1883

LAKSHMAN BHATKAR v. BÁBÁJI BHÁTKAR.

above Rs. 5,000. The Subordinate Judge seems to have been under a misconception as to the wrong inclusion of a *padav* in the family property, as there was, in fact, a mortgage on it held by the defendant; but, after adding this to the ascertained value of the immoveables and such money claims of which there was any evidence, the result is as we have stated. The items seem to have been recklessly, if not fraudulently, overvalued, and the Court is bound to exact a reasonable regard and obedience to the intentions of the Legislature.

For these reasons, we confirm the order appealed against with costs.

Order confirmed.

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice. On appeal before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice West.

1882 *March* 21, 23, 24, 25, 28, 30, 31; *April* 1, 3, 4, 15, 17, 18, 20, 21, 22, 24, 25, 27, 28, 29; *May* 1, 2, 5.

On Appeal, 1883 *March* 30; *April* 2, 5, 6, 9, 10, 12, 13, 16, 17, 10.

THE LAND MORTGAGE BANK OF INDIA (PLAINTIFFS), *v.* AHMEDBHOY HABIBBHOY AND KESOWRA'M RA'MA'NAND (DEFENDANTS).*

Nuisance—Noise—Smoke and fluff of mill—Injunction—Damages—Combination of injunction and damages—Specific Relief Act I (of 1877)—Delay—Acquiescence—Right of reversioners to sue.

The plaintiffs were owners of the Grant Buildings situated at Colába in Bombay. The said buildings comprised two three-storied blocks known respectively as the eastern block and the western block. Each block consisted of four divisions, those in the eastern block being numbered respectively Nos. 1, 2, 3, and 4, and those in the western block being numbered Nos. 5, 6, 7, and 8. Each block contained thirty-four sets of rooms. The plaintiffs became owners of the Grant Buildings in 1868, and had ever since derived a considerable income from the rooms by letting them as dwelling rooms to Europeans at an average rent of Rs. 50 a month.

The defendants were owners of an adjacent cotton mill known as the Nicol Mill, which was erected in 1873. Prior to 1873 the site of the mill was occupied by the buildings of the Hydraulic Press Company, which were erected in 1868. These premises were in 1873 purchased by the Nicol Press and Manufacturing Company, who thereupon proceeded to build the Nicol Mill. On the 3rd August, 1874, the erection of the mill having then just commenced, the plaintiffs' solicitor wrote to the Secretaries of the Nicol Press and Manufacturing Company as follows:—"It is rumoured that it is intended to carry on the business of spinning

* Suit No. 57 of 1881.

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

and weaving in the buildings now being erected. A business of this nature carried on so close to the Grant Buildings will render our clients' property comparatively valueless, and we are instructed to bring this fact to your notice and to say that the Bank will not permit any business of the kind to be carried on to the detriment of their property." To this letter the Company replied that the business of the Hydraulic Press Company had been previously carried on by that Company on the same site without any remonstrance either from the plaintiffs or from the occupants of the Grant Buildings; that the value of the plaintiffs' property would be increased, not depreciated by the erection of the new mill; that the plaintiffs had been aware of the intention of the Nicol Company to convert the Hydraulic Press Company's premises into a spinning and weaving mill, and that they should have entered their protest months before; that under the circumstances the plaintiffs had no right to interfere in the working of the mill, and that the Nicol Company therefore intended to continue the erection of the building and to use it, when completed, for the purposes of the Company.

