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TURNER v. NEW SOUTH WALES MONT DE PIETE DEPOSIT AND INVESTMENT CO. LTD.

Isaacs J.

On the question of damages, in view of the fact that by consent or without objection they were assessed to include the value of the goods, I agree that the amount is not so great as to provoke interference on the ground of their being excessive.

I concur in allowing the appeal.

Appeal allowed.

Solicitor, for appellant, *H. E. McIntosh.*

Solicitors, for respondents, *Dawson, Waldron & Glover.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

NELSON . . . . . APPELLANT;
DEFENDANT,

AND

WALKER . . . . . RESPONDENT.
PLAINTIFF,

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MELBOURNE, *May* 24, 25, 26; *June* 6.

Griffith C.J., O'Connor, Isaacs and Higgins JJ.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Vendor and purchaser—Derogation from grant—Implied grant—Quasi-easement—Rain water flowing over surface—Adjoining owners—Natural servitude—Alteration of surface—Transfer of Land Act 1890 (*Vict.*) (*No.* 1149), *sec.* 89—*Conveyancing Act* 1904 (*Vict.*) (*No.* 1935), *sec.* 6.

In order that the grant to a purchaser of a right in the nature of an easement in respect of land of the vendor may be implied from a conveyance of part of a parcel of land of which the vendor retains the balance, it must appear, having regard to all the circumstances of the case, to have been in the contemplation of the parties that the grantor should not use the land which he retains in a manner inconsistent with the enjoyment of the alleged easement.

By *Griffith* C.J. and *O'Connor* J. (*contra* by *Isaacs* J. and *Higgins* J. : If the principle that an owner of land is bound to receive the rain water naturally flowing over the surface of adjoining higher land is part of the common law, it applies to the case of land the surface of which has been altered by the hand of man or otherwise during unity of title and possession and before severance, as well as to land the original natural surface of which has not been altered.

By *Griffith* C.J. and *O'Connor* J. : That principle, if it is part of the common law, applies only to country lands and not to town lands.

By *O'Connor* J. (*semble* by *Griffith* C.J.) : That principle is not part of the common law and the owner of the lower land may prevent such water from flowing on to his land.

Quœre, *per Higgins* J., whether land held under the *Transfer of Land Act* 1890 is subject to a natural right on the part of the proprietor of adjoining land to the flow of water.

Per Higgins J. If there is any right such as is declared in *Vinnicombe* v. *MacGregor*, it must be confined, as in the case of a defined stream, to water spreading over the natural surface of the land ; but under the word "natural" surfaces (or river beds) which have been changed beyond living memory should be included.

The ground of "derogation from grant" was not open to the plaintiff on the appeal, as the case was based from first to last on natural right, and the grant (the transfer) was not even put in evidence.

In this case, however, no grant of right to let water flow through the defendant's land is to be implied ; and, *semble*, no such grant is to be implied (so as to bind successors in title) from circumstances not referred to in the transfer.

Vinnicombe v. *MacGregor*, 28 V.L.R., 144 ; 24 A.L.T., 15 ; 29 V.L.R., 32 ; 24 A.L.T., 200, discussed and opinion therein doubted.

In 1895 A., the owner of allotments 12 and 13, which were two of four township allotments lying side by side, containing about 25 perches each, and being subject to the *Transfer of Land Act* 1890, sold and transferred allotment 12 to B., the owner of the other two allotments, 10 and 11. In 1873, while the whole of the land was Crown land, the Crown had made an excavation thereon, so that the surface which had theretofore sloped from allotment 13 to allotment 10 thereafter sloped from allotment 10 to allotment 13, with the result that rain water falling on allotments 10, 11 and 12 flowed over the surface on to allotment 13. In 1905 A. erected a dam along the boundary between allotments 12 and 13, and thereby prevented such rain water from flowing over the surface on to allotment 13.

Held, that no grant by A. to B. of a right to the continuance of the flow of such surface water from allotment 12 to allotment 13 could be implied, and that B. was not entitled to a mandatory order directing A. to remove the dam.

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NELSON v. WALKER.

Decision of the Supreme Court : (*Walker* v. *Nelson*, (1909) V.L.R., 476 ; 31 A.L.T., 39), reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the County Court at Benalla by George James Walker against Mary Nelson and Charles Nelson, her husband, claiming "(*a*) An injunction restraining you from continuing to keep an embankment wrongfully placed by you upon your land situated in Hannah-street, Benalla, whereby the natural flow of the surface water from the plaintiff's land situated in Hannah-street, Benalla, aforesaid, is wrongly obstructed and the said water is caused to accumulate upon the plaintiff's said land ; (*b*) A mandatory injunction that you remove the said embankment ; and (*c*) Damages for the injury caused to the plaintiff by the said embankment."

The action was heard by his Honor Judge *Moule*, who gave judgment for the plaintiff with costs, and granted an injunction directing the defendants to remove the embankment, and awarded £5 for damages. From this judgment the defendants appealed to the Supreme Court, who upheld the judgment, so far as the injunction was concerned ; but, inasmuch as the male defendant had no interest in the land, which belonged to his wife, they varied the judgment by entering judgment for him without costs : *Walker* v. *Nelson* (1).

The defendant Mary Nelson now appealed to the High Court.

The facts which are material are set out in the judgments hereunder.

Cohen, for the appellant. The respondent was not at common law entitled to prevent the obstruction of the water naturally flowing over the surface of his land on to the appellant's land. The rule of the Roman civil law that the owner of land of a higher level is entitled to send down, and the owner of adjoining land of a lower level is bound to receive, rain water falling on the higher land and flowing naturally over the surface is not part of the common law of England. The decision to the contrary in *Vinnicombe* v. *MacGregor* (2) is not supported by the English

(1) (1909) V.L.R., 476 ; 31 A.L.T., 39.

(2) 28 V.L.R., 144 ; 24 A.L.T., 15 ; 29 V.L.R., 32 ; 24 A.L.T., 200.

decisions, of which none is directly in point, and the statement to a similar effect in *Kerr on Injunctions*, 4th ed., p. 195, is not supported by the only case cited in support of it, *Smith* v. *Kenrick* (1). In the United States of America it has been decided that the rule of the civil law is not part of the common law: *Barkley* v. *Wilcox* (2); *Walker* v. *New Mexico and Southern Pacific Railroad Co.* (3); *Swett* v. *Cutts* (4); *Hoyt* v. *City of Hudson* (5). See *Gould on Waters*, 3rd. ed., p. 552; *Andrews' American Law*, p. 993. The same view is taken in Canada: *McBryan* v. *Canadian Pacific Railway Co.* (6); *Ostrom* v. *Sills* (7); and in New Zealand: *Solicitor-General* v. *Smith* (8).

[O'CONNOR J.—In New South Wales the Supreme Court has laid down the law the same way in *Butcher* v. *Borough of Woollahra* (9), and that decision has always been acted upon.]

The proper rule of common law is that a man may do what he chooses on his own land with respect to rain water naturally flowing over the surface. If the water is on his own land, he may prevent it from flowing as it naturally would on to adjoining land of lower level: *Broadbent* v. *Ramsbotham* (10); *Rawstron* v. *Taylor* (11); and the corollary to that is that he may prevent it from flowing as it naturally would from adjoining land of a higher level on to his own land.

[GRIFFITH C.J.—The rule of the civil law only applied to country lands and not to town lands such as this is: *Digest*, Book XXXIX., tit. III.; Book VIII., tit. IV.

HIGGINS J. referred to *Sharpe* v. *Hancock* (12); *Baird* v. *Williamson* (13).]

[Counsel also referred on this question to *Young (John) & Co.* v. *Bankier Distillery Co.* (14); *Scots Mines Co.* v. *Leadhills Mining Co.* (15); *Pennington* v. *Brinsop Hall Coal Co.* (16); *Mayor of Bradford* v. *Pickles* (17).] Even if the rule of the Roman civil law is part of the common law, it does not apply when the surface of

(1) 7 C.B., 515.
(2) 86 N.Y., 140.
(3) 165 U.S., 593.
(4) 9 Am. Rep., 276.
(5) 9 Am. Rep., 473.
(6) 29 Can. S.C.R., 359.
(7) 28 Can. S.C.R., 485; 24 Ontario App. Rep., 526.
(8) 14 N.Z.L.R., 681.
(9) 14 S.C.R. (N.S.W.), 474.
(10) 11 Ex., 602.
(11) 11 Ex., 369.
(12) 7 M. & G., 354.
(13) 15 C.B. (N.S.), 376, at p. 392.
(14) (1893) A.C., 691.
(15) 3 Macq. H.L. Cas., 743.
(16) 5 Ch. D., 769.
(17) (1895) A.C., 587.

