the present suit to be taken to have entertained it, this is not a case in which a decree for specific performance ought to be made." He goes on to say that that ground was perhaps not necessary for the decision of the case, but his opinion is clear and emphatic. There being here, then, good reason why purchasers in the position of the respondents might believe themselves entitled to get such a grant, it ought not to be assumed against them, in view of the actual conveyance, that they did not so believe, and especially when as here they offered to testify as to their belief and were prevented by the appellant.

Consequently it stands that not only is it open to a Court to find that such rights impliedly passed, but also that the respondents believed they passed, and as rescission is impossible, are in either case entitled to retain the grant they have obtained as it stands: *Sells* v. *Sells* (1), and other cases.

In my opinion, therefore, this appeal utterly fails and should be dismissed with costs.

Appeal allowed.

Solicitors, for the appellant, *Brown & Mitchell* by *Makinson & Plunkett.*

Solicitor, for the respondents, *B. K. Cohen.*

C. A. W.

(1) 1 Drew. & Sm., 42.