The mill was completed and commenced working in June, 1876, with 13,644 spindles, there being room and engine-power sufficient for 40,000 spindles and 250 additional looms. In March, 1877, the number of spindles was increased to 19,832, which was the number in the mill at the date of suit. Since March, 1874, the eastern block of the Grant Buildings had been closed and not offered to tenants, the demand for rooms of that character having been only sufficient to fill the western block. In 1878, however, the demand again increased and the eastern block was re-opened and let to tenants. Division No. 1 being opened in January, 1878, and Division No. 2 in March, 1878, Division No. 3 in November and Division No. 4 in December, 1878. Complaints having been received from the tenants of these divisions of the nuisance arising from the Nicol Mill, the plaintiffs in December, 1878, sent instructions to counsel to prepare a plaint against the Nicol Press and Manufacturing Company. On the 26th of that month, however, a resolution was passed to wind up the Company and the working of the mill was discontinued. In consequence of this no plaint was prepared, but the plaintiffs' solicitor sent a notice to the Liquidators of the Company referring to what had taken place and warning them not to sell the mill without giving the purchaser notice of the plaintiffs' intention to take proceedings against any person who should recommence to work the mill. Advertisements to that effect were also published in the English and native daily newspapers. On the 9th August, 1880, hearing that the mill was to be put up to auction, the plaintiffs sent to the Liquidators a similar notice. On the 25th August, 1880, the defendants' mill was put up for sale and the notices were read out by the plaintiffs' solicitor. The defendants were present and heard the notice read. The defendants purchased the property for Rs. 3,61,000, and the sale was confirmed by the Court. On the 1st January, 1881, the mill recommenced working, having been idle for two years. On the 26th January, 1881, a notice was sent to the defendants to discontinue the working of the mill on pain of a suit. The defendants replied denying the nuisance and stating that any suit would be defended. The suit was filed on the 5th February, 1881. The plaintiffs alleged a nuisance, especially to the tenants of the eastern block of the Grant Buildings arising from the noise, smoke and cotton fluff and smells issuing from the defend-

ants' mill. They complained that the said nuisances would be much increased when the defendants carried out their intention of completing the number of spindles and looms for which the mill was built. They prayed for an injunction and Rs. 1,000 damages. The defendants denied the alleged nuisance and contended that the plaintiffs were debarred from the relief claimed.

At the time of the filing of the suit the only rooms in the Grant Buildings that were vacant were the following:—In the east block two rooms in Division No. I, one room in Division No. III, and one room in Division No. IV. In the west block five rooms were vacant. The total net rental of the vacant rooms was Rs. 359 a month, and of the occupied rooms Rs. 2,410. Evidence was given that many tenants had vacated their rooms in the east block on account of the nuisance experienced from the mill, but that the demand for rooms was so great that other tenants were found to fill the vacancies almost as soon as they occurred.

At the time of the hearing of the suit four rooms were vacant in the east block and none in the west block. Between the date of the filing of the suit and the hearing, changes had been effected in the mill which decreased the nuisance, *e. g.*, new boilers were erected, smokeless coal was used, screens, steam-jets and baffle-plates were introduced. In order to diminish the noise double fixed windows were put in on the north side of the mill and the cog-wheeled gearing was bricked up.

At the hearing it was contended—(1) that the mill was no nuisance; (2) that even if it was, the plaintiffs were debarred by their conduct from objecting; (3) that the plaintiffs being reversioners were not entitled to sue.

Held, on the evidence, that the plaintiffs were not debarred from suing by acquiescence or laches, but that the defendants and the previous owners of the mill had been at every stage acquainted with the plaintiffs' intention to resist the working of the mill if it proved to be a nuisance;

(2). That the working of the mill was a nuisance to the occupants of Divisions 2, 3 and 4 by reason of (*a*) the noise and also by reason of the (*b*) smoke and cotton fluff issuing from the mill during the monsoon;

(3). That the only cause of action on which the plaintiffs could rely in support of their claim to an injunction was the diminution in the value of their property owing to the working of the mill being a nuisance in respect of the four rooms vacant in Divisions Nos. 2, 3 and 4, at the time of the filing of the suit;

(4). That the efficacy of the changes and improvements made by the defendants after the filing of the suit for the purpose of diminishing the nuisance complained of depended so much on the good intention and constant personal care of the defendants and their servants that it ought not to influence the question of injunction when once the nuisance was proved to have existed;

