(1869) 04 CAL CK 0008

Calcutta High Court

Case No: None

John George Bagram		APPELLANT
	Vs	
Khettranath Karformah and Another		RESPONDENT

Date of Decision: April 23, 1869

Judgement

Norman, J.

The plaintiff alleges that as the owner of a house, 6 Old China Bazar, he is entitled to have the light and air enter through certain windows and a verandah; and that the defendant, by erecting a building near the said house and verandah, has obstructed the light and air, and rendered the house dark, unwholesome, and of less value. He prays for an order, directing the defendant to pull down his new building and for rupees 30,000, the damages alleged to be caused to him by its erection. It was proved that the house of the plaintiff has a frontage of 56 feet to the south, and is two stories high. The lower floor consists of godowns and offices. The upper story is used as a dwelling-house. In the middle of the south side is a verandah 22 feet 6 inches long which has three openings. There is a room lighted from the verandah with three windows, and on each side are rooms having windows looking to the south, two on each floor. The general line of the front of the plaintiff"s house is about 17 feet from the boundary line which separates his own land from that of the defendant. The verandah projects from the front of the plaintiff"s house, to within about three feet of the boundary line,. The height of the verandah to the ceiling is about fourteen feet. In the south-west corner of the plaintiff"s lands is a tiled hut, the top of which is on a level with the floor of his upper rooms. It stands at a distance of little more than two feet from the dwelling-house, and extends from the west, eastwards, as far as the middle of the second window on the ground floor,. coming within five feet of the verandah. The land of the defendant adjoining the plaintiff"s land on the south, is a strip about 15 feet wide, lying between the plaintiff"s land and Canning Street. On this land, down to the month of July 1866, was a building used as a godown, standing closer to the boundary line of the plaintiff"s and the defendant"s premises, about fifteen feat in height, being in fact very little higher than the level of the floor of the plaintiff"s verandah.

As long as that godown remained unaltered, there was a clear view over the godowns in all directions from the upper story of the plaintiff"s house.

2. It was proved, that for 30 or 40 years prior to July 1866, the buildings on the plaintiff"s and the defendant"s land, had remained in the same condition. In July 1866 the defendant rebuilt his godown and added a second story to it, carrying his wall to a height of 25 feet 4 inches. The wall is set back a little, and now comes within four feet and 11 inches of the plaintiff"s verandah at one part, and 4 feet 1 inch at another. It extends from the west, to within about five feet of the eastern extremity of this verandah, rising to the height of eleven feet above the level of the floor, the top being only two feet and a half below the line of the interior of the roof of the verandah.

3. Mr. Osmond says : "the new building has, undoubtedly, injured the light and air of the plaintiff"s house. So far as the air is concerned, it is materially affected; as to light, to some extent. In my opinion, the "alteration has diminished the value of the plaintiff"s house."

4. On cross-examination, he stated: "I did not go into all the rooms "on the upper floor, only the centre room. That has three windows" looking into the verandah, corresponding with, but not so large as the "openings in the verandah. There was light enough in that room to read" by comfortably. The light of the room with such a verandah before it, " would be affected by the alteration, but not to a very considerable extent. Half the east window is unaffected by the defendant"s building; that "is affected by another building. I think the chief damage is done by" depriving the house of the south wind. The alteration would cause a "diminution in light which would affect the value."

5. On re-examination, he says: "The defendant"s building affects the "value of the plaintiff"s building as to wind chiefly. But also as to" light, not to a great extent."

6. Mr. Rowe says : "The new godown is 24 feet 4 inches high. This "difference in height would make a material difference in light and air;" not in the air below. On the west side there is a godown close to "and higher than the window. As the promises now stand, they are" worth 120 rupees a month. If the premises were in the same state "as before, they would be worth Rs. 140 or Rs. 150 a month." Cross-examined. "The depreciation from all causes is from 20 rupees to 30 rupees. I give the present difference for the upper story. I did not "observe the damp. It was quite light enough when I was in the middle "room of the upper floor. The chief damage is shutting out the south "breeze. The damage caused by diminution of light would not be" serious. I have not taken the prospect into consideration. It can"t be "now used as a dwelling-house for a respectable family."

7. Mr. Justice Markby dismissed the plaintiff"s suit, and from that decree, the plaintiff has appealed.

8. The learned Judge treats it as clear that a claim founded on prescription and supported by evidence of modern user can always be defeated, by showing that the right did not

exist or could not have existed at any one given point of time within the period of legal memory, which, according to the English law, is about 700 years.

9. If the learned Judge"s argument is correct, there can be no such thing as a claim to a servitude by prescription, within the local limits of the original jurisdiction of the High Court. His position on this point, with the view he takes as to the nature of the possession from which alone a grant can be presumed, appears to me to strike at the root of a great number of urban servitudes--rights most important to owners of house property in Towns.