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the land has been altered artificially. Assuming that the respondent is entitled to raise the question of derogation from the grant, there has been none, for no grant of a *quasi*-easement or servitude will be implied here. No such grant will be implied from a mere conveyance of land. There must be words in the conveyance indicating the purpose for which the land is sold in order to support such an implication. In *Bayley* v. *Great Western Railway Co.* (1); and *Rigby* v. *Bennett* (2), relied on by the Supreme Court as authorities for implying a grant of the right claimed by the respondent, the purpose for which the land was to be used appeared in the conveyance. [He also referred to *Popplewell* v. *Hodkinson* (3); *Goddard on Easements*, 6th ed., p. 30; *Taylor* v. *Browning* (4).]

[ISAACS J.—The implication arises from the surrounding circumstances and not from the words of the contract: *Birmingham, Dudley and District Banking Co.* v. *Ross* (5).]

The right claimed by the respondent is not necessary to the reasonable enjoyment of his land, for he might, under sec. 3 of the *Drainage of Land Act* 1890, have entered on the appellant's land or on the adjoining road and made a drain to carry away the surface water. To imply a grant of such a right as is claimed from a mere transfer of land would be contrary to the provisions of the *Transfer of Land Act* 1890. No new kind of easements will be recognized by the Courts.

Dethridge (with him *S. R Lewis*), for the respondent. There is to be implied from the contract between the parties an undertaking that the appellant would not destroy the enjoyment of the land which he has sold to the respondent. Even supposing that undertaking does not run with the land, it can be enforced by the respondent against the appellant: *Grosvenor Hotel Co.* v. *Hamilton* (6), where it was held that a lessor of a house could not use his adjoining land, even in a reasonable way, so as to injure the leased premises. The decision was based on implied covenant, and the principle that a man cannot derogate from his own grant. See

(1) 26 Ch. D., 434.
(2) 21 Ch. D., 559.
(3) L.R. 4 Ex., 248.
(4) 11 V.L.R., 158; 6 A.L.T., 244.
(5) 38 Ch. D., 295.
(6) (1894) 2 Q.B., 836.

also *Caledonian Railway Co.* v. *Sprot* (1); *Vickery* v. *Jenner* (2); *Broomfield* v. *Williams* (3); *Myers* v. *Catterson* (4).

[HIGGINS J. referred to *North Eastern Railway Co.* v. *Elliot* (5).]

The Judge of the County Court has found as a fact that the respondent's land is rendered useless by the damming back of the water upon it, and the evidence supports that conclusion. The Courts will recognize rights which are necessary or incidental to the enjoyment of a particular piece of land as being in the nature of easements: *Keppell* v. *Bailey* (6); *Simpson* v. *Mayor &c. of Godmanchester* (7). Sec. 6 of the *Conveyancing Act* 1904 is not inconsistent with the *Transfer of Land Act* 1890, or with sec. 89 of it, and operates to convey definite visible rights enjoyed by land at the time of its conveyance: *Hood and Challis on Conveyancing*, 7th ed., p. 31. Here the appellant could have created an easement in respect of the right of the flow of surface water over his land, and that right has, by virtue of sec. 6 of the *Conveyancing Act* 1904, been conveyed by the transfer of that part of the land which enjoyed that flow of water from it over the lower adjoining land of the appellant.

[ISAACS J. referred to *Cable* v. *Bryant* (8); *Brown* v. *Alabaster* (9).

HIGGINS J. referred to *Markham* v. *Paget* (10); *Swansborough* v. *Coventry* (11).]

The injunction is not too wide, for the respondent is entitled to have the surface water, no matter where it comes from, pass off over the appellant's land. Assuming the principle laid down in *Vinnicombe* v. *MacGregor* (12), as to natural surface water, to be correct, there is no reason why it should not apply to the surface of the land as it exists in this case.

Cohen, in reply. The *Conveyancing Act* 1904 is not consistent with sec. 89 of the *Transfer of Land Act* 1890, and the

(1) 2 Macq. H.L. Cas., 449.
(2) 17 N.S.W.L.R., 438.
(3) (1897) 1 Ch., 602.
(4) 43 Ch. D., 470, at p. 481.
(5) 1 John & H., 145.
(6) 2 Myl. & K., 517.
(7) (1896) 1 Ch., 214; (1897) A.C., 696.
(8) (1908) 1 Ch., 259.
(9) 37 Ch. D., 490.
(10) (1908) 1 Ch., 697.
(11) 9 Bing., 305, at p. 309.
(12) 29 V.L.R., 32; 24 A.L.T., 200.

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only rights which pass under that section are rights appurtenant to the land. [He referred to *Burrows* v. *Lang* (1).]

Cur. adv. vult.

June 6.

The following judgments were read:—

GRIFFITH C.J. The relevant facts of this case, in which the pecuniary value of the interests involved is small, but in which questions of far-reaching importance have been raised, may be stated very briefly. The appellant and respondent are the owners of two contiguous allotments of land in the Town of Benalla in Victoria, containing respectively about 25 and 30 perches, and known as allotments 13 and 12, the boundary between which runs from north-west to south-east, the appellant's allotment lying to the north-east and the respondent's to the south-west. In the year 1873 (when the land was apparently waste lands of the Crown) the Government Railway Authorities made an excavation from 6 to 7 feet deep extending over a considerable part of the land now comprised in the allotments, for the purpose of obtaining material for an embankment. Before the excavation was made the surface sloped to the south-west so that rain water falling upon it ran in that direction. The bottom of the excavation, however, was lower at the south-east side. Whether this was so when the excavation was first made does not appear, but it was so in 1905.

In the meantime the land had been alienated from the Crown, and was held under the *Transfer of Land Act*. In that year the appellant, being entitled to both allotments, took a transfer of allotment 13 to herself, and sold allotment 12 to the respondent, to whom, at her request, a transfer was duly given. The appellant afterwards, finding that the rain water which fell and accumulated upon allotment 12 ran off upon her lower lying allotment 13, made a bank of earth on her own side of the boundary line to keep it off. The respondent thereupon brought an action against her in a County Court, claiming an injunction restraining her "from continuing to keep an embankment wrongfully placed by you upon your land situated in Hannah Street,

(1) (1901) 2 Ch., 502.

Benalla, whereby the natural flow from the plaintiff's land situated in Hannah Street aforesaid is wrongfully obstructed and the said water is caused to accumulate upon the plaintiff's land."

Two Victorian Courts have held that he is entitled to this relief, but upon different grounds.

The learned Judge of the County Court held (very properly) that he was bound to follow the law as laid down by *Madden* C.J. in the case of *Vinnicombe* v. *MacGregor* (1), which was accepted by a majority of the Full Court (2), although the Full Court held it inapplicable to the facts of that case. The learned Judge thought that it applied to the facts of the present case.

In *Vinnicombe* v. *MacGregor* (1) *Madden* C.J. held that the rule of the Roman civil law that in the case of adjoining lands lying upon a sloping surface the proprietor of the higher land is entitled to send down, and the proprietor of the lower land is bound to receive, rain water falling on the higher land is part of the common law of England. The rule in question is to be found in the *Digest*, Book XXXIX., tit. III., "*De aquâ et Aquæ Pluviæ Arcendæ*" (*scil. Actione*).

The Supreme Court were of opinion that the principle of law enunciated in *Vinnicombe's Case* (2) was correct, but that it did not apply to the present case because the natural surface no longer existed but an artificial surface had been substituted for it by the hand of man. But, with all respect, I am quite unable to see any foundation for this distinction. There is not a word in the *Digest* to suggest that the rule only applies when the original surface of the earth has not been altered by the hand of man. The action is said to be competent "*vel superiori adversus inferiorem . . . . ne aquam, quæ naturâ fluat, opere facto inhibeat per suum agrum decurrere; et inferiori adversus superiorem, ne aliter aquam mittat, quam fluere naturâ solet.*" The word "*naturâ*," as I understand it, refers to the source of the water and to the laws of gravitation, and has nothing to do with the question how it came to pass that one piece of land is in fact higher than the other. The Romans were practical people, and their laws were adapted to deal with things as they are when the law is to be applied, not as they were decades or centuries before.