(5). That although (the plaintiffs being at the date of the suit entitled only to complain of the nuisance as to four out of sixty-eight sets of rooms) it might be said there was no material diminution of the value of the property arising from the nuisance, the Court in considering the propriety of granting an injunction would have regard to the fact that the injunction, if granted, would render it unnecessary for the plaintiffs to bring an action in respect of all the other rooms in Divisions Nos. 2, 3 and 4 after giving the tenants notice to quit, and so prevent that multi-

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

plicity of suits on which an injunction is authorized by section 54 of the Specific Relief Act. Under the special circumstances of the case the question whether an injunction should go, should be dealt with as if the plaintiffs had a right of action in respect of all the rooms in Divisions Nos. 2, 3 and 4;

(6). The only interest of the plaintiffs in the Grant Buildings being a personal interest and the only object of the plaintiffs having been to secure the highest value for their property, and considering that, from the nature of the case, an injunction, such as the plaintiffs prayed for, would place the defendants entirely in the power of the plaintiffs, the relief given to the plaintiffs should assume the form of pecuniary compensation rather than of an injunction, and directed further evidence to be taken as to the diminution in value of the plaintiffs' property caused or likely to be caused by the nuisance so far as it affected Divisions Nos. 2, 3, and 4 of the eastern block.

After taking further evidence the Court considered that the case would be best dealt with by a combination of damages and injunction; and made on order for an injunction to issue against noise, smoke and cotton fluff so as to be a nuisance to the plaintiffs as owners or to their tenants for the time being of Divisions Nos. 2, 3 and 4. Such injunction not to issue in case the defendants should pay to the plaintiffs the sum of Rs. 40,000 before the expiration of a fortnight from the date of the decree. In the event of the payment of the said sum to them, an injunction to issue restraining defendants from working the said mill otherwise than with closed double glass windows on the side next the Grant Buildings, and also restraining defendants from allowing any smoke or cotton fluff to issue so as to cause such nuisance as aforesaid with liberty to plaintiffs to apply in case the noise be materially increased beyond what it is at present.

On appeal,

Held per BAYLEY, C. J. (Acting), and WEST, J., that admitting that money compensation was a right form of relief, it should be compensation measured by the premises not owned but occupied by the plaintiffs; in other words the rooms unlet. It was only in respect of these that the plaintiffs were competent to sue, and they could not be entitled to compensation on a more extensive ground. It was only in respect of the rooms in question that the present suit and the decree therein could guard the defendants against further actions. An award of Rs. 40,000 to the plaintiffs could not prevent any tenant of the rooms affected by the nuisance from suing the defendants on the same grounds as were taken by the plaintiffs in this suit. It would be unreasonable that the defendants should be made to pay as damages in bulk to persons not legally entitled what they might have to pay over again to those who are or may be entitled in detail. For the damages arising to the plaintiffs on account of the rooms unlet at the institution of the suit, Rs. 1,000 would afford sufficient compensation, and the sum awarded should be reduced to that amount.

The decree was varied accordingly and a clause was also inserted, distinctly providing against any increase of smoke, cotton fluff or noise of machinery beyond what subsisted at the date of the decree, and further providing that in case any invention should be made by which the nuisance might easily be diminished,

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

the decree was not to be deemed to prejudice the right, if any, the plaintiffs as owners or the tenants of the Grant Buildings to require the defendants to introduce such invention into the said mill so as to cause the least annoyance reasonably possible.

THIS was a suit for an injunction to restrain a nuisance caused by the working of the defendants' cotton mill, and for damages.

The plaintiffs were owners of certain premises known as the Grant Buildings, situated at Colába, in the Island of Bombay. The first defendant Ahmedbhoy Habibbhoy was the real, and the second defendant the nominal, owner of an adjacent cotton mill known as the Nicol Mill.