10. In fact, it would seem to follow, that no mere length of enjoyment could confer rights in respect of the access of light, or the support of "buildings.

11. The learned Judge assumes that it is impossible that such a right as that claimed, could have existed before the introduction of English law whatever may have been the state of the premises, or the relation of the owners. To that I cannot assent.

12. The laws of every country must necessarily recognize servitudes. It has been well said that the origin of servitudes is as ancient as that of property, of which they are a modification.

13. It seems clear that servitudes were known and recognized both by Hindu and Mohammedan law.

14. In the Hedaya, Hamilton"s Edition, Vol. IV, p. 132, it appears that a right in the nature of an easement is acquired by one who digs a well in waste ground, viz.. that no one shall dig within a certain distance of it, so as to disturb the supply of water. Eights to the use of water for purposes of irrigation or drainage are recognized and defined in pages 136 to 155 of the same book. One urban servitude, at least, is mentioned at page 146, viz., the right to discharge water on the terrace of another. I think there can be no doubt, that urban servitudes generally were recognized by Mahommedan law.

15. As to Hindu law, in Halhed"s Gentoo Law, page 162, which is a translation of a compilation of the ordinances of the pandits, made under the direction of Warren Hastings, between 1773 and 1775, it is laid down that "if a man have a window in his own premises, another person having" built a house very near to this and living there with his family have no "power to shut up that man"s window; and if this second person would" make a window to his own house, on the side of it, that is towards the "other man"s house, and that man at the time of constructing such window" forbids and impedes him, he shall not have power to make a window. "If the drain of a man"s house have for a long series of years passed" through the buildings belonging to another person, that person shall not "give impediment thereto." Many other species of servitudes are referred to in the same book.

16. The subject is also dealt with in the Vivada Chintamani, pp. 124, 125.

17. From the very earliest times, the ancient common law of England recognized rights to the access of light and air through windows. There are cases in the Year Books in Michaelmas Term, 7th Edward the Third, and Michaelmas Term, 14th Hen. IV., fol. 25, in which it was treated by the Court as settled law, that if a man had an ancient house, with windows overlooking the land of his neighbour, through which light and air had been admitted from a time from which the memory of man ran not to the contrary, an action lay against any person who might obstruct such light and air.

18. In the 3rd Institute, 201, it is said : "The common law prohibits the building of any edifice to a common nuisance or to the nuisance of any man in his house, as the stopping up of his light, or to any other prejudice or annoyance of him." A man shall not build on his own soil to the injury of his neighbour.

19. In Aldred''s case 9 Coke''s Rep., 53, it was resolved that, "in a house four things are desired : the habitation of man, the pleasure of the inhabitant, the light, and wholesome air; and for nuisance done to the habitation of man, for that is the principal end of a house, an action lies, and so far the hindrance of light or air, for both are necessary."

20. A custom to build on land where there was no house before, and so to stop a neighbour''s lights, has been adjudged void. It seems impossible to suppose that when English law was introduced within the local jurisdiction of the High Court, so important a part of it as that which deals with servitudes was excluded. Then comes the question bow a right to the unobstructed access of light, through windows looking on another man''s land, can be acquired.

21. There can be no doubt that such a right could be conferred, firstly, by express grant or covenant that the grantee should enjoy the lateral access of light to his windows; or, secondly, by implied grant or reservation, when the dominant and servant tenements had originally belonged to the same owner. Such implication might arise when such owner sold the house with its appurtenances; or, after the erection of the house, sold the land overlooked by its windows. This appears from the cases of Swans-borough v. Coventry 9 Bing. 305 and Richards v. Rose 9 Exch. 948.

22. The title may be rested upon prescription, or a right to be presumed from long enjoyment.

23. I doubt if the learned Judge is right in supposing that in England, claims founded on prescription could always have been defeated by showing that they arose at some time later than the first year of the reign of Richard the first, which, in modern times, is treated as the period of legal memory. The preamble of the 2 and 3 Wm. IV, c. 71, says, "the expression, time immemorial, or time whereof the memory of man runneth not to the contrary, is in many cases considered to include and denote the whole period of time from the time of Richard the first." The 3rd section relating to rights, altered the law by abolishing the customary right which the citizens of London possessed of building on old

foundations, though they might obstruct their neighbour''s light and air by creating right in cases where light had been enjoyed by the acquiescence of tenants for life or years. In these cases, before the passing of the Act, acquiescence for 20 years or more conferred no right: see Barber v. Richardson 4 B. & Ald. 579; Daniel v. North 11 East. 372.