(1) 28 V.L.R., 144; 24 A.L.T., 15. (2) 29 V.L.R., 32; 24 A.L.T., 200.

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The rule, of course, had no application so long as there was unity of title and possession, whether in the hands of the sovereign power or of an individual, but as soon as unity of title and possession was severed the rule applied automatically to the state of things then existing. Whether that condition had been brought about by a convulsion of nature, by a gradual degradation of the hills, by reclamation from the sea, by the filling up of valleys with the *debris* of mines or quarries, or otherwise, was a matter quite immaterial.

I agree, however, though not for the reasons given by the learned Judges, that the rule relied on does not govern the present case.

That rule of the civil law applied only to country land and not to buildings or towns. "*Item sciendum est, hanc actionem non alias locum habere, quam si aqua pluvia agro noceat. Cæterum si aedificio vel oppido noceat, cessat actio ista.*" (Art. 17). In such cases the remedy was by a proceeding called an "*actio de servitute*" which is dealt with in Book VIII., tit. iv., and in which the existence of the servitude claimed had to be established by evidence of convention or prescription. It is not suggested that the rule laid down in *Vinnicombe's Case* (1) has any other source than the Roman civil law. The Supreme Court, however, thought that the plaintiff was entitled to succeed upon another ground which, as it happens, is one which would fall within the Roman law as to the *actio de servitute*, but which also falls within recognized rules of English law.

It is not necessary for the decision of this appeal to give any formal decision upon the correctness of the law as laid down in *Vinnicombe's Case* (1), but as the matter has been fully argued, and is one of general importance to the whole Commonwealth, I think it right to say a few words on that subject.

The industry of counsel has not been able to find any express decision on the point by a Court of the United Kingdom.

When *Vinnicombe's Case* (1) came before the Full Court of Victoria, *Hodges* J. agreed with the Chief Justice; *Williams* J. did not express any definite opinion on the point but was inclined to agree; *à Beckett* J. dissented, giving very weighty reasons for

(1) 29 V.L.R., 32; 24 A.L.T., 200.

his dissent. The whole Court agreed that, whether the law was correctly laid down by *Madden* C.J. or not, it had no application to that case. So, in the present case, the Full Court, constituted by *Madden* C.J., *Hodges* J. and *Cussen* J., agree that it does not apply. The opinion of the Judges, however, stands upon a higher footing than that of mere *dicta*.

As authorities on the other side upon the question whether this rule of the Roman civil law is part of the common law of England we have the opinion of the Supreme Court of the United States: *Walker* v. *New Mexico and Southern Pacific Railroad Co.* (1); decisions of the Supreme Courts of various States of the American Union which have adopted the common law of England (amongst which the judgment of the Supreme Court of New York delivered by *Andrews* J. in the case of *Barkley* v. *Wilcox* (2) contains a full and lucid exposition of reasons why the rule should not be accepted as part of the common law), the opinion of the Supreme Court of Canada as to the law of Ontario where the common law is in force: *Ostrom* v. *Sills* (3); the opinion of *Williams* J. in the Supreme Court of New Zealand in *Solicitor-General* v. *Smith* (4), and that of the Supreme Court of New South Wales in *Butcher* v. *Borough of Woollahra* (5).

Amongst the English authorities only two were referred to having an apparently direct bearing on the point. The first is *Rylands* v. *Fletcher* (6). In that case the plaintiff, who was the owner of land adjoining that of the defendants, but at a lower level, complained of the influx of water from the higher land. The flow of water was not however a natural flow, but was occasioned by an accumulation of water in a reservoir on the defendants' land, which was not properly constructed and allowed the water to escape, causing the damage complained of. Lord *Cairns* L.C. said (7):—"The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if, in what I may term the natural user

(1) 165 U.S., 593.
(2) 86 N.Y., 140.
(3) 28 Can. S.C.R., 485; 24 Ont. App., Rep. 526.
(4) 14 N.Z. L.R., 681.
(5) 14 S.C.R. (N.S.W.), 474.
(6) L.R. 3 H.L., 330.
(7) L.R. 3 H.L., 330, at p. 338.

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of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature." The learned Lord Chancellor apparently thought that under such circumstances the owner of the lower land might lawfully interpose a barrier to protect himself from the natural flow. In the same case Lord *Cranworth* said (1), referring to the cases *Smith* v. *Kenrick* (2), and *Baird* v. *Williamson* (3):—"In the former the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal. The damage sustained by the plaintiff was occasioned by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was his business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water as that it should not impede him in his workings. The water, in that case, was only left by the defendant to flow in its natural course." The learned Lord apparently agreed with Lord *Cairns* that in such a case the owner of the lower land might lawfully erect a barrier to keep out the water flowing from the higher land. The point, however, did not directly arise for decision.

The other case is *John Young & Co.* v. *Bankier Distillery Co.* (4) in which Lord *Watson* said: "The right of the upper heritor to send down, and the corresponding obligation of the lower

(1) L.R. 3 H.L., 330, at p. 341.
(2) 7 C.B., 564.
(3) 15 C.B. N.S., 376.
(4) (1893) A.C., 691, at p. 696.

heritor to receive, natural water, whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground, is due to gravitation, unless it has been unduly and unreasonably increased by operations which are *in æmulationem vicini.*" After quoting cases to show that in this respect the English and Scottish law agreed he added, quoting from Lord *Gifford's* judgment in *Blair* v. *Hunter Finlay & Co.* (1): "Although there is a natural servitude on lower heritors to receive the natural or surface water from higher grounds, the flow must not be increased by artificial means." In that case the flow complained of was not a natural flow, but had been increased by the owner of the higher land by pumping operations, so that again the point now in question did not arise for decision.

It is to be observed, however, that the words "The lower heritor cannot object, &c.," are capable of two meanings. It is one thing to say that the owner of the lower land cannot be heard to complain in a Court of law of a natural flow of water, whether above or below ground, which is due to gravitation, and quite another thing to say that he cannot lawfully take measures to protect himself against it. A man cannot complain that a strong wind blows over his land from his neighbour's, but it does not follow that he may not build a wall to keep the wind away.

The common law as to watercourses and the respective rights of upper and lower proprietors with respect to the water naturally flowing in them is well settled. If the rule of the civil law as to the flow of rain water when not confined to a channel is part of the common law it is strange that no reference to it is to be found in any decided case or in any treatise, with the solitary exception of a passage in *Kerr on Injunctions*, 4th ed., p. 195, apparently based on a misconception of the case of *Smith* v. *Kenrick* (2). A party setting up a rule of the common law hitherto unthought of is, to say the least, heavily handicapped. Under these circumstances I do not think that *Vinnicombe's*

(1) 9 Court Sess. Cas., 3rd Series (Macpherson), at p. 207.
(2) 7 C.B., 564.

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Case (1) can be relied upon as an authoritative statement of the law of Victoria.

I turn to the point on which the Supreme Court thought the plaintiff entitled to recover. They were of opinion that the obstruction by the defendant of the flow of water from the higher to the lower level of the bottom of the excavation was a derogation from the defendant's grant to the plaintiff. Before any question of derogation from grant can arise there must be a grant, either express or implied. In the present case there is no suggestion of an express grant. The foundation of the doctrine of implied grant in the case of a conveyance of part of a parcel of land, the vendor retaining the rest, is that, having regard to all the circumstances of the case it must (not may) have been in the contemplation of the parties that the grantor should not use the land which he retains in such a way as to preclude any use of the land which he sells, or that use for which he knows he is selling it to the purchaser: *Broomfield* v. *Williams* (2). What, then, were the circumstances in the present case? The only relevant circumstances, in my opinion, are that the subject matter of the sale was one of two contiguous town allotments, each containing about 30 perches, fronting two streets, and on which an excavation had been made extending into the land retained by the vendor, and that the bottom of the excavation was lower in the land retained than in the land sold. It must have been in the contemplation of both parties that the land sold as well as that retained should be used for the purposes for which land in towns is ordinarily used, one of which is the purpose of building upon it. Under such circumstances the Court is asked to infer that it must have been in the contemplation of the parties that the vendor should never fill up the excavation so long as the purchaser desired to use it as a receptacle for surface water falling on or flowing into his land—in other words, that the vendor was not to use it for building purposes, or for any other purpose which would require that the surface should be raised to the level of the surrounding land, or that water should be excluded from it, except upon condition of providing an exit for the water that would otherwise flow from the purchaser's land. I think that such a servitude

(1) 29 V.L.R., 32; 24 A.L.T., 200. (2) (1897) 1 Ch., 602.

might be created by express grant—possibly by prescription—but it seems to me impossible to conceive that it was in the contemplation of the parties. The only fact, therefore, which could raise the implication of the existence of such a servitude was the difference in the level of the two allotments. But that is the single fact upon which the rule of the Roman law depended. The learned Judges, however, thought that that fact was sufficient, unconsciously applying the very doctrine which they thought excluded. True, they thought it excluded by the circumstance that the surface was not natural but artificial. In reality, as I have shown, it never applied to town lands at all.

