The Court dissents from Mr. Pinhey's view, that the Munsif can take cognisance of a suit brought against a public servant for acts done by him in his public capacity, and would suggest that he review the order, which be very properly sent up for the opinion of the Court.

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LATE SUPREME COURT, EQUITY SIDE.

1862.
Dec. 22.

PRA'NJIVANDA'S HARJIVANDA'S .....*Plaintiff.*
MAYA'RA'M SA'MALDA'S and RANSORD RAGHUNA'TH .....*Defendants.*

Prescription—Light and Air—Windows—Injunction—Attachment.

To acquire by prescription a right to the uninterrupted access of light and air through the windows of a dwelling-house, it is sufficient that the building in respect of which the right is claimed has assumed the appearance and outward aspect of a dwelling-house for more than twenty years before the time of the commencement of the suit, though not completed or used as a dwelling-house for the full period of twenty years before that time.

When a building is so far completed as to show an intention to use it as a dwelling-house with certain windows or openings for light and air, from that time it becomes the duty of those who are concerned in preventing a prescriptive right to the access of light and air from arising in respect of such windows to take steps to challenge and hinder the acquisition of such right.

If an injunction has been granted restraining a person from interrupting the access of light and air to certain windows, and the Court considers that the injunction has been infringed, an attachment will issue, even though the defendant has proceeded according to the advice of his surveyor and legal adviser in constructing the building complained of as a breach of the injunction. The Court in such cases does not consider itself bound by the opinion of surveyors, but will form its own judgment as to the probable effect of the structure complained of.

IN this case a bill of complaint had been filed, on the 18th day of November 1861, on the Equity side of the late Supreme Court, by the plaintiff against the defendants, praying (amongst other things) for an injunction to restrain the defendants, their servants and agents, from erecting any building, or completing or continuing a certain wall in the bill mentioned to such an elevation, or otherwise in such sort, as to darken or obstruct any of the windows or lights of the plaintiff's dwelling-house also in the bill mentioned until the further order of the Court.

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The bill stated that the plaintiff was possessed in perpetuity of a certain dwelling-house in the island of Bombay, in which were certain windows through which light and air had, during twenty years and upwards before the commencement of the suit, entered, and of right ought to enter, for the convenient and wholesome use, occupation, and enjoyment thereof; that the defendants had commenced building a house on the north side of the plaintiff's house, and were erecting and intending to complete a high wall within a few inches of the plaintiff's windows on that side, and that thereby the said windows would be greatly darkened and deprived of light and air, and the plaintiff's house rendered uncomfortable, unwholesome, and unfit for habitation, and that applications had been made to the defendants to desist from such building, but without effect. On the 13th of December 1861 the plaintiff moved *ex parte* on affidavits, and obtained an order for the issue of an injunction in the terms of the prayer of his bill till the further order of the court. The defendants did not move to dissolve the injunction, but on the 7th of April 1862 filed their answer, whereby they alleged that the plaintiff's house, if not built entirely within twenty years before the commencement of the suit, had not at any rate been completed or used as a dwelling-house for so long a period as twenty years. They denied that at the commencement of the suit the plaintiff had acquired any right to have an unimpeded access of light and air to his said windows; they admitted their proceedings, and intention to erect certain buildings as alleged, and that to some extent the plaintiff's house would be deprived of the access of light and air, but, according to their belief, the plaintiff's enjoyment of the house would not thereby be materially prejudiced or interfered with, as the rooms in question had other windows than those which would be to some extent darkened, and that sufficient light and air could come in through such other windows.

The cause came on for hearing on the 22nd and 23rd of November 1862.

Westropp and *Green* for the plaintiff.

Lewis (Advocate General) and *Dunbar* for the defendants.

Evidence was gone into on the part of the plaintiff, the effect of which was that the plaintiff's father, in October 1840, purchased the ground on which the plaintiff's house now stands; that there was then a dwelling-house on the

ground; that the father pulled down the old house and built the present one, having commenced such new building about June or July 1841; that the new house differed in some respects from the old one, especially as to the position and number of the windows; that the windows, frames, and beams of the roof of the new house had been put in their places before the beginning of November 1841, but that the house was not completely finished till some months after, and was not inhabited till the month of August 1842, the owner having waited some time for a propitious day on which to commence his habitancy.