24. It is stated by Sarjeant Manning, in the note to Cassidy v. Stewart 2 M. & Gr. 467 citing Bracton and the Second institute, page 94, that at common law the time of legal memory meant "within the memory of a person living or of his father." The rule of law in the most ancient times having been, that no man could prove any matter, "unless it had been seen by himself or by his father who enjoined him to testify the fact." The rule which has been acted on in England in later times, that the time of legal memory is usually considered to date from the first year of the reign of Richard the first, is an accidental not an essential part of the law relating to rights claimed by enjoyment from time immemorial.

25. It was, as explained by Serjeant Manning in the note above referred to, originally a mere rule of practice introduced by the sole authority of the Court of Common Pleas, in analogy to the Statute 3, Car. 1, cap. 39, in case of suitors, in respect of whom the Legislature had omitted to define the extent of human memory. He gives many instances of what would be ordinarily called rights by prescription which have undoubtedly arisen since that time.

26. In Bury v. Pope Cr. Eliz. 118 it was resolved by all the Justices in the Exchequer Chamber, that if two men are owners of two parcels of land adjoining, and one of them builds a house upon his land, and makes windows and lights looking into the other''s land and this house and the rights have continued for the space of 30 or 40 years, yet the other may upon his own land and soil lawfully erect a house or other thing against the said lights and windows, and the other can have no action, for it was his folly to build his house so near to the other''s land, and it was adjudged accordingly.

27. It has, however, been observed of that case, that it was decided while the period of limitation in real actions was sixty years under the 32 Hen. VIII. cap. 2, and that according to the analogy of that Statute, a sufficient time had not elapsed to confer a title under it to real estate. After the passing of the 21 Jac. 1, chap. 16, in Lewis v. Price 3 Wms. Saunders. 175-a Wilmot, C.J., held, that where a house had been built and lights enjoyed for forty years, if the owner of the adjoining ground builds against the windows, so as to obstruct them, an action lies. In Dougal v. Wilson (Ibid.), in 1769, Wilmot, C.J., said, if a man has been in possession of a house, with lights belonging to it, for fifty or sixty years, no man can stop up those lights.

28. In Darwin v. Upton (Ibid.) 175-c, in 1786, the plaintiff in an action on the case for obstructing his lights, proved an uninterrupted possession of them for 25 years. The defendant relied on the possession prior to the 25 years. Gould, J., said, that he thought that 20 years'' possession unanswered was sufficient.

29. On a motion for a new trial Lord Mansfield said, that the enjoyment of lights with the defendant''s acquiescence for 20 years, is such decisive presumption of a right by grant or otherwise, that a Jury ought to act upon it.

30. In Penwarden v. Ching Moo. and Mal. 400 a window had been made about 21 years before the alleged obstruction. It was objected that the window was not ancient, its date being shown. Tindal, C.J., said the question was not whether the window was what is strictly called ancient, but whether it was such as the law in indulgence to rights has in modern times so called. No doubt, it is true as said by Mr. Gale that English Judges have usually treated rights of this kind as owing their origin to a contract, either express or to be implied from the peculiar relation of the parties at the time they become possessed of their respective tenancies, or from the long continued exercise of the right.

31. Upon the question, whether a lost grant could be presumed, Mr. Justice Markby applied this test, viz.: "that the Court is to consider as ''a question of fact, whether the evidence given in the case shows that the ''owners of the adjoining lands, or those who preceded them, ever intended ''by any grant to confer on the owner of the messuage of the right to ''enjoy the passage of light and air, or in other words, whether the ''defendant intended to deprive himself of the right of building on ''his land, so as to interrupt the passage of light and air to the plaintiff''s house."

32. It appears to me that a right to the unobstructed access of light to windows is not a property or interest in the light itself; or a right to be enjoyed in or over the soil of the adjacent owner. I think it is a mistake to confound what is called the right of light with easements proper, such as rights of way, rights of common, and the like. The form of action again at one who builds so as to obstruct the light, is for a nuisance to the house, not for disturbance of property in the light. See the passage above cited from the 3rd Institute, and Fitzherbert''s Natura Brevium, pages 289 and 429.

33. It seems to me that the presumption of a lost grant from enjoyment in case of easements is a mere legal fiction, and can no more be treated seriously than any other legal fiction, such for instance as the ''destination du pere de famille'' of the French Code, the ouster of John Doe, or the fiction that the defendant was in the custody of the King''s Marshall, or that the plaintiff was the King''s debtor, on which the English Courts of King''s Bench and Exchequer formerly founded a large portion of their jurisdiction.

34. If a right is to be implied by possession for upwards of 20 years, it is perhaps little more than a question of words, whether a jury are to be told that, in the absence of evidence to the contrary, they must presume the existence of such right; or whether they are to be told that they must presume a grant, and have their verdict set aside if they refuse to do so, a practice referred to in Gale on Easements, 139, citing Jenkins v. Harvey 1 C.M. and R. 894. In this country we have no jury in civil cases. We cannot direct ourselves to presume a grant after 20 years'' enjoyment. It is, in fact, absurd to raise an artificial presumption that a grant has been made, and the deed lost in cases where there

is really no reason to believe a grant ever to have existed in fact.