I have said nothing about the difficulty arising from the *Transfer of Land Act* 1890, but it must not be supposed that I assume that the doctrine of implied grant is at all applicable to land under that Act. It is not necessary to express an opinion on the subject.

There being, then, no such grant as asserted, no question of derogation can arise, and the vendor was entitled to fill up the excavation as and when she pleased. What is complained of is a partial filling up, which was a lawful act, and an action will not lie against her for doing a lawful act, even if, as the learned County Court Judge thought, it was not necessary at that time for the reasonable enjoyment of her property: *Mayor &c. of Bradford* v. *Pickles* (1).

A point was taken that this last ground was not open to the plaintiff on the plaint as framed. On the whole I am inclined to think that it was, although, if the defendant's case could have been bettered by any evidence tending to negative the existence of the implied grant asserted, I do not think that it ought to have been allowed to be asserted, as it was, for the first time after all the evidence was closed.

For these reasons I think that the appeal must be allowed with the usual consequences.

O'CONNOR J. The land in regard to which the important questions of law argued in this case have arisen consists of two small allotments, part of a subdivision in the town of Benalla.

(1) (1895) A.C., 587.

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In 1905 the respondent owned numbers 10 and 11 of the subdivision, and the appellant owned the adjoining allotments on the eastern side, numbers 12, 13, 14, and 15. The title was under the *Transfer of Land Act* 1890, and the parties were the registered proprietors of their allotments respectively. In that year the appellant sold and transferred No. 12 to the respondent, and the boundary line between those allotments then became their common boundary. Many years before the parties first acquired the land the Government Railway Department had excavated the site of the subdivision, taking out the surface to the extent of a few feet in depth, leaving the bottom with a general slope from north-west to north-east, so that surface water falling on respondent's allotment 12 would flow naturally on to appellant's allotment 13. I mention the circumstance of the excavation, not because I think it has any relevancy to the matter under consideration, but because the learned Judges in the Supreme Court seem to have held that the principles of law regulating the rights of adjoining land owners with regard to the flow of water over the natural surface of the land from the higher to the lower land had no application to a case in which the natural surface had been altered. In my opinion there can be no reason for any such distinction between the natural surface and the artificial surface. Whatever rights or liabilities arise at common law by reason of the surface slope of adjoining allotments must be based on the conditions actually existing when the rights arise. The surface as it then exists whether artificial or not is, for the purpose of applying the law regulating the rights of the respective owners, the natural surface. The proposition laid down by the Supreme Court would lead to some extraordinary consequences. Adjoining land owners, who had built on filled in land, for instance, would either have their rights regulated by the slope of the original surface buried many feet beneath them, or else the ordinary principles of the common law regulating such rights could have no application to them. Mr. *Dethridge*, the respondent's counsel, very properly, in my opinion, declined to adopt or to rely upon any such distinction. I take it, therefore, that whatever was the surface condition of the land when these parties first became adjoining owners, that is, when the appellant sold

and transferred allotment 12 to the respondent, that must be taken to have been the natural surface for the purpose of ascertaining their common law rights. It is clear that at that period there was no defined channel or watercourse carrying water down the slope, but rain water falling on allotment 12 and those above it flowed naturally over the surface from 12 on to and across allotment 13 and the appellant's other allotments to a sand-pit on the lower part of the last mentioned allotment. At the time when the appellant sold allotment 12 to the respondent that was the only get away for rain water falling on the surface of that allotment and the allotments above it. After the appellant's sale of allotment 12 to the respondent she built an embankment on a portion of her boundary between allotment 12 and allotment 13 for the purpose of protecting the lower part of her land from the flow of surface water off allotment 12, and the other allotments above it. The result was that the water thus prevented from flowing off allotment 12 was backed up on the lower part of that allotment and remained there to the respondent's injury. The latter proceeded in the County Court for relief and the learned Judge granted an injunction directing the removal of the embankment, awarding also a small sum for damages. He delivered a judgment basing his decision on the principle laid down by *Madden* C.J., in *Vinnicombe* v. *MacGregor* (1) namely, that the lower adjoining owner is bound to receive on his land without hindrance waters naturally flowing on to it from the surface of the higher adjoining owner's land. The Supreme Court on appeal, while affirming the principle acted on by the learned County Court Judge, held it to be inapplicable to a case in which the surface on both adjoining lands had been altered from its original condition, but they affirmed the judgment on the ground that the appellant could not without derogation of his grant deny the right claimed by the respondent. It seems difficult to find any reason for this ground of decision, as it is explained in the judgment of the learned Chief Justice, without applying the principle of *Vinnicombe* v. *MacGregor* (2). I propose, therefore, to consider in the first place whether that case has rightly laid down the law, and

(1) 28 V.L.R., 144, at p. 182; 24 A.L.T., 15.
(2) 29 V.L.R., 32; 24 A.L.T., 200.

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secondly, whether the steps taken by the appellant to protect his land from the surface water coming on to it from the respondent's land did amount to a derogation of his grant. The decision in *Vinnicombe* v. *MacGregor* (1) went on appeal to the Full Court, which reversed it on other grounds, but the majority of the Judges expressed approval of the general principle on which it was founded. Mr. Justice *à Beckett*, however, declined to follow that view. In the course of his judgment he summarizes the principle laid down by the learned Chief Justice in the form of two propositions as follows (2):—(*a*) "That, according to English law, where lands of different owners adjoin the lower land is subject to an easement to receive the natural flow of the natural surface water from the higher land. (*b*) That the owner of the lower land has no right to raise any structure on his own land which will impede this flow, and that he is answerable in damages to the owner of the higher land for any injury caused by his doing so." I entirely concur with Mr. Justice *à Beckett's* view that no such principle has been established by decided cases, or is recognized by English text writers of authority, and I wish to adopt the reasoning by which the learned Judge arrives at that conclusion. The doctrine in question is really an application of the civil law doctrine as to the rights of adjoining land owners. I agree with my learned brother the Chief Justice for the reasons he has given that the doctrine of the civil law as stated by *Madden* C.J. does not apply to town lands. On that matter, however, it is unnecessary to express an opinion, because I take the view that the English common law has never in this respect adopted the doctrine of the civil law. In England the rule of the common law on this question seems never to have been laid down by any direct authority. But in America, where in such matters the rule of the civil law prevails in some States and the English common law in others, it has become necessary to determine and lay down what is the doctrine of the common law. Out of many authorities cited in argument I shall select one for the purposes of quotation. In *Walker* v. *New Mexico and Southern Pacific Railroad Co.* (3) the Supreme Court of the United States

(1) 28 V.L.R., 144; 24 A.L.T., 15. (2) 29 V.L.R., 32, at [illegible] parties
(3) 165 U.S., 593.

was called upon to decide what was the law of the territory of New Mexico as to the rights of adjoining land owners under circumstances involving the question now under consideration. New Mexico had by its Statute adopted the common law as recognized in the United States, and the Supreme Court had to lay down what was the common law on the point. Mr. Justice *Brewer*, in delivering the judgment of the Court, quoted with approval (1) the following statement from the judgment of Chief Justice *Dixon* of Wisconsin in *Hoyt* v. *Hudson* (2):—"'The doctrine of the civil law is, that the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one, to discharge all waters falling or accumulating upon his land, which is higher, upon or over the land of the servient owner, as in a state of nature; and that such natural flow or passage of the water cannot be interrupted or prevented by the servient owner to the detriment or injury of the estate of the dominant or any other proprietor. . . . The doctrine of the common law is, that there exists no such natural easement or servitude in favour of the owner of the superior or higher ground or fields as to mere surface water, or such as falls or accumulates by rain or the melting of snow; and that the proprietor of the inferior or lower tenement or estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and in so doing may turn the same back upon or off on to or over the lands of other proprietors, without liability for injuries ensuing from such obstruction or diversion.