Cur. ad. vult.

December 22. SAUSSE, C.J.:— The period during which the plaintiff in this case and his father appear by the evidence to have enjoyed the uninterrupted access of light and air to the windows of his house borders very closely on the period, viz., twenty years, prescribed by the law for the acquisition by user of a right of this description. We think, however, that the plaintiff has made out his claim to the relief he seeks. We consider that the enjoyment of light and air began from the time when the window-frames were put into, and the roof-tree and beams laid on, the new building. When the building assumed the appearance and outward aspect of a dwelling-house, there could be no doubt as to the intention of the then proprietor in erecting it. The ground of the rule of law, by which the fact of twenty years' user and enjoyment of an advantage like that of the access of light and air is held to confer a right to such advantage, is this, that it is thence presumed that the persons concerned in preventing such right from being acquired have agreed or assented to the acquisition of the same. It would be scarcely reasonable in this case to suppose that a person who had so far advanced his building as the plaintiff's father had in this case, in November 1841, had not some such agreement or assent. It appears to us to be established in evidence that some days before the 18th of November 1841 the window-frames of the new house had been put in, the beams of the roof laid, and in fact that the building had assumed the form and appearance of a house. I have come to the conclusion, therefore, that a perpetual injunction must be awarded in the words of the prayer, and inasmuch as the defendants have contested and denied the legal right of the plaintiff they must pay the costs of the suit.

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COUCH, J. :—I am of the same opinion. The principle on which the acquisition of rights of this kind is based is very clearly and fully stated in the judgment of Mr. Justice Littledale in *Moore* v. *Rawson*.* Applying the principles there laid down to the present case, I consider that when a building assumes the shape and appearance of a house, and by the placing of window-frames the intention is indicated that by their means the access of light and air is to be had, then begins the time for persons interested in preventing such user from becoming a right, to challenge the same, and take steps to prevent such right from being acquired. Being of opinion that the time when such duty of challenge arises can be sufficiently ascertained in this case, and that it runs from the time when the window-frames were placed, and the structure assumed the shape and appearance of a dwelling-house, it is not necessary to consider the question when a house can be said to be completed. I agree with the Chief Justice that a perpetual injunction should be awarded as prayed, and with costs.

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On the 6th of November 1863 the plaintiff moved on notice for an order for an attachment against the defendants for breach of the injunction awarded at the hearing of the cause.

White and *Green* for the plaintiff.

Lewis (Advocate General) and *Dunbar* for the defendants.

The facts stated in the affidavits filed for the purposes of this motion, so far as the same are material, and the points urged in argument, sufficiently appear from the judgment of the Court, delivered by the Chief Justice on the 26th of November 1863, and which was as follows :—

SAUSSE, C. J. :—This is an application that the defendants be committed for breach of a perpetual injunction granted

* 3 Barn. & Cress. 340 :—The passage alluded to by the Judge is the following : " Every man on his own land has a right to all the light and air which will come to him, and he may erect, even on the extremity of his land, buildings with as many windows as he pleases. In order to make it lawful for him to appropriate to himself the use of the light, he does not require any consent from the owner of the adjoining land. He, therefore, begins to acquire the right to the enjoyment of light by mere occupancy. After he has erected his building, the owner of the adjoining land may afterwards within twenty years build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies, from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy the light without obstruction, so long as he shall continue the specific mode of enjoyment which he had been used to have during that period."

upon the 22nd of December 1862. By that injunction the defendants were restrained from "erecting any building, or completing or continuing to build a certain wall therein referred to, to such an elevation, or otherwise in such sort, as to darken or obstruct any of the windows or lights of the plaintiff's dwelling-house.