35. There is a broad and simple ground upon which the right may be legally rested, without having recourse to any legal fiction at all.

36. The right to the access of light, is, in the view I take, one capable of being acquired by occupancy as an incident to property. Light and air are publici juris. The light which comes to a man''s land over the soil of his neighbour, did not belong to that neighbour while passing over his land.

37. No man has any absolute property in the open space above his land, To interfere with the column of air superincumbent upon such land, is not a trespass. Lord Ellen borough justly ridiculed the notion that travelers in a balloon could be deemed trespassers on the property of those over whose land the balloon might pass.

38. He who opens a window overlooking his neighbour''s land, and receives the light and air which come to him over his neighbour''s land, does his neighbour no injury and takes nothing from him. He is simply exercising a natural right, and taking and enjoying that which has hitherto remained common to every body. His neighbour has a right to build on his own soil up to its extremist limits. The exercise of this right might, no doubt, interfere with the passage of light through the windows of the first builder. Any such interference must, therefore, take place within the time which the law allows for the assertion and vindication of rights against persons in actual possession. This view of the nature of a right to the access of light accords with the opinion of Littledale, J., in Moore v. Rawson 3 B. and C. 339, and that of the Court of Exchequer Chamber, in Webb v. Bird 13 C. B. N.S. 841.

39. In a case in this Court, Lackersteen v. Tarrucknauth Poramanick Cor. Rep. 91, Mr. Justice Levinge held, that if a house has existed for 32 years, and the windows have been enjoyed without interference for over 20 years, it confers the dominant right.

40. Lord Mansfield and Wilmot, C.J., were of opinion that such incorporeal rights ought to be decided by analogy to the Statute of Limitations.

41. Whatever may be the theories of the different Judges as to the foundation of the right, practically the rule in England has been in accordance with that which Lord Mansfield would have laid down on that principle.

42. In the recent case of Joy Prokash Sing v. Ameer Ally 9 W. R. 91. Sir Barnes Peacock, C.J., referring to a case in the mofussil of a claim of right to the flow of water in a particular manner, said, that the inclination of his opinion was that in this country, by analogy to the Indian Limitation Act, an adverse and uninterrupted use of an easement for 12 years would confer a right to it.

43. For myself, I think it clear, that when the access of light and air through the windows of a house has been enjoyed for so long a period as 20 years, and there is nothing to rebut the presumption of title, the law implies an obligation on the Dart of the adjoining owner not to interrupt the free access of necessary light and air through such windows.

44. Mr. Justice Markby assessed the damages contingently at rupees 3,000 for the obstruction of air, and rupees 1,000 for the obstruction of light. Against these findings, the defendant''s Counsel, Mr. Marindin, objected by way of cross appeal.

45. The plaintiff''s witnesses state fairly enough, that the principal damage is done by depriving the house of the south wind. No doubt, the loss of the south breeze is a serious damage to the plaintiff, and renders the house less valuable. But it does not necessarily follow that the plaintiff has a right to restrain the defendant from doing the act which causes him such damage.

46. As shown in Aldred''s cast 9 Coke''s Rep 58, the right acquired against the neighbour is limited to such easements as are necessary. It is there said, that for stopping a prospect which is matter of delight and not of necessity, no action lies, and yet it is a great recommendation of a house, if it has a long and large prospect. Again, in The Fishmonger''s Company v. The East India Company 1 Dick. 163, Lord Hardwicke says, it is true that the value of the plaintiff''s house may be reduced by rendering the prospect less pleasant, but that is no reason for hindering a man from building on his own ground. In Webb v. Bird 10 C.B.N.B. 268 and the same case in error 13 C.B.N.S. 841, it was held that no right to a free passage of air to a windmill can be implied from 20 years'' enjoyment. The reasoning of the Court in that case is applicable to the claim for the free passage of air from a particular quarter, and it was so treated by Mr. Justice Peterson, sitting in this Court in the case of Barrow v. Archer 2 Hyde''s Rep. 129. To give a right of action (in a case where there is no express contract on the subject) for an interference with the access of air to dwelling-houses by building on adjoining land, the obstruction must be such as to cause what is technically called a nuisance to the house, in other words to reader the house unfit for the ordinary purposes of habitation or business. Nothing of the kind is suggested here. The attempt to show that the ground floor was rendered damp wholly fails. Then as to the alleged interference with light. The claim for damages for obstructing the light of the ground floor windows, has not been, and could not have been pressed upon us. The plaintiff''s own sued obstructs the passage of light to them. It is impossible to believe that a wall rising 12 feet above the level of the first floor of the upper rooms, standing due south at a distance of seventeen feet from the windows on that floor, could, in this country, at any period of the day, interrupt a single direct ray of light passing to such windows. It is clear that there must be some interference with the light in the room which looks into the verandah.