"It would be useless to cite the many authorities from the different States in which on the one side or the other these doctrines of the civil and the common law are affirmed. The divergency between the two lines of authorities is marked, springing from the difference in the foundation principle upon which the two doctrines rest, the one affirming the absolute control by the owner of his property, the other affirming a servitude, by reason of location, of the one premises to the other."

In Canada the rule of the common law has been laid down by the Supreme Court of the Dominion in much the same terms:

(1) 165 U.S., 593, at p. 603.

(2) 27 Wisconsin, 656, at p. 659.

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McBryan v. *Canadian Pacific Railway Co.* (1). In New South Wales *Sir James Martin* C.J. and *Hargrave* J., being the majority of the Court, in *Butcher* v. *Borough of Woollahra* (2), expressed similar views. In that case the doctrine now contended for was unsuccessfully advanced as expressing the rule of common law. The decision, which has ever since been followed in New South Wales, must therefore be regarded as a direct authority that the common law does not impose on the owner of the lower land the burden of receiving the surface water from the upper land adjoining, nor does it prevent the owner of the lower land from building on his own land any obstruction which may be necessary to guard it from the consequences of such surface water coming upon it to his detriment. To complete the chain of decisions from the Courts of the British Empire I may add that the Supreme Court of New Zealand in the *Solicitor-General* v. *Smith* (3) has laid down the common law rule in similar terms. In the face of this concurrence of opinion by Courts administering the common law, and called on to declare the English common law in this matter, it would seem to be reasonably clear that *Vinnicombe* v. *MacGregor* (4) cannot be regarded as correctly expounding the law in force in Victoria as to the obligations of adjoining land owners. The judgment therefore cannot be supported on the ground taken by the learned County Court Judge.

The Supreme Court however did not purport to uphold the judgment for the reasons given in the County Court. Their judgments are based upon the ground that the appellant in stopping at the boundary of his own land the flow of surface water from the respondent's land had acted in derogation of his grant. In determining how and to what extent the appellant's action could amount to a derogation of his grant it becomes necessary to examine their relative positions from another point of view. I have already shown that in my opinion there was no such easement or *quasi*-easement between the lands of these parties as the learned County Court Judge found. There is nothing on the face of the transfer on which any such right as that claimed can be founded, nor can any such right be implied

(1) 29 Can. S.C.R., 359.
(2) 14 S.C.R. (N.S.W.), 474.
(3) 14 N.Z.L.R., 681.
(4) 29 V.L.R., 32; 24 A.L.T., 200.

from its language whether with or without the aid of the *Transfer of Land Act* 1890 or the *Conveyancing Act* 1904. But it is contended that the full rights of ownership which passed by the transfer cannot be enjoyed by the respondent unless the surface water from allotment 12 which the appellant sold to him is permitted to flow on to allotment 13 which the appellant did not sell to him just as it did when the appellant was the owner of both allotments. It is argued that the appellant cannot without derogating from his grant prevent that flow of surface water from continuing. It is important therefore to have regard to what it was that the appellant sold to the respondent—a town allotment of vacant land not for any special purpose, but to be put to any use the respondent might think fit to make of it. In the *Grosvenor Hotel Co.* v. *Hamilton* (1) and in all the cases cited therein one circumstance is invariably present. The grantor has let or sold land with a building on it which required for its reasonable enjoyment some advantage or convenience from land adjoining which the grantor still retains, or the land was sold or let for some special purpose which could not be carried out unless the state of things existing at the time of grant or lease on the grantor's property adjoining was permitted to continue. As I have pointed out, the sale in this case was for no special purpose, it was an ordinary sale of a vacant town allotment to be used as the purchaser thought fit. For the enjoyment of such a grant how could it be necessary that the grantee should have any larger or greater right of having his surface water carried off than the vendor himself, or any other owner of the allotment would have? If the appellant had sold allotment 13 to another person before selling allotment 12 to the respondent the latter would have had no such right as he is now claiming and the owner of allotment 13 would have been entitled to protect his land from the flow of surface water just as the appellant has done. But the respondent claims that by a mere transfer of a vacant allotment under the circumstances I have stated he is entitled to be placed in a better position because his vendor continues to be the owner of the adjoining allotment. Further, I am at a loss to understand how the right which the respondent demands to have continued can exist after

(1) (1894) 2 Q.B., 836.

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the ownership of the allotments have been severed. It is true no doubt that when the appellant owned both allotments the surface water flowed from allotment 12 to allotment 13 without obstruction. It did so because the appellant chose not to prevent it. But the sale of allotment 13 severed the ownership, and thereupon as between these parties all the common law obligations, rights and duties which arise out of the ownership of adjoining lands attached unless they were modified by contract. The transfer in no way purported to modify any of those rights, and amongst them was the right of the appellant to protect his land from being flooded by surface water from the higher adjoining allotment. In doing what is complained of he exercised that right and no more. But it is claimed that by the mere act of transfer he has prevented himself from using the right, nay more, that he has imposed on himself an obligation to receive the respondent's surface water, and has deprived himself of the possibility of making any use of his allotment by filling up, building or otherwise which would interfere with that flow of water. That such consequences might follow from an ordinary transfer of an allotment under the circumstances put before the Court in this case is certainly a startling proposition, and I have been unable to find any reason on which it can be justified. I have come to the conclusion, with every respect to the learned Chief Justice in the Court below, that the principle on which he has based his decision in this case is inapplicable to the facts proved except on the supposition that there does exist in the owner of the higher land the right of having surface water flow on to the lower land adjoining as expounded in *Vinnicombe* v. *MacGregor* (1). But as I have pointed out there is no such right known to the common law. For these reasons I am of opinion that the ground on which the learned County Court Judge based his opinion was erroneous, that the Supreme Court upheld the judgment upon a ground which cannot be supported, and that the appeal must be allowed.

ISAACS J. This case has been well argued, and its various aspects clearly exhibited.

(1) 29 V.L.R., 32; 24 A.L.T., 200.

The Full Court held that the doctrine enunciated by the learned Chief Justice of Victoria in *Vinnicombe* v. *MacGregor* (1) was right, but was inapplicable because the natural surface no longer exists. As to the accuracy of that doctrine I desire to reserve my opinion until its consideration becomes material. With its inapplicability to this case I agree. Not only has the original surface been altered but the slope of the lands concerned is reversed from that which naturally existed. It is obvious therefore that the present flow of surface water cannot be taken to be one of the original natural incidents of the property and that the respondent must invoke some principle other than the *jus naturæ*, as expounded in *Vinnicombe* v. *MacGregor* (2). Nothing has been pointed to in the language of the contract of sale, or the transfer, or the certificate which expressly or by implication confers the right he claims. The Full Court however thought that right was amply sustained by another principle which they deduced from two cases, *Rigby* v. *Bennett* (3) and *Bayley* v. *Great Western Railway Co.* (4).

With great deference to the learned Judges of the Supreme Court, the formula as stated assumes the whole position in contest, because in it the land to be sold is described as land which would if severed from the rest be subject to the burden. Of course if that is so, there is an end of the whole matter. But unless the principle as stated is to be so regarded, it is much too wide. Its terms would bind the vendor of part of his land to permit, in favour of the purchaser, the continuance of every mode of enjoyment of the land retained which the vendor, at the time of sale, in fact exercised in connection with the land sold, whether the circumstances indicated probable permanency of such mode of enjoyment or not. Their Honors expressly stated that they do not confine the rule to those things only which are ordinarily the subject of easement properly so called. But *Rigby's Case* (3) was a case of the support of a house on adjoining land; *Bayley's* (5) a case of a right of way. Both therefore were cases of easements, and the Court in each case was speaking of

(1) 28 V.L.R., 144, at p. 182; 24 A.L.T., 15.
(2) 29 V.L.R., 32; 24 A.L.T., 200.
(3) 21 Ch. D., 559.
(4) 26 Ch. D., 434, at p. 452.
(5) 26 Ch. D., 434.