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The plaintiff was possessed of a house three stories high. In the third story there were three windows, and in each of the first and second stories one window, all facing to the north. There was no interruption to the free access of light and air through these windows for over twenty years. The defendants' house (until the alteration complained of) was lower than the three windows in the third story, and did not extend so far to the east as the windows in the first and second stories of the plaintiff's house. The defendants, having in 1862 pulled down their said house, were extending its dimensions to the east five feet beyond the plaintiff's windows, and within a few inches in front of them. They were also intending to raise the walls of this new building to a greater elevation than the plaintiff's house, and at a similar distance from the plaintiff's upper windows. The plaintiff, having applied for, obtained an injunction until the hearing, when it was made perpetual in the terms before mentioned. The defendants then erected the wall of their house in front of and within two feet of the plaintiff's windows, so as to block up all view from them, and leave barely sufficient space for the shutters of those windows to open outwards. The plaintiff complains of that erection as a breach of the injunction against "erecting any building or wall to such an elevation or otherwise in such sort as to darken or obstruct the windows or lights of the plaintiff's house." The defendants show as cause against this application that they desired to carry out the terms of the injunction, and with that view consulted Mr. Wilcox, Surveyor to the Municipal Commissioners of Bombay, and that, after a conference between him and their counsel, they carried out his directions in every respect except in the building of two small cross walls enclosing plaintiff's windows, which, however, they submitted and offered to remove. They now insist that after the removal of these the plaintiff's house in respect of air and light will not be in any respect materially injured, and they also rely upon an affidavit made by Mr. Wilcox in their behalf, in which he states his opinion to be "that if the obstruction of the two small walls

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be removed sufficient light and ventilation will be secured to the plaintiff's rooms in which the windows are, and that the light which the plaintiff derived from the said windows previously to the building of the defendant's said wall will not be materially obstructed by such wall, and that the ventilation of the plaintiff's house by means of the said windows will be increased rather than diminished, in consequence of the gully forming a kind of channel up which the wind will blow with greater force into the windows than if quite open to the direct breeze." He further says that "he has known cases in Bombay where buildings have been erected within three feet of windows similarly circumstanced, and that the building was not considered to be an obstruction." He also states that "it is the almost universal custom in Bombay of persons building or rebuilding houses by the side of other houses, in the walls of which there are windows looking out upon the new building, to leave a passage or gully varying from two to five feet, and that with such a passage or gully the new building is not considered to be an obstruction." He further adds that "the windows of the plaintiff's house have plenty of light and air," and "that the light and air which the plaintiff enjoyed through his five windows previously to the erection of the defendant's new building has not been obstructed to any material extent by such new building, and that that part of the plaintiff's house near the said windows will not be rendered less habitable, closer, or less healthy than it was previously to such erection, and that the plaintiff is not, and will not be in any way damaged or injured by the erection of the defendant's wall." On the part of the plaintiff, in addition to their own affidavits complaining of the obstruction and of the consequent deterioration in value of their house, a Civil and Executive Engineer, Mr. Robins, swears that the defendants' wall will not allow the free access of light and air; that no sunshine will be allowed to enter, and that the plaintiff will not enjoy nearly the quantity of light and air he before obtained and enjoyed; that no breeze or sun can ever enter, as was formerly the case; that the plaintiff's house will remain darkened, and have a deficiency of light, as all five windows are entirely closed to the north, south, and west, from which last quarter the winds come, and that two of the windows are shut in from the east as well as from the other three aspects. Another surveyor states "that that part of the plaintiff's house near the windows has been materially darkened, and thereby

rendered less habitable." There is thus the conflict of evidence and opinion almost invariably found in similar cases, but can any reasonable man doubt that the light and air entering into windows will be materially obstructed by a blank wall built in front to a greater elevation and within two feet of them? It is quite obvious that such an erection will greatly impede the free access of light and air which the plaintiff had enjoyed for twenty years, and that it must tend to the daily and perpetual annoyance of the owner of the plaintiff's house. In *Gooch* v. *Marshall** Vice-Chancellor Wood defines the right of such an easement thus:—"When a man allowed his neighbour to enjoy a free and uninterrupted access of light and air for upwards of twenty years, he barred himself from the right of raising any building which would impede that light and air which he had conceded for so long a period. In effect he gave away any right he might have to raise buildings which would have as their result the annoyance of his neighbour. Comfort, health, and other similar considerations were not to be lost sight of." That case arose out of an attempt made in London to raise a wall of ten feet to the height of forty-eight feet, and within a distance of twelve feet of the plaintiff's windows, and not within two feet as in the present case. There were there, as here, most contradictory affidavits as to the fact and extent of injury, and it was also contended there, as in the present case, that these rights of easement should be modified according to the locality. With reference to that argument the Vice-Chancellor said that he thought a modification of the ordinary right of easement should be taken into consideration, in accordance with the special locality and all surrounding circumstances, but, although that erection was in London, he did not hesitate to restrain the defendants from erecting that wall within twelve feet of the plaintiff's window. We think that some modification of the ordinary rights of easement may be necessary and reasonable in a town like Bombay. The great difficulty consists in determining what the extent of that modification should be, and had a reasonable discretion been exercised in the present case we should probably have felt reluctant to interfere, but we entertain no doubt that in erecting the wall in the manner they have done the defendants have been badly advised, and have committed a clear breach of the injunction granted by this Court. It has been urged strongly that the