47. There is no reason to suppose, that the plaintiff would ever have brought the action for any injury he might have sustained from this case, if it had stood alone. I think that no case has been made out for an order that the defendant''s buildings should be pulled

down. Such an order would cause a great injury to the defendant, and, on the other hand, the injury to the plaintiff by the obstruction, if allowed to remain, is one capable of being compensated by the payment of any moderate damages. Therefore 1 say, that no cause has been shown for making such an order. The principle on which Courts of Equity act in such cases is discussed in Robson v. Whittingham L.R. 1 Ch. App. 442; Clark v. Clarke L.R. 1 Ch. App. 16; Dent v. The Auction Mart Company L.R. 2 Eq. 246.

48. As the case stands, it appears to me, the plaintiff cannot be entitled to anything more than a very small sum as damages, for the interference with the light of the room looking into the verandah. The Chief Justice thinks that such slight damage, as has been sustained, is not a ground of action. I am not prepared to go so far. But I think that in order to maintain the action, it was incumbent on the plaintiff to show that he did sustain some actual injury, capable of being estimated in money, by the obstruction of the light, and that he has failed to give that proof.

49. On that ground, I concur in the order dismissing the suit with costs, both in this Court and the Court below.

Sir Barnes Peacock, Kt., C.J.

50. I am of opinion that by the use of the south window uninterruptedly for upwards of 20 years, the plaintiff did not acquire a right to enjoy the south breeze without obstruction. Such a right may be acquired by express grant, but it cannot be acquired merely by presumption arising from user, whether the presumption is a presumption of prescription or not. I agree that there has been no such obstruction of the air, as to render the defendant liable to an action.

51. The only remaining question is, whether the defendant is liable to an action for obstructing the light. The acquisition of the right to light and air which are necessary for habitation, stands upon a different footing from that to the enjoyment of a south breeze. But the only amount of light for a dwelling-house which, in my opinion, can be claimed by prescription or by length of enjoyment without an actual grant, is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house.

52. In Aldred"s case 9 Coke"s Rep, 68, which is referred to by Mr. Justice Norman, it was resolved that "in a house four things are desired, habitatio hominis, delectatio inhabitantis, necessitas luminis, et salubntas aeris: and for nuisance done to three of them, an action lies, that is, 1st, to the habitation of man, for that is the principal use of a house; 2nd, for hindrance of the light, for the ancient form of an action on the case was significant, quod messuagium horrida tenebritate obscuratum fuit."

53. It must be remarked that of the four things said to be desired, it is merely stated that for nuisance to three of them an action lies. Two of the three are expressly specified; the third as to the salubrity of the air, was the point decided in the case. The delectatio inhabitants is doubtless the one, for a nuisance to which it was intended that an action

would not lie.

54. It is laid down in Comyn''s Digest, page 420, Title Action upon the case for a nuisance "that" an action will not lie for a thing done to "the inconvenience of another; as if a man erect a wall so near to the" mill of another, whereby the other loses part of his profit, where the ""former mill is not from time immemorial:" so an action upon the case for a nuisance will not lie for the obstruction of a prospect, although there seems to be reason why a man may not be bound by express grant not to build on his own land so as to obstruct his neighbour''s prospect, or his enjoyment of a south breeze, which are looted upon merely as matters pro delectatione.

55. In Aldred''s case, it was said that for stopping as well of the wholesome air as of light an action lies, and damages shall be recovered for them, for both are necessary; but for a prospect, which is a matter only of delight and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect." But the law does not give an action for such things of delight, that is to say, an action founded upon a right gained by prescription. Formerly it was held, that a right to light could not be acquired by a user of 30 or 40 years. Bury v. Pope Cr. Eliz. 118; but the modern doctrine is that upon proof of an enjoyment of light for 20 years acquiesced in by the owners of the servant tenement, a grant may be presumed 3 Wms. Saund. 175-a.

56. It is clear, however, that such presumption may be rebutted by showing that the owner of the servant tenement did not, or could not, legally acquiesce : as for instance, that during a great portion of the 20 years he was an infant or insane or that he had only a limited interest, and consequently could not bind the remainder man.

57. I entirely agree with Mr. Justice Markby that as regards prescription, in the strict meaning of that term, according to English law, the presumption has been rebutted; but I do not concur in all the reasons of the learned Judge as to non-existing grants. I am of opinion that the uninterrupted enjoyment of light for 20 years, acquiesced in by the owner of the servant tenement, raises a presumption of right which, in the absence of any evidence to rebut it, ought to be acted upon by those whether Judge or jury, who have to determine the facts.