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easements or *quasi*-easements. *Bayley's Case* (1) contains a very general observation by *Bowen* L.J. which appears to have been the foundation of the opinion of the Full Court. It is this:— "When two properties are severed the parties to the severance, both the man who gives and the man who takes, intend that such reasonable incidents shall go with the thing granted as to enable the person who takes it to enjoy it in a proper and substantial way."

But the "incidents" referred to do not mean mere personal convenience. They include more than what were strictly legal easements, while the land was unsevered, because no man can have an easement over his own land; they include what are known as *quasi*-easements, that is, such things enjoyed *de facto* during unity of possession as would, had that unity not existed, have been easements. And it is of that class of things the learned Lord Justice is speaking. See *per Rigby* L.J. in *Broomfield* v. *Williams* (2). The word "reasonable" must have its proper effect, which will be found to be reasonable according to the circumstances.

This branch of the law is not, in my opinion, open to any doubt. I begin with *Wheeldon* v. *Burrows* (3) in 1879 because that case settled finally the swaying controversy which had existed since *Palmer* v. *Fletcher* (4) in 1675—practically two hundred years—and had evoked varying opinions from Judges of such eminence as *Watson* B. and his brother Barons, Lord *Westbury*, and Lords Justices *James* and *Mellish*. In *Wheeldon* v. *Burrows* (5) the first general rule stated by *Thesiger* L.J. is in these words:—"On the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi*-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety *for the benefit of the part granted*."

(1) 26 Ch. D., 434, at p. 453.
(2) (1897) 1 Ch., 602, at p. 615.
(3) 12 Ch. D., 31.
(4) 1 Lev., 122.
(5) 12 Ch. D., 31, at p. 49.

Subsequent cases to which I shall refer show the true meaning of the word "used" in that connection.

This rule, as the learned Lord Justice says, is founded on the maxim that a grantor shall not derogate from his grant, and arises by way of implied grant.

The next case I shall refer to is *Beddington* v. *Atlee* (1), where *Chitty* J. indicates how an implied grant arises. He says:— "Now I go to the question which has been so much argued, as to the grant to be implied on the conveyance. The first observation I make is this: on reading the conveyance no implication whatever arises. It is not like the case of an implied grant when, upon reading the instrument, you say the terms employed mean so and so; and it is necessary, in order to give effect to the intention, as manifested by the deed, to imply something which is not expressed in so many words. In this case, in order to raise any implied grant, *it is necessary to look outside the deed of conveyance, and to consider the surrounding circumstances*," and then he proceeds to illustrate his meaning.

Then comes the leading case of *Birmingham, Dudley and District Banking Co.* v. *Ross* (2), in 1888, where *Cotton* L.J. in a passage which I read during the argument, and which is ever since the decision recognized at law, states the true meaning and foundation of the "implied obligation" to which he referred in *Rigby* v. *Bennett* (3). *Bowen* L.J. (4) confirms that statement of law in language conspicuous for its clearness. He says of this obligation that it is not an express obligation at all, and proceeds: —"It is not an obligation that 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 is only by looking outside the deed that the implication of a duty arises. I think that is the effect of the language of the House of Lords

(1) 35 Ch. D., 317, at p. 326.
(2) 38 Ch. D., 295, at pp. 308 and 309.
(3) 21 Ch. D., 559.
(4) 38 Ch. D., 295, at pp. 314 and 315.

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in *Caledonian Railway Co.* v. *Sprot* (1). I think it is what was meant by the Master of the Rolls and by Lord Justice *Cotton* in the case of *Rigby* v. *Bennett* (2), and that view has been followed by the judgment of Mr. Justice *Chitty* in the recent case of *Beddington* v. *Atlee* (3)."

In accord with this are the observations of *Davey* L.J. in *Grosvenor Hotel Co.* v. *Hamilton* (4). In the late case of *Quicke* v. *Chapman* (5), *Cozens-Hardy* L.J. quotes with approval the views of *Bowen* L.J. in the *Birmingham Case* (6) fifteen years before. We have here a clear, consistent and authoritative exposition of the way in which an implied grant arises.

The first step then in working out Lord Justice *Thesiger's* rule in *Wheeldon* v. *Burrows* (7) is to look at the circumstances in order to see whether there is to be an implied grant of any of the *quasi*-easements he mentions. It must, however, be borne in mind that his words, carefully and accurately chosen, were "easements . . . . used by the owners of the entirety *for the benefit of the part granted.*" The last words in this passage are essential. He was not speaking of mere personal conveniences, but of conveniences enjoyed as if they were appurtenant to the land granted, and on severance they may become strictly easements. Lord *Watson* in *Dalton* v. *Angus* (8) puts it thus:—"A right constituted in favour of estate A. and its owners, in or over the adjoining lands of B., is in my opinion of the nature of an easement, and that whether such right is one of the natural incidents of property, or has its origin in grant or prescription." Of course, if there is anything in the contract or conveyance negativing the desired implication it cannot arise: see *per* Lord *Selborne* L.C. in *Russell* v. *Watts* (9). But free from that, the circumstances of the properties respectively granted and retained determine whether any grant is to be implied. And what is of equal importance, they determine the extent of the grant. For this purpose I again cite *Bowen* L.J. in the *Birmingham Case* (10). He says:—"Now, if it is an obligation which *arises* from

(1) 2 Macq. H.L. Cas., 449.
(2) 21 Ch. D., 559.
(3) 35 Ch. D., 317.
(4) (1894) 2 Q.B., 836, at p. 841.
(5) (1903) 1 Ch., 659, at p. 671.
(6) 38 Ch. D., 295.
(7) 12 Ch. D., 31 at p. 49.
(8) 6 App. Cas., 740, at p. 830.
(9) 10 App. Cas., 590, at p. 596.
(10) 38 Ch. D., 295, at p. 315.

such an implication, it must be *measured* by all the surrounding circumstances . . . . it is a question of the proper inference to be drawn from a consideration of all the facts."

Title is one circumstance, and in *Quicke* v. *Chapman* (1) the Court refused to draw the implication because an essential element, viz., the title to grant the easement claimed, did not exist in the grantor of the land and therefore could not be implied against him. This affirms the position that the obligation is not a mere personal one—one in gross. But title is only one circumstance, as *Romer* L.J. pointed out (2). He said:—"In my opinion you are also entitled to inquire into the surrounding circumstances which are relevant to such a question—*the circumstances affecting the two pieces of land*, though this is not strictly a matter of title and might not appear on the title if it were inquired into."

Now with all respect to the judgment under appeal no effect whatever appears to have been given to these essential considerations. One circumstance, and one only, engaged the attention of the Court, and that was considered conclusive. I mean the fact that, as the relative surfaces were then shaped, water ran from the respondent's land to that of the appellant. But there were other circumstances and, as I think, overwhelming ones. The land consists of small allotments situated in the town of Benalla, not far from the railway. The respondent has now a store upon his allotment which evidences the use to which land in that locality is appropriately put. That character of the land must have been obvious to the parties when the sale took place. The respondent, in order to establish the implied grant of a perpetual easement, must satisfy the Court that the necessary implication from the circumstances existing when he bought was that the retained land was never to be filled up to its natural level. True, the excavation then existed, and the owner of the entirety permitted the surface to remain so as to allow the water to run from west to east, that is from respondent's land to appellant's, and sold the allotment to respondent in that state. But everyone knew and could see that the excavation was not made with a view to an alteration of the land itself, or to bestow upon it its permanent

(1) (1903) 1 Ch., 659.

(2) (1903) 1 Ch., 659, at p. 671.

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future character. The excavation was to obtain material for railway purposes, and no one in his senses could have imagined that the site was destined in perpetuity to remain an open receptacle for neighbouring drainage. Either by refilling, or by using the excavated portion as a cellar or some cognate purpose the land was plainly adapted for utilization as a building allotment, and, if for building, who could have imagined the intention of the grantor or grantee that a pool of water was to stand under the habitation?