The Grant Buildings consist of two large three-storied blocks running in a line nearly due east and west, separated from each other by a narrow cart road, the two blocks being similar in all respects, and known respectively as the eastern and the western block. Each block is divided into four divisions with separate staircases, each division (above the basement) being divided into several large rooms running right through the building and having windows at both ends, the easternmost and westernmost rooms in each block having also east and west windows respectively north and south. These rooms are again variously divided into sets of smaller rooms or compartments by means of partitions of wood and canvas about seven feet in height, each set communicating by an outer door with a staircase common to all the rooms in that division. Each division bears a number, the numbers running from 1 to 8, the east block comprising Divisions Nos. 1, 2, 3, 4 and the west block comprising Divisions Nos. 5, 6, 7 and 8. Each block contains thirty-four sets of rooms (exclusive of the rooms on the basement which are not used as dwelling rooms), the two end divisions of each block containing each ten sets of rooms, and the two mid-divisions each seven sets of rooms. Some of the rooms in each division are contained, not in the main building of the block but in projecting wings, two of which in each block run out from the main building or its southern side to the extent of 40 feet, affording extra room accommodation to the first and second floors and a flat roof or terrace to the third floor. These projections occur midway between each successive

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

pair of divisions. The plaintiffs have for many years past derived a considerable income from the rooms by letting them as dwelling rooms to Europeans at an average rent of Rs. 50 per month.

The defendants' mill is to the south of and runs parallel to the eastern block of plaintiffs' buildings throughout its entire length at a distance of 70 feet from the windows in the main south wall of the latter and only thirty feet from the windows in the south wall, a road 30 feet wide intervening between the mill and the low wall which bounds the plaintiffs' premises on the south side. The mill building which is a larger building than either block of the Grant Buildings consists of a ground floor and two upper floors, and has two chimneys at its western extremity—the one, the main chimney, for carrying off the smoke, 101 feet in height; and the other, an iron tube 73 feet 6 inches in height, running up alongside the former on its northern side, and used for carrying off the dust and cotton fluff emitted by the mill. The centre of the base of the main chimney is distant 120 feet from the south-west angle of the main walls of the eastern block of the Grant Buildings. The engine which drives the mill, as well as the gearing which communicates the motion to the spinning machinery on the several floors are both situated towards the western end of the building, the latter being what is technically known as cog-wheeled gearings and running from the floor to the top of the building. The preparing machinery, including the blowing machinery and all the machinery in the card-room, covers the larger part of the ground floor. The other floors are occupied by the spinning machinery, which, however, only covers a portion of each floor, the mill being capable of working some 15,000 to 20,000 more spindles than it actually contains.

Close to the western block of the Grant Buildings is the "Cotton Green", a large open piece of ground, on which cotton is exposed for sale. From November to the beginning or middle of June the traffic along the north and west faces of the Grant Buildings and in all parts of the Cotton Green caused by the cartage of bales of cotton to various parts of the Cotton Green and from one part of the Cotton Green to another, is very considerable. By the beginning or middle of June, how-

ever, when the rainy season commences it has wholly ceased, and for the next five months there is no cotton traffic at all.

The Grant Buildings were built about the year 1836, and in 1865 were mortgaged to the plaintiffs for a sum of Rs. 7,50,000. In 1867 the plaintiffs entered into possession, and in 1868, the mortgagor having become insolvent, the property was put up to auction and the plaintiffs became the purchasers for a sum of Rs. 2,50,000.

The Nicol Mill was built by a company called the Nicol Press and Manufacturing Company in the year 1874-75, on the site previously occupied by a press company called the Hydraulic Press Company. The buildings of the Hydraulic Press Company, erected in 1868, consisted of two low single-storied blocks, one to the south of each of the two blocks of the Grant Buildings. When the Nicol Press and Manufacturing Company purchased this property in 1873 they knocked down the easternmost of the two blocks, and substituted the larger premises above described as the Nicol Mill. The other, the western block of buildings erected by the Hydraulic Press Company, remained as it was, and was afterwards used, both by the Nicol Press Manufacturing Company as well as by their successors the defendants, merely as godowns for the storage of cotton. The chimney erected by the Hydraulic Press Company was also allowed to stand, and is the chimney above described as the main chimney of the Nicol Mill, the only alteration subsequently in it being an addition to the top of it of an iron cylinder 6½ feet in height which brought up the extreme height of the chimney to 101 feet.

