1935

M. C. PATAIL v. H. G. ARIFF.

PAGE, C.J.

other way the directors had power to purchase the property in question, because the sole question of law which it is suggested arises is in connection with the construction of clause 3 (*f*) of the memorandum of association. The case upon appeal turned upon the merits, and was decided upon the facts of the case. I am of opinion that, inasmuch as the decree from which it is sought to appeal to His Majesty in Council affirmed the decision of the lower Court and no substantial question of law is involved in the appeal, the application for a certificate granting leave to appeal to His Majesty in Council must be refused, and it is dismissed with costs,—one set of costs,—seven gold mohurs.

BA U, J.—I agree.

LETTERS PATENT APPEAL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Ba U.

1935

July 3.

DAW GYAN
v.
MAUNG MAUNG.*

Easements—Implied easements—Grant of part of a tenement—Quasi easements that go with the grant—Three contiguous houses with one owner—Use of path at back for carriage of night soil buckets—Sale of two houses—Right of user of the path by the purchaser.

On the grant by an 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 (which are 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. In such a case it is a grant of an easement by implication.

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* Letters Patent Appeal No. 1 of 1935 arising out of Special Civil Second Appeal No. 99 of 1934 of this Court.

Hansford v. *Jago*, (1921) 1 Ch.D. 322; *Pearson* v. *Spencer*, 3 B. & S. 767; *Pwllbach Colliery Co.* v. *Woodman*, (1915) A.C. 634; *Wheeldon* v. *Burrows*, 12 Ch.D. 31—*referred to.*

In 1910 there were three houses which were contiguous and belonged to one and the same owner. The houses faced a public road, and there was a path at the back running south to north and then west to east which was used by the owner for the carriage of night soil buckets of the three houses on to the public road where conservancy carts took the night soil away. In 1923 the owner sold the houses to the south to a woman who mortgaged them to the respondent, and he became the purchaser thereof at a Court sale in execution of his mortgage decree. The house to the north passed by way of inheritance to the appellant. It was established by evidence that from 1910 the night soil buckets from the two houses to the south had usually been carried along the path to the north through the appellant's compound. It was also in evidence that the piece of waste land to the west belonging to another person was sometimes used by the sweeper of the two houses, but that land was fenced up by the owner some six years ago, and was no longer available to the respondent for the carriage of his buckets. In 1931 the appellant blocked up the portion of her compound through which the path lay, and thereby prevented the respondent from using the pathway for the carriage of his buckets. The respondent claimed a right of way as an easement of necessity.

Held, that it was not a case of an easement of necessity, but that at the time when the two lower houses were separated from the upper house in 1923 it was the common intention of both the vendor and the purchaser that thereafter the night soil buckets should be taken to the public road along the path through the upper compound in the manner in which they had been taken before, and that an implied easement to that effect resulted from and was ancillary to the conveyance of the two lower houses in 1923.

Kale for the appellants. At the time the tenements in question were separated there was a vacant plot of land to the west of the two holdings, now in the possession of the respondent, over which night soil buckets from the respondent's premises were carried. Consequently, the respondent cannot claim any way of necessity over the appellant's land for the removal of night soil. The mere fact that the respondent will be put to some expense in finding a way for the removal of the night soil, the vacant plot of land to the west now being fenced round, is no ground for allowing the respondent a right of way over the appellant's land. Moreover, the easement claimed by the respondent was not continuous and apparent, and it cannot therefore pass by implied grant. The

1935

DAW GYAN
v.
MAUNG
MAUNG.

doctrine of implied grant or grant by implication is also based on "necessity", and the law will imply only that to be conveyed which is absolutely necessary. Though the Easements Act does not apply to Burma the principles underlying the Act may be used as a guide in deciding questions of this nature.

A. N. Basu for the respondent was not called upon.

PAGE, C.J.—This appeal is dismissed.

The question at issue is the right of the respondent to have the latrine buckets at night taken from his latrine by a path to the north through the appellant's compound, and thence by a path through the appellant's compound from west to east to the West Moat Road.

Now, the facts, as found or admitted by the learned Judge of the Assistant District Court at Mandalay, are that the tenement as a whole is covered by three houses which are contiguous, all of them with a frontage on the West Moat Road. The appellant owns the most northern of the houses, and the respondent the two southern houses. To the west of the holding is land now occupied by Parawa Devi. Until about six years ago the land to the west was an open space. A fence has now been run round it flush against the property of the appellant and the respondent.