To imply a grant the same degree of certainty must exist as would justify the implication of a term in a contract. And as to that there is no longer room for question. In *Douglas* v. *Baynes* (1) Lord *Atkinson*, speaking for the Judicial Committee, said:— "The principle on which terms are to be implied in a contract is stated by *Kay* L.J. in *Hamlyn* v. *Wood* (2) in the following words:—'The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied.'" As to what amounts to necessary implication, we have the authority of Lord *Eldon* in *Wilkinson* v. *Adam* (3), and *James* L.J. in *Crook* v. *Hill* (4) for saying it means "not natural necessity, but so strong a probability of intention that a contrary intention cannot be supposed," or as Lord *Chelmsford* phrased it in the House of Lords: *Hill* v. *Crook* (5), not "necessarily susceptible of only one interpretation, but that it is sufficient if it is indicated in a way that excludes the probability of an opposite intention."

For the purpose of determining whether any, and if any, what implied grant arises in a given case, the terms of the contract, or of the conveyance (or of the will in the case of a devise): *Pearson* v. *Spencer* (6) may prove very material factors. The instrument may negative the implication; or it may by affirmative words assist it; of course in every case the substantive subject

(1) (1908) A.C., 477, at p. 482.
(2) (1891) 2 Q.B., 488, at p. 494.
(3) 1 V. & B., 422.
(4) L.R. 6 Ch., 311, at p. 315.
(5) L.R. 6 H.L., 265, at p. 277.
(6) 1 B. & S., 571, at p. 581; 3 B. & S., 761.

aliened must be ascertained to begin with. If that subject include a house—whether specifically referred to or not (see *Newcomen* v. *Coulson* (1) and *Union Lighterage Co.* v. *London Graving Dock Co.* (2)), the lights would by *primâ facie* implication pass with it: *Barnes* v. *Loach* (3) and *Cable* v. *Bryant* (4). If a farm, a way upon which the tenement is in necessary dependence in order to the enjoyment in the state in which it is aliened, upon the adjoining tenement, would *primâ facie* pass, though no way whatever was mentioned in the instrument: *Pearson* v. *Spencer* (5); see also *Phillips* v. *Low* (6). The instrument was silent as to the fact or measure of the implied grant, but the Court was left to deduce it entirely from the extrinsic circumstances by means of the principles I have stated.

Applying those principles to the present case, the conveyance, as I may term it, does not contain any words assisting the respondent, and, on a careful consideration of the relations of the parties as they existed on the making of the contract, I am of opinion that no implication of the grant of what is substantially a servitude *ne facias*, or what Lord *Macnaghten* in *Colls* v. *Home and Colonial Stores Ltd.* (7) calls a negative easement, the violation of which is in the nature of a nuisance, can properly be made.

Mr. *Dethridge* very adroitly presented another argument, based upon sec. 6 of the *Conveyancing Act* 1904. He urged that the transfer and certificate of title under the *Transfer of Land Act* 1890 must, by force of sec. 6 of the *Conveyancing Act* 1904, be read as if they gave the alleged easement to his client. He referred to sec. 89 of the *Transfer of Land Act* 1890, which gives to a transferee along with the land itself "all rights powers and privileges thereto belonging or appertaining." But these words, unaccompanied by any others enlarging their meaning, carry no more than strictly legal appurtenances. *Barlow* v. *Rhodes* (8) is one of the numerous authorities which evidence this. Then Mr. *Dethridge* said the 6th section of the *Conveyancing Act* 1904 did carry the matter further, by supplying the enlarged meaning, so as to include the *quasi*-easement relied on. But, assuming that

(1) 5 Ch. D., 133, at p. 142.
(2) (1902) 2 Ch., 557, at p. 570.
(3) 4 Q.B.D., 494.
(4) (1908) 1 Ch., 259, at p. 263.
(5) 1 B. & S. 571 ; 3 B. & S., 761.
(6) (1892) 1 Ch., 47.
(7) (1904) A.C., 179.
(8) 1 Cr. & M., 439.

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with respect to land under the *Transfer of Land Act* 1890 sec. 6 applies, the circumstances do not fit the section. The section, it will be observed, is headed "General Words." That is a well known term in conveyancing. *Davidson's Conveyancing*, 4th ed., vol. I., p. 92, contains a passage which describes what is meant by the "general words," and their functions. It is pointed out that "easements and privileges legally appurtenant to property pass by a conveyance of the property simply, without any additional words; but easements and privileges may be used or enjoyed with or may be reputed to appertain to property, and may be capable of being conveyed with it without being legally appurtenant, and such easements and privileges will not pass by a conveyance of the property simply, or without being expressly mentioned."

The *Conveyancing Act* 1904 simply inserts these in a conveyance, unless that instrument contains something to indicate a contrary intention. But the words of the section will not pass anything which an express grant in general words would not pass. For instance, they would not pass an easement annexed to the land by implication of law or express grant; *Ackroyd* v. *Smith* (1). Nor will these words, even in the Act of Parliament, pass easements, privileges or advantages, not legally appendant or appurtenant to property, unless the circumstances raise an implication that they are intended to pass. So it was held in *Birmingham, Dudley and District Banking Co.* v. *Ross* (2), where *Cotton* L.J. stated the conditions under which the section would convey such rights. In *Godwin* v. *Schweppes, Ltd.* (3) *Joyce* J. thus stated the law:—"But in the very important case of *Birmingham, Dudley and District Banking Co.* v. *Ross* (4) it was determined that, although a grantor shall not derogate from his own grant, this rule does not entitle the grantee of a house with the lights, under the words imported into the grant by the *Conveyancing Act* 1881, to any easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee. The expression 'lights enjoyed' in the Statute is con-

(1) 10 C.B., 164.
(2) 38 Ch. D., 295, at p. 307.
(3) (1902) 1 Ch., 926, at p. 933.
(4) 38 Ch. D., 295.

fined to the light enjoyed under such circumstances as would reasonably and properly lead to an expectation that the enjoyment of that light would be continued." And see *per Farwell* J. in *International Tea Stores Co.* v. *Hobbs* (1).

This at once calls into play the same considerations as I have applied to the argument with respect to implied grant; the same question must be asked, and the same answer given.

For these reasons I am of opinion the appeal must be allowed.

HIGGINS J. This action was based on the doctrine of *Vinnicombe* v. *MacGregor* (2), and on that doctrine alone. The evidence is short and undisputed. In 1873 the Railway Department removed certain soil from lots 10 to 16 in the township of Benalla, with the effect that rain water which used to be distributed along the surface from lots 10 to 12 towards the west, thereafter ran to the east, into the deepest part of the excavation —that is into lots 13 and 14. The plaintiff became owner of lots 10 and 11, and in 1906 purchased lot 12 from the defendant. The defendant has since put up an embankment on lot 13 which keeps the water off lots 13 and 14, and throws it back on lots 10 to 12. The charge in the plaint is that "the *natural flow* of the surface water from the plaintiff's land . . . is wrongfully obstructed and the said water is caused to accumulate upon the plaintiff's said land." The plaintiff seems to have thought that whenever water seeks the lowest level by gravitation, even if that level has been created by artificial means, that is its "natural flow." On this basis the case went to trial; on this basis the evidence was called and closed; and on this basis the learned Judge of the County Court, following, as in duty bound, the decision in *Vinnicombe* v. *MacGregor* (2), decided for the plaintiff, and ordered the defendant to remove the embankment. On appeal, however, the Full Court, while adhering to the doctrine of *Vinnicombe* v. *MacGregor* (2) as "undoubtedly correct," said that the doctrine does not apply to a case such as the present where an artificial surface has been substituted for the natural surface by the act of man. The water would not flow from the plaintiff's land to the defendant's but for the artificial excavation.

(1) (1903) 2 Ch., 165, at p. 172. (2) 29 V.L.R., 32; 24 A.L.T., 200.

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Now, I do not intend to express a final opinion on *Vinnicombe* v. *MacGregor* (1). Counsel for the plaintiff has not argued in favour of the doctrine of that case; for he rests his case on another principle, to which I shall hereafter allude. It is not necessary to decide as to *Vinnicombe* v. *MacGregor* (1) if the distinction drawn by the Full Court is sound; and I do not like to pronounce, without full argument, against a doctrine which is evidently the result of much careful thought. I can only say that I am not convinced that a landowner has the same natural right to compel his neighbour on a lower level to allow surface water to spread into his land, as he has to compel him to allow a defined natural stream to flow into it.