The purchase by the Nicol Press and Manufacturing Company of the premises of the Hydraulic Press Company occurred in the latter end of 1873. On the 3rd August, 1874, the solicitors of the plaintiffs wrote to the Secretaries of the Nicol Press and Manufacturing Company as follows:—"It is rumoured that it is intended to carry on the business of spinning and weaving in the buildings now being erected. A business of this nature carried on so close to Grant Buildings will render our clients' property comparatively valueless, and we are instructed

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

to brin this fact to your notice and to say, in case the rumour may be correct, that the Bank will not permit any business of the kind to be carried on to the detriment of their property. We are instructed to give this early notice that the company may be spared any useless expense."

The erection of the new building had then but just been commenced, the removal of the old foundations not having been sanctioned until the 20th June, 1874. On the 25th August the Nicol Press and Manufacturing Company, through their solicitors, replied to the above letter of the 3rd August in the following words:—

"We are instructed on behalf of the Company (the Nicol Press and Manufacturing Company) to inform you that the Company are much surprised at the statements contained in your letter under reply, for, in the first place, your clients must be well aware that the site of the buildings now in course of erection was until recently, the site of the Hydraulic Press Company's premises, which latter Company for some years carried on the business of pressing cotton there, by steam-power, without any remonstrance on the part either of the owners or occupants of Grant's Buildings, although the business of the Hydraulic Press Company was in its nature quite as likely to render your clients' property valueless as the business which the Nicol Press Company proposes to carry on there is likely to prove, and in the next place the Company consider that the effect of carrying on their spinning and weaving business at Colába will be not to depreciate the value of your clients' property, but on the contrary to add considerably to its value.

"We are also instructed to inform you that the Company consider your clients should have entered their protest some months ago, if they seriously meant to object to the Company's business being carried on at Colába, as they must have been fully aware for a long time past that it was proposed to convert the Hydraulic Press Company's premises into spinning and weaving mills.

"The intention of the Company to do this was plainly expressed by an advertisement in the leading local English and Native newspapers of the 9th, 10th, and 11th February last.

"Under these circumstances the Company do not consider that your clients have any right to interfere in the working of the Company's mills, and the Company therefore intend to continue the erection of the buildings, and, when completed, to use the buildings for the purposes of the Company."

The erection of the mill was proceeded with, and on the 11th June, 1878, spinning was commenced with only 13,644 spindles, the buildings and the engine-power according to the report of the directors being sufficient for the working of 40,000 spindles, while the godown to the south of the west block of the Grant Buildings was capable of holding in addition 250 looms. In March, 1877, the number of spindles was increased to 19,832, which remained the number in the mill at the time this suit was brought. At that time, and ever since March, 1874, the eastern block of the Grant Buildings was closed and not offered to tenants, the demand for rooms of that character being then only sufficient to fill the western block. By 1878, however, the demand for accommodation of that character had again increased, and the eastern block was accordingly gradually re-opened and let to tenants at the usual rates—Division No. 1 being opened in the month of January, Division No. 2 in March.

In December, 1878, instructions to prepare a plaint against the Nicol Press and Manufacturing Company were sent to counsel. On the 26th December, 1878, a resolution was passed to wind up voluntarily the Nicol Press and Manufacturing Company and the working of the mill was at the same time discontinued, and on the 11th January, 1879, that resolution was confirmed. In consequence of this and by counsel's advice no plaint was actually prepared, but, instead, the plaintiffs' solicitors sent a notice to the Liquidators of the Nicol Press and Manufacturing Company in which, after dwelling on what had already taken place between the plaintiffs and the Nicol Press and Manufacturing Company, they continued—"Under these circumstances in December last we laid instructions before counsel for a plaint by the Bank against the Company, to obtain an injunction restraining them from working so as prejudicially to affect the said Grant Buildings, and we now write to inform you that this plaint has not been filed, because the Company has ceased working and is

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

in liquidation, and for no other reason, and we beg to give you distinct warning not to sell the mill or in any way deal with it as a going concern without giving the purchaser or assignee notice of the Bank's determination to institute proceedings at once against any person or persons who may recommence the working of the mill."