The holding which includes the appellant's house and the two houses belonging to the respondent had a path running at the back of the respondent's house to the north where it joined the compound of the appellant, and in that way access was obtained from the latrine of the respondent

to the West Moat Road where the conservancy carts took the night soil away. From 1910 to 1923 the holding belonged to Ma Myint, and during the time in which the three houses belonged to her the night soil buckets were always removed along the path from the latrine of the respondent northwards and westwards through the appellant's property to the West Moat Road. U Ba Soe, a Higher Grade Pleader, stated that he occupied the respondent's house in 1914 and the appellant's house from 1914 to 1930. In 1923 Ma Myint sold all three houses to Mg. Mg. Thet, the father of the appellant, and soon afterwards Mg. Mg. Thet sold the two houses to the south to Ma Hafiz Bi, who mortgaged them to the respondent, the respondent ultimately purchasing them at an auction sale in execution of a mortgage decree that he had obtained against Ma Hafiz Bi. There was evidence that at the time when the two houses to the south were sold by Mg. Mg. Thet to Ma Hafiz Bi the sweeper of the houses to the south used sometimes to take the night soil buckets away through the waste land to the west, but it was found as a fact by the learned Judge of the Assistant District Court, and there was evidence to support his finding, that at all material times from 1910 upwards the night soil buckets from the two houses to the south had usually been carried along the path to the north through the appellant's compound.

Now, in 1931 the appellant blocked up the portion of the compound through which this path lay, thereby preventing the night soil buckets from the respondent's compound from being carried as hitherto had been done through the appellant's compound to the West Moat Road. Hence the

1935

DAW GYAN
v.
MAUNG
MAUNG.

PAGE, C.J.

present suit, in which the respondent claimed an injunction restraining the appellant from obstructing his easement, being the right of way for the conveyance of the night soil buckets through the appellant's compound.

Now, in so far as the easement was claimed to be an easement of necessity, in my opinion, the suit must fail; because it is clear, and it is not disputed, that at the time of severance it was possible to take the night soil buckets from the respondent's latrine over the waste land to the west, and if at the time when Mg. Mg. Thet conveyed the houses to the south to Ma Hafiz Bi there was no easement of necessity there is no easement of necessity which can be claimed by the respondent in the present case. But, as I have stated, it has been found, and we accept and agree with the finding, that the normal, ordinary and only practicable way in which the night soil buckets could be taken to the West Moat Road from the respondent's latrine was at all material times by the path through the appellant's compound.

Now, how does the law stand in this matter? Although the Easements Act does not apply to Burma no doubt the Court would have regard to the Easements Act in considering questions such as that under consideration. The law, however, in my opinion, applicable to the question at issue was laid down by Lord Parker in *Pwllbach Colliery Company, Limited* v. *Woodman* (1). His Lordship observed:

"The right claimed is in the nature of an easement, and apart from implied grants of ways of necessity, or of what are called continuous and apparent easements, the cases in

(1) (1915) A.C. 634.

which an easement can be granted by implication may be classified under two heads. The first is where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted . . . The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used."

Again, in *Pearson* v. *Spencer* (1) Erle C.J. observed that the case then under consideration fell

"under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement."

and in *Wheeldon* v. *Burrows* (2) Thesiger L.J. pointed that

"two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that 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."

See also *Hansford* v. *Jago* (3).

(1) 3 B. & S. 767. (2) 12 Ch.D. 31 at p. 49.
(3) (1921) 1 Ch.D 322.

1935

DAW GYAN
v.
MAUNG
MAUNG.

PAGE, C.J.

Now, it is obvious that at the time when the two lower houses were separated from the upper house in or about 1923, it was the common intention of both the vendor and the purchaser that thereafter the night soil buckets should be taken to the West Moat Road along the path through the upper compound in the manner in which they had been taken before, and, having regard to the authorities to which reference has been made, I am of opinion that an implied easement to that effect resulted from and was ancillary to the conveyance of the two wer houses by Mg. Mg. Thet in 1923.

For these reasons, in my opinion, the appeal fails and must be dismissed with costs.

BA U, J.—I agree.

APPELLATE CRIMINAL.

Before Mr. Justice Mosely.

1935

July 17.

MOHAMED ISMAIL

v.

KING-EMPEROR.*

*Cognizable offence—Power of arrest without warrant not unqualified—Officer acting independently—Subordinate officer deputed by superior officer to arrest—Authority in writing necessary—Authority to be shown to arrested person—Criminal Procedure Code (Act V of 1898), ss. 54, 56—*Bona fide *but unauthorized arrest by police officer—Right of private defence.*

S. 54 of the Code of Criminal Procedure does not give an unqualified power in all cases to any police officer to arrest, without an authorization in writing, a person concerned in a cognizable offence. The provisions of s. 54 are limited by those of s. 56 of the Code. A police officer may without a warrant arrest any person concerned in a cognizable offence, provided the officer is acting on his own initiative, or independently in the course of his duty. But where a subordinate police officer is not

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* Criminal Appeal No. 780 of 1935 from the order of the Honorary Magistrates, Rangoon, in Criminal Trial No. 393 of 1935.