I must also protect myself from misunderstanding in any subsequent discussion by pointing out that nowhere in *Vinnicombe* v. *MacGregor* (2), either in the arguments of counsel or in the judgment of the Court, does there appear to be any reference to the very pertinent and very debateable question as to the effect of the *Transfer of Land Act* 1890 (secs. 74, &c.), on such a natural right as was there claimed, or as is claimed in the case of defined streams. The land in that case was under the *Transfer of Land Act* 1890. Perhaps the natural right was treated as an easement within sec. 74; but it is not an easement in the proper sense. For instance, a natural right is not acquired by grant, whereas every easement has its origin in grant, express or implied. A natural right is not extinguished, as an easement is, by unity of *seisin*: *Wood* v. *Waud* (3); and see *Rameshur Pershad Narain Singh* v. *Koonj Behari Pattuk* (4). Natural rights may be temporarily suspended, not wholly extinguished.

But if the doctrine of *Vinnicombe* v. *MacGregor* (1) be accepted, the Full Court was right, in my opinion, in confining it to the case of water spreading over the natural surface. Counsel for the respondent has not presented any arguments against this view of the Full Court. This distinction between the natural and an artificial surface is recognized in the cases of streams and other waters following a defined channel: *Wood* v. *Waud* (5);

(1) 29 V.L.R., 32; 24 A.L.T., 200.
(2) 28 V.L.R., 144; 24 A.L.T., 15; 29 V.L.R., 32; 24 A.L.T., 200.
(3) 3 Ex., 748.
(4) 4 App. Cas., 121.
(5) 3 Ex., 748, at p. 772.

Rameshur Pershad Narain Singh v. *Koonj Behari Pattuk* (1); *Goddard on Easements*, 3rd ed., pp. 66, 71; 6th. ed., p. 76; *Mason* v. *Shrewsbury and Hereford Railway Co.* (2); and if the law as to water running in a defined channel is to be applied to undefined surface water, why should it not be limited in the same way to natural surfaces? Under the word "natural," surfaces or river beds which have not been changed within living memory should probably be included. The change in the watershed here took place in 1873.

The Full Court has affirmed the order of the County Court, without qualification, on the ground—not mentioned at the trial—that, as the defendant had sold lot 12 to the plaintiff in 1906, and as at the time of the sale the water flowed from lot 12 to the other lots of the defendant (13 to 16), she had no right to "derogate from her grant" by obstructing the flow. Now, I am clearly of opinion that this ground was not fairly open to the plaintiff on the appeal. Of course the point can only arise when there has been a "grant" of some sort, some privity in contract between the parties or their predecessors in title. Yet the plaint is framed as it would be framed if the parties were complete strangers. It seeks an injunction "restraining you from continuing to keep an embankment wrongfully placed by you upon your land situated . . . whereby the *natural flow* of the surface water from the plaintiff's land situated . . . is wrongfully obstructed." The claim is based on mere natural right as between adjoining proprietors. There is not one word about grant—not one word about contract or about any privity in relations. The evidence—which is very short—is all consistent with this one ground. The only "grant"—the transfer from Lang by direction of the defendant to the plaintiff—was not even put in; nor was there any other evidence tendered—assuming that other evidence was admissible—to show the purpose for which lot 12 was bought. The carefully reasoned judgment of the learned Judge in the County Court shows that the point of "derogation from grant" was not discussed. I cannot think it fair to the defendant, on the appeal, to treat her as having given by implication the right to discharge water from

(1) 4 App. Cas., 121, at p. 126. (2) L.R. 6 Q.B., 578, at p. 586.

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lot 12, without giving her an opportunity to put in the grant, or such other evidence as she should think fit.

But if we are to consider the point, on the evidence before us I concur with my colleagues in the view that no such grant is to be implied. Here we find nothing but the facts that the defendant, having bought lot 12, sold it to the plaintiff; that the original vendor transferred it by the defendant's direction to the plaintiff; and that at the time of sale the surface water flowed from lot 12 to lot 13, because of the excavation. There is nothing to show the purpose for which lot 12 was bought. These facts do not show that the defendant in selling the land promised never to bank up the surface water—never to fill up the pit—never to restore the land to its natural condition. There is no such baneful doctrine—baneful to industry and to improvement—as that when a man sells a strip of his land to another he necessarily binds himself and all his successors in title not to fill up a pit on the land which he retains if that pit at the time of the sale relieves the strip of surface water. There is no such a doctrine as "Once a pit—always a pit." If the plaintiff's argument is right, the defendant is to be treated as even binding himself never to put on lot 13 a building which should obstruct the surface water.

But I want to guard myself from being understood as accepting the view that a grant of a right as to real property may be implied from a consideration of circumstances, not mentioned in the conveyance, existing as between vendor and purchaser at the time of the sale. Leaving out of account cases of prescription, &c., a deed was always required for the creation or the transfer of incorporeal hereditaments; and a deed is also required in the case of corporeal hereditaments (*Real Property Act* 1890, secs. 162, 163). The *Transfer of Land Act* 1890 substitutes for the deed an instrument as prescribed. The principle of "derogation from grant" is clear enough. As expressed by *Bowen* L.J. in *Birmingham, Dudley and District Banking Co.* v. *Ross* (1), the principle is that a "grantor having given a thing with one hand is not to take away the means of enjoying it with the other." But he must first give it; and this must be done by the appropriate instrument.

(1) 38 Ch. D., 295, at p. 313.

As *Wood* V.C. puts it in *North-Eastern Railway Co.* v. *Elliot* (1). "if the conveyance is made *for the express purpose* of having buildings erected upon the land so granted, a contract is implied on the part of the grantor to do nothing to prevent the land from being used for the purpose for which to the knowledge of the grantor the conveyance is made"; and see *Lyttleton Times Co. Ltd. v. Warners Ltd.* (2). Counsel have not been able to refer us to any case in which the doctrine of "derogation from grant" has been applied where the purpose for which the land was to be used was not in some way mentioned in the conveyance. If a "stable" is leased, the lessor must not do anything to prevent the lessee from using it as a stable; if a "house" is leased, the vendor cannot undermine it so as to bring it down. But if A. sell to B. land described merely by metes and bounds, C. and other subsequent purchasers of the land are not bound to investigate all the relations between A. and B. at the time of the sale by A. They need not inquire into matters which do not appear on the face of the title or on the face of the land. I am confining my observations to the doctrine of grant—grant binding the land in the hands of successors in title. Under the *Transfer of Land Act* 1890 the position of transferees is still stronger owing to its express provisions for their protection, and also to the simple form of transfer prescribed. Under the old system of conveyancing the purpose for which land is bought is usually apparent. The case of *Birmingham, Dudley and District Banking Co.* v. *Ross* (3) has been, in my opinion, misunderstood. The contract and the lease mentioned "buildings"; the parties admitted that the grant was for building purposes; and the question arising as to the *extent* of the right granted, the Court examined all the circumstances at the time of the contract. There was no question then arising as to the interpretation of the words of the deed. The question was, was there any infringement? But I must not spend too much time on this subject; for in this case my opinion is that, even if we look outside the transfer, there is no grant to be implied of any right to discharge the water.

Even on the assumption that the plaintiff is entitled to any

(1) 1 Johns. & H., 145, at p. 153. (2) (1907) A.C., 476.
(3) 38 Ch. D., 295.

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relief on the ground of derogation from grant, this order—to remove the embankment, *simpliciter*—could not stand. Such an order, by the way, is very unusual. It is not a mandatory injunction, or an injunction of any kind. It does not represent the true measure of the defendant's duty. Her duty would be to do nothing to obstruct the water of lot 12 from discharging itself on lot 13; and she might carry out this duty, for instance, by drains and culverts without removing the embankment. Moreover, under the order as it stands, the plaintiff gets lots 10 and 11 freed of water as well as lot 12 and yet the only grant is a grant of lot 12. Under the doctrine on which the Judge of the County Court based his order, this latter point could not be raised; but it is clearly applicable when the only right of the plaintiff rests on the sale of lot 12.

I am of opinion that the appeal should be allowed.

Appeal allowed. Order appealed from discharged, and appeal from the County Court allowed with costs, including costs of settling the case. Judgment for the defendant in the action with costs. Respondent to pay the costs of the appeal.

Solicitors, for the appellant, *Lamrock, Brown & Hall.*

Solicitors, for the respondent, *F. T. Hickford* for *Hamilton Clarke*, Benalla.

B. L.