Advertisements warning intending purchasers that a suit would be brought against any one who again worked the mills were at the same time published in the English and Native daily newspapers in Bombay. On the 30th January, 1879, the solicitors of the Liquidators replied:—"Our clients deny any right on the part of your clients to object to the working of the Company's mill at Colába, on the score of annoyance caused by noise, cotton fluff and fibre, or any other cause. The Company has been working continuously since the beginning of 1876, and during that period no proceedings have been taken against it on the ground of the alleged nuisance, and it is now somewhat late in the day to urge this complaint."

On the 3rd December, 1879, Mr. Greenwood hearing that the mill was about to be put up to auction wrote to the Liquidators forwarding a copy of the notices which had previously been published in the newspapers and calling upon them to cause such notices to be read at the auction sale. At the sale, which took place on the 6th December, the plaintiffs' solicitors attended and read out the notice in English and Gujaráti. No sale was, however, then effected. In January, 1880, and again in June, 1880, Mr. Greenwood hearing that the mill was about to be sold privately, sent to the intending purchasers similar notices. On the 9th August, 1880, hearing that the property was again about to be put up to auction the notice similar to that of the 3rd December, 1879, was again sent to the Liquidators. The notice concluded:—"I may add that in consequence of the Nicol Mill having stopped working, the eastern block of Grant Buildings, which was closed in 1874 and re-opened in 1878, is now all but completely tenanted; and that the rental of both blocks of those buildings has increased by about 200 per cent., which circumstance I desire may be brought to the notice of those persons

who may be present at the sale." The Liquidators replied in much the same terms as those employed in the previous reply of the 30th January, 1879. The property was put up for sale on the 25th August, 1880, and the notice was read out by the plaintiffs' solicitors as on the previous occasion on the 6th December, 1879. Both the defendants were present on that occasion, and heard the notice read. A tenant of the Grant Buildings was also present, and stated that he would proceed against any purchaser who worked the mill. The entire mill property was sold on that day nominally to the second defendant, the first defendant being the real purchaser, for Rs. 3,61,000, and the sale was afterwards confirmed by the Court. The mill and its contents had cost the Nicol Press and Manufacturing Company between Rs. 9,00,000 and Rs. 10,00,000. On the 1st January, 1881, the mill recommenced regular work, having been idle for a period of just two years.

On the 26th January a notice was sent to the defendants to discontinue the working of the mill on pain of a suit. The defendants replied on the 28th, denying the nuisance and stating that any suit would be defended. On the 31st January, 1881, instructions for the plaint were sent to counsel, and on the 5th February, 1881, the plaint was filed.

The evidence given on either side, so far as it is material to the points at issue in the case, is fully dealt with in the judgment of Sargent, C. J.

At the hearing the following issues were raised :—

1. Whether the plaintiffs can maintain this suit ?

2. Whether the working of the defendants' mill has caused or now causes such nuisances as are in the 17th paragraph of the plaint alleged, or any of them ?

3. If so, whether the plaintiffs are not debarred, by lapse of time and acquiescence, from the relief prayed?

4. Whether the plaintiffs have sustained any or what damages as in plaint alleged ?

5. Whether the plaintiffs are entitled to the relief claimed or any part thereof ?

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

The Hon. *F. L. Latham* (Acting Advocate General), *Inverarity* and *Anderson* for the plaintiffs.

Pigot, Lang and *Russell* for the defendants.