* 1 *Law Times*, N. S., 210.

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Court should act upon the skilled testimony of Mr. Wilcox, the Surveyor to the Municipal Commissioners of this town, who has had great experience in such matters. We think that the extent to which a court should feel bound by such testimony is well laid down in *Wilson* v. *Townsend*,* which also was a case of an obstruction to ancient lights. Several witnesses for the plaintiffs there deposed that the building complained of (which was not in front of, but at right angles to, and at a distance of six feet from, the window) would materially obstruct the light, and to a certain extent the air, coming to the plaintiff's window. On the other hand, as many house-agents, builders, and such persons, equally competent to offer an opinion, deposed for the defendants that there would be no material diminution of the light and air coming to the plaintiff's window. Vice-Chancellor Kindersley, upon that part of the case, said: "on the conflict of evidence I must take leave to say this, that although one is bound to defer to the opinion of what are called skilled witnesses, upon a point where skill and experience *alone* render a person competent to judge, there are some matters upon which any man of ordinary observation and ordinary common sense is capable of forming his own judgment from his own observation and experience." We think that is the true distinction, and we must take leave to form our own judgment upon a case like the present. We cannot understand how anybody can seriously say that the access of light and air to windows would not be materially obstructed and lessened by the erection of a wall of greater elevation in front of and within two feet of them. There is not any custom in Bombay, such as formerly existed in the City of London, by which the possession of ancient foundations was held to confer a right to raise walls to any height above them, without regard to any easement of light which an adjoining tenement might otherwise have acquired by lapse of time. As to the alleged practice, referred to by Mr. Wilcox, of persons who were entitled to ancient lights having permitted buildings to be erected in front of and at a distance of from two to five feet from their windows, we can only say that those persons were at liberty to abandon any rights they had acquired. On the other hand, the files of this court abound with bills filed for injunctions to restrain persons erecting buildings from doing so, so as to impede the access of light and air, and we have no doubt at distances consider-

* 3 *Law Times*, N. S. 352; 6 Jur. N. S. 1109; 1 Drew. & Sm. 324.

ably greater than two feet, and there is no case, we are sure, in which an injunction has not been granted under circumstances similar to the present.

It is not the province of the Court to lay down *à priori* any rule for the modification of this right of easement, which may arise out of the circumstance of its having been enjoyed in a densely built and populated town. The person who has allowed another to obtain such a right over his property will infringe that right at his peril. Within reasonable bounds it is as much the property of his neighbour as the house in respect of which it is enjoyed. It will be far safer for him to enter into some arrangement with his neighbour, than to run the hazard of acting upon his own interested judgment, or of depending upon the mental casuistry by which an opinion can be formed that a front wall erected to a greater elevation, and within two feet of windows which previously enjoyed uninterrupted access of sun, of light, and air, is not only no material injury, but in some respect an advantage to those windows.

We think the order for the committal of the defendants must go, and that they must pay the costs of this application. Although the defendants allege that they completed their wall without objection by the plaintiff, that fact is denied; it appears improbable after the plaintiff obtained the injunction: and although it would have been much better if the plaintiff had applied to the Court before the defendants completed their wall, yet there is not such lâches as should disentitle him to costs, when there has been such a clear breach of the injunction as well as of the directions given by the defendants' surveyor and adviser.

Attachment ordered to issue accordingly. At the suggestion and by the consent of the plaintiff, the writ was ordered to lie in the office for a fortnight before being executed, in order to afford the defendants time to propose terms of arrangement.