58. In Cross v. Lewis 2 B. and C. 686, Mr. Justice Bayley remarked that 20 years'' uninterrupted possession did not confer a right, but that it raised a presumption of right; and he added that ever since the case of Darwin v. Upton, 2 Wms. Saund. 175-c it has been held that in the absence of any evidence to rebut the presumption a jury should be directed to act upon it. In Bealey v. Shaw, 6 East. 208 Lord Ellenborough says:--"I take it that 20 years'' exclusive enjoyment of water in any particular manner affords a conclusive presumption of right in the party so enjoying it, derived from grant or Act of Parliament."

59. This, if a correct view of the law as I believe it is, shows that the presumption is one of law and not one of fact, for a jury ought not to be directed to acts upon a mere

presumption of fact if they believe that the fact does not exist.

60. In Wright v. Howard 1 S. and S. 190 the Vice Chancellor Sir John Leach, who had to determine the facts as well as the law, with reference to a right to the use of water, stated that the proprietor who claimed the right, must prove an uninterrupted enjoyment for 20 years; and he added, "which term of 20 years is now adopted upon a principle of general convenience, as affording a conclusive presumption of grant," that is presumption conclusive upon the Court or Jury, not if actually believed, but if not rebutted.

61. In possessory actions for the obstruction of an easement, it was never necessary for the plaintiff to set out the origin of his title to the easement: it was sufficient to state that be was possessed of the right; as for instance, in an action for obstructing lights, it was sufficient to allege that the plaintiff was possessed of a dwelling-house, in which there was a window through which the light and air ought of right to enter for the convenient and wholesome use of his dwelling-house. See Comyn''s Digest, Title Pleader, (c) 39; 2 Williams Saunders'' Reports, 113-a.

62. In the precedent recited in Aldred''s case 9 Coke''s Rep. 53, it was alleged, that the plaintiff was possessed of a dwelling-house and seven windows or lights, by force of which the said plaintiff, and all those whose estate he had in the said house, had from time immemorial had, and been used to have for them and their tenants, diverse wholesome and necessary easements and commodities by reason of the open air and light, and that the defendant, maliciously intending to deprive him of the said easement and "messuagium obscurare predictum horrida tenebritate," created a new building whereby the plaintiff lost the said easement '' et maxima pars messuagii pradicti horrida tenebritate obscurata fuit.''''

63. In the plea of justification of a trespass, the case was different. There it was necessary to set out the origin of the defendant''s title and if a defendant could not make out a right by prescription, he was forced to show that be had a title by grant or some other legal title, amongst which Lord Ellenborough said he would presume, if necessary, an Act of Parliament, When defendant claimed by deed, he was obliged to make profit of it or bring it into Court, or to allege and prove by presumption or otherwise that the alleged grant was lost.

64. I think that prior to the Prescription Act, a Judge in England, upon proof of 20 years'' uninterrupted use of light or other easement, would have misdirected a Jury if he had told them that they ought not, or need not, to find in favour of the right, if they believed that in point of fact no grant ever existed. In the case of an action for obstructing an easement, it was not necessary to direct the Jury that the evidence raised a presumption of a lost grant; it was sufficient to tell them that it raised a presumption of the right, without stating how it originated. It was only when a lost grant was pleaded and put in issue, that it became necessary to direct them upon the subject of a grant.

65. The legal unrebutted presumption of a grant, no more depends upon the actual belief of its existence, than the legal unrebutted presumption of prescription, depends upon the actual belief that the right has been enjoyed from the time of Richard I.

66. In Darwin v. Upton 3 Wms. Saund. 175-c; Lord Mansfield said: "Time immemorial is only presumptive evidence; "yet no one would, I think, contend that a Judge would be right in finding against a right claimed by prescription, upon evidence of 20 years" adverse user, merely because he believed without evidence to rebut the presumption, that the easement had not, in fact, been used ever since the time of Richard the First.

67. In the same case, Lord Mansfield said, "the enjoyment of lights, with the defendant"s acquiescence for 20 years, is such a decisive presumption of a right by grant or otherwise, that unless contradicted or explained, the Jury ought to believe it."

68. If a Jury ought to believe, or to be directed to act upon the presumption, a Judge in this country ought, in my opinion to find the right exists, unless the presumption is rebutted. If questions of this sort are to depend upon the actual belief of prescription, or that a grant was actually made, I am afraid that Dearly all the lights in this city might be darkened to-morrow, without the owners having any redress. We must look before us before we start new doctrines, or I fear we may cause much mischief.