Latham for the plaintiffs.—The main questions in the suit are—(1) Is the defendants' mill a nuisance? (2) Are the plaintiffs now debarred from objecting to it? There is a third point as to whether the plaintiffs can maintain this suit. That point I shall deal with in reply. On the first point the evidence will be conclusive. As to the second point, all the authorities are in our favour. Mere delay short of twenty years, unless it amounts to acquiescence, does not affect the right to sue. Here, as the mill only began to work in 1876, there is clearly no question of delay. The defendants must, therefore, prove acquiescence. The facts of the case, however, show that the plaintiffs could not have done more than they did in objecting to the mill and in warning the defendants. Acquiescence is something positive which makes it inequitable to sue. Delay is simple lapse of time. "Acquiescence which deprives a man of his legal rights must amount to fraud": *Willmott* v. *Barber*(1), *Crump* v. *Lambert*(2), *Tipping* v. *St. Hilen's Smelting Company*(3), which was a stronger case than this, as there the delay was greater and an interlocutory injunction was granted. As to the difference between the acquiescence which debars from interlocutory injunction and that which debars from perpetual injunction see Kerr on Injunctions (ed., 1878) 20. Nothing less than twenty years will take away plaintiffs' right, and the time at which the cause of action accrues is when the injury amounts to a nuisance: *Ball* v. *Ray*(4), *Smith* v. *Smith*(5), *Sturges* v. *Bridgman*(6), *Fullwood* v. *Fullwood*(7). The right to impose a nuisance is an easement: Gale on Easements, 483. Sections 26 and 27 of the Limitation Act XV of 1877 therefore apply. An injunction is our right: *Gullick* v. *Tremlett*(8) in which an interlocutory injunction was granted, *Saville* v. *Kilner*(9), *Jamnádás* v. *Atmárám Hurgovan*(10). As to the discretion to give damages for past and prospective

(1) 15 Ch. Div. at p. 105 *per* Fry, J.
(2) L. R. 3 Eq. 409.
(3) L. R. 1 Ch. Ap. 66.
(4) L. R. 8 Ch. Ap. 467 at p. 470.
(5) L. R. 20 Eq. 500.
(6) 11 Ch. Div. 852.
(7) L. R. 9 Ch. Div. 176.
(8) 20 W. R. 358.
(9) 26 L. T. (N. S.) 277.
(10) I. L. R. 2 Bom. 133.

injury instead of an injunction: *Crawford* v. *Hornsey Steam Brick Company* (1). We claim an injunction. We have suffered damage and are likely to do so in the future. Specific Relief Act I of 1877, sec. 54.

[SARGENT, C. J.—Your case would be stronger if the plaintiffs lived in the building instead of letting it to tenants.]

On that point see *Wilson* v. *Townend* (2). We were in possession of part when suit was brought. Possession of part is possession of the whole. The reversioner's right is denied by reason of lapse of time. That is sufficient to entile the plaintiffs to sue.

Pigot for defendants.—Under the circumstances of this case the Court cannot grant an injunction. The Court may possibly give damages but not an injunction: *Aynsley* v. *Glover* (3). In the first place the plaintiffs' delay has been too great.

[SARGENT, C. J.—The east block was not opened until 1878, and just as plaintiffs were about to sue, the mill ceased working.]

Further, the suit of the plaintiffs is not genuine. It is an attempt to coerce the defendants to buy their property at their own price: *Isenberg* v. *East Indian House Estate Company* (4). Under the Specific Relief Act (I of 1877), section 54, the plaintiffs cannot get an injunction unless they show that damages cannot be assessed: *Crawford* v. *Hornsey Steam Brick Company* (1). In *Aynsley* v. *Glover* (3) Jessel, M. R., says he would not grant an injunction in a case where the plaintiff's loss was slight and the loss to the defendant would be great. Here an injunction would cause enormous loss to the defendant. It would stop the mill. Section 54, cl. (*b*) of the Specific Relief Act in effect provides that no injunction shall be granted if the prospective damages can be calculated, in effect giving to this Court the same powers as are conferred on the Court of Chancery by Lord Cairns' Act. The plaintiffs must show that it is impossible to assess such damages. This is certainly a case in which damages would be adequate relief: *National Provincial Plate Glass Insurance Company* v. *Prudential Assurance Company* (5), *Kino* v. *Rudkin* (6).

(1) 45 L. J. Ch. D. 432.
(2) 1 Dr. and Sm. 324.
(3) L. R. 18 Eq. 544; L. R. 10 Ch. Ap. 283.
(4) 3 De. G. J. and S. 263.
(5) 6 Ch. Div. 757.
(6) 6 Ch. Div. 160.