69. The case of Darwin v. Upton, above cited, was, I believe, the first case in which it was held to be actionable to obstruct the light to a dwelling-house which was not ancient, that is to say, which had not existed from time immemorial; but it was never intended that 20 years" enjoyment of light without obstruction, would create a greater right than could be acquired by prescription, or would justify a presumption of a grant by which the owner of the adjoining land had bound himself not to do anything upon his land which could render the plaintiffs house less light or of less value than it always had been. It would be unreasonable to presume that the owner of the servant tenement intended to grant a right to the use of more light than was necessary for the comfortable and convenient habitation of the dwelling-house, or that be intended to increase the value of his neighbour"s house, by reducing the value of his own land. Principles of general convenience, upon which the presumptions of right to light by prescription or grant depend, require that lights in a dwelling-house, which have been uninterruptedly used for a long time, should not be darkened so as to render the house unfit for comfortable habitation, but they do not require such a presumption as would impede the erection of buildings on the servant tenement, which would not deprive the dominant house of any degree of what was reasonably necessary for comfortable habitation.

70. To carry the case further, in large cities especially, would cause great inconvenience and depreciation of property without any corresponding benefit. I cannot say that the English law of presumption as to the right to light and air, where nothing is done on the servant tenement which the owner of it could prevent by action, is the perfection of reason. But it has grown, from time to time to meet man"s wants, and it has been founded

upon actual or supposed principles of convenience. The reasoning of that eminent Jurist, Savigny, may be apparently more logical, but even his arguments are not strictly accurate, for when be draws a distinction between the acquisition of the possession and the acquisition of the right, and bases the latter on the animus possidendi, it is not very easy to discern how the argument can be accurately applied to light or to an incorporeal hereditament such as a way, which is not capable of actual possession, but only of that which the Civil law calls a quasi possession.

71. Bracton considers the obligation to respect the natural course of a flowing stream as a duty imposed by law, and that the owner of land over which water flows has no more right to divert the course of a stream than he has to pen back the water or to divert it into his neighbour''s land.

72. Mr. Justice Story lays it down that the right to have a stream flow in its accustomed course, is a right universally incident to the property in the adjoining land. He says "prima facie, every proprietor upon each bank of "a river, is entitled to the land covered with water, in front of his bank, "to the middle thread of the stream; or, as it is commonly expressed ad "medium filum aqua. In virtue of this ownership, he has a right to the "use of the water flowing over it in its natural current, without "diminution or obstruction. But, strictly speaking, be has no property in "the water itself, but a simple use of it while it passes along. The "consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether "" the party be a proprietor above or below in the course of the river, "the right being common to all the proprietors on the river; no one has a right to diminish the quantity which will, according to the natural" current, flow to a proprietor below, or to throw it back upon a proprietor "above." Tyler v. Wilkinson Mason. U. S. R. 397; see Gale on Easements, 131.

73. It is not necessary here to consider what light is. The principle applicable to streams of water has not been extended to rays of light; for it would be contrary to general convenience, and no man could erect a wall or any other building upon the land without the consent of his neighbour, for be would thereby obstruct Borne of the rays which pass over his land to his neighbour''s. But when a man erects a house at the extremity of his own boundary, and uses the light which passes over his neighbour''s land, and through the windows of the house, he is in fact, as much in possession of that part of every ray of light which enters his house, as he is of a way over his neighbour''s land, and after 20 years'' uninterrupted enjoyment, he may be presumed to have acquired as great a right to prevent the obstruction of the light necessary for the habitation of his house as be has to prevent the obstruction of a stream of water on his neighbour''s land above his own. He appropriates to his own use for the purpose of habitation, and uses for that purpose as of right, every ray of light which passes over his neighbour''s land, and after 20 years'' enjoyment with the acquiescence of his neighbour, he has as great a right to have light pass in its natural and accustomed course, so far as is necessary for the reasonable and comfortable use of his house, as be would to have a stream of water pass over his neighbour''s land, without obstruction. But be cannot appropriate more of the light than is

necessary. If he requires more, either for luxury or for delight or to increase the value of his property, he must obtain an express grant. The law of presumption will not assist him. There is no more reason in support of the law relating to the acquisition of the right to light by prescription than there is in support of that which relates to the acquisition of it by uninterrupted enjoyment for 20 years. The principle is the same, whether the house is 700 years old or only 100. Nor is there any substantial difference in principle between an enjoyment for 20 years, and an enjoyment for 19 years and 364 days. In the one case, however, the law presumes a right, in the other it does not. The law has, in my opinion been too long settled for us to overturn it: and in doing so, we should probably cause great mischief.

74. I understand the law to have been clearly laid down as far back as the year 1786, that the enjoyment of light with the defendant"s acquiescence, is such a decisive presumption of a right by grant or otherwise, that unless contradicted or explained, the Jury ought to believe it. It is capable of being legally rebutted, like the presumption of a right by prescription, or any other presumption of law, by proof of facts legally inconsistent with such presumption. As the presumption of prescription may be rebutted by proof of unity of seisin, that is to say, that the same person has been seized of both the servant and dominant tenements within the time of legal memory, so the presumption arising from enjoyment may be rebutted by proof that the owner of the servant tenement was not capable of acquiescing in the easement : as for instance, that he was an infant, or that he had only a limited interest in the estate. Time immemorial was declared by Lord Mansfield, to be only presumptive evidence in the same case in which he declared that 20 years" uninterrupted enjoyment was only presumptive: 2 Williams Saunders, 175-b.

75. The actual disbelief by a Jury of the existence of a right which the law presumes, does not rebut the legal presumption; the presumption can be rebutted only by the existence of facts legally inconsistent with the presumption. There is no more reason for holding that the belief of a Jury that no grant ever actually existed, is sufficient to justify them in finding against the right, than there is for holding that their belief that the enjoyment has not been, from the time of Richard I, is for finding against the presumptive evidence a right by prescription. If the presumption were one of fact only and not of law, a Judge would not be justified in telling the Jury that they ought to find according to the presumption.

76. It was said by Mr. Justice Bayley, in the case above cited, of Cross v. Lewis 2 B. and C. 686 that an obstruction was the only means of preventing the acquisition. I am not sure that independently of the Prescription Act, the presumption of acquiescence may not be rebutted by evidence of non-acquiescence, such as a written protest or notice served by the owner of the servant tenement, at the time when the erection of the dwelling-house was commenced, and continued from time to time. One would imagine that non-acquiescence might be proved by evidence of that nature as well as by proof of the incapacity of the owner of the servant tenement. or of the limited interest of the person in whose time the right was enjoyed.

77. It would be rather hard to compel a man to block up a window at the top of a five-storied house, on his neighbour''s land, in order to preserve his right to build a similar house on his own land. There are many things from which a man may derive pleasure which may be obtained by express grant, and which cannot be obtained by prescription or uninterrupted use for 26 years.

78. I agree with Mr. Justice Norman that the plaintiff has not sustained actual damage by the obstruction of light, and, in point of law, I think he is not entitled to nominal damages. The damage has not resulted from an injury for which he is entitled to maintain an action, as the plaintiff has still as much light as is necessary for the comfortable habitation of the house. More light than be has, was not necessary for habitation. Whatever portion of light he has been deprived of, is merely a diminution of that which was for the delectalio habitantis, not of that which was necessary for the habitation of man.

79. The plaintiff''s own witness Mr. Osmond stated, that in his opinion the chief damage was done by depriving the house of the south wind. He said, '''' I did not go into all the rooms of the upper floor, only the centre room. There was light enough in that room to read by comfortably. The light of a room, with such a verandah before it, would be affected by the alleged alteration, but not to a very considerable extent.'' The witness says the alleged alteration would cause diminution in light, which would affect the value, but he does not say that there was not enough light for the convenient use of the dwelling-house.

80. Mr. Rowe, also one of the plaintiff''s witnesses, says: "The chief damage is shutting out the south breeze; damage caused by diminution of light would not be serious. It was quite light enough when I was in the middle room of the upper floor.''

81. I do not think that there is any evidence, from which I ought to presume, that, in fact there was any grant which precluded the defendant from using his land in such a manner as to cause the plaintiff a merely nominal damage in regard to right. All that I find is that which I am bound by law to presume, namely, that the plaintiff had a right to the access of such light and air as are necessary for the convenient and wholesome use of his house. But I find that such right has not been infringed. To presume such a grant as would entitle the plaintiff to mere nominal damages would be extending the presumption of law beyond its proper limits, and would convert that which was founded upon the principle of general convenience and a consideration of what was necessary for habitation into an instrument of oppression, a source of general inconvenience in large cities and towns, and would prevent the use of land for those purposes which general convenience may require.

82. There may be some nisi prius cases at variance with the above opinion, but I think they cannot be supported to their full extent.

83. The above remarks are strengthened when we consider, that under the old law the action for obstructing lights was treated as an action for a nuisance to an ancient

dwelling-house, and has by modern oases been extended by considerations of convenience, if not of necessity, to dwelling-houses of more modern date. To presume that the owner of the defendant''s land intended that the plaintiff''s house should have more light than was necessary for comfortable use and habitation, would be to presume that the defendant or his predecessors intended to render the plaintiff''s house valuable, by binding himself and his own land to an extent which would depreciate the value of his own property. Such a presumption would in my opinion be a violent presumption not warranted by law, nor required by the rules which were originally based upon the principles of public convenience. For the above reasons, it appears to me that the decree ought to be affirmed with costs, and to be taxed according to scale No. 2.