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

[SARGENT, C. J.—It is difficult to suppose that the pecuniary damages would not afford adequate relief, but you must show that there is some standard for ascertaining them. How, for instance, can you say what the effect would be of the erection of a rival building unaffected by any such nuisance.]

That cannot be taken into consideration: *Hadley* v. *Baxendale* (1). In *Wood* v. *Sutcliffe* (2) such a calculation, however, was found possible. Again, the plaintiffs here sue for a nuisance to third parties, *viz.*, the tenants of the Grant Buildings. The only allegation is that their comfort is interfered with, but there has never been a remonstrance or complaint addressed by the tenants either to the Nicol Mill Company or to the defendants. There are two classes of cases of nuisance in which an injunction is granted: first, where property is depreciated by the alleged nuisance; secondly, where personal discomfort is caused *to the plaintiff*. Depreciation of the letting-value of property does not come under the first class: *Tipping* v. *St. Helen's Smelting Company* (3). In that case the injury was to the property itself.

[SARGENT, C. J.—Do you contend that you can sue for actual injury to the property itself but not for injury to the enjoyment of the property?]

I say that a *reversioner* cannot sue for an injury to the enjoyment. If the injury to the enjoyment is not permanent in its nature it is not an injury to the property, and the reversioner cannot sue: *Mumford* v. *Oxford and Worcester Railway Company* (4), *Simpson* v. *Savage* (5), *Mott* v. *Shoolbred* (6), *Jones* v. *Chappell* (7), *Cooper* v. *Crabtree* (8), *Broder* v. *Saillard* (9), *Clowes* v. *Staffordshire Water-works Company* (10). These authorities show that such a nuisance as that caused by a mill is not permanent.

[SARGENT, C. J.—It is morally certain that this mill will continue working. That certainty diminishes its present market value. It seems a strange thing to hold that the owner cannot sue for the injury on the ground that such an injury is only "in

(1) 9 Exch. 341.
(2) 2 Sim. N. S. 163.
(3) 11 H. L. 642.
(4) 1 H. and N. 34.; 26 L. J. Ex. 265.
(5) 1 C. B. N. S. 347; 26 L. J. C. P. 50.
(6) L. R. 20 Eq. 22.
(7) L. R. 20 Eq. 539.
(8) L. R. 19 Ch. Div. 193.
(9) 2 Ch. Div. 692.
(10) L. R. 8 Ch. Ap. 125.

expectation." A jury would certainly consider the injury "permanent" if the matter were left to them.]

The law considers that if the injury is real the occupier will sue. The case of *Wilson* v. *Townend* (1) cited by the other side was long prior to the cases just mentioned and must be held to be overruled. The case of *Bell* v. *Midland Railway Company* (2) is the only one against us. In that case Willes, J., expressed disapproval of the cases I have cited. There is no case in which a landlord has succeeded in a suit in which he only proved damage to his tenant.

[SARGENT, C. J.—Would he not succeed if he showed that the value of his property was affected?]

Not if the value was affected only by reason of annoyance to tenants. The only cases in which the landlord has succeeded are (1) where the occupier of the property has joined in the suit: *Broder* v. *Saillard*(3), *Jones* v. *Chappell*(4), or (2) where besides discomfort to the tenant some injury was shown to the property itself, or (3) in cases of a nuisance permanent in its nature. Under the Specific Relief Act, section 56, clause (*k*), an injunction cannot be granted where the plaintiff has no personal interest in the matter: *Pentney* v. *The Lynn Paving Commissioners*(5). The rule laid down can cause no inconvenience because landlord and tenant can join in the suit.

Inverarity in reply.—There are three questions before the Court: (1) whether the plaintiffs have proved defendants' mill to be a nuisance from its noise, smoke and fluff; (2) whether, if so, the plaintiffs can sue; (3) whether damages or an injunction should be given. I will deal with the second question first. I contend that in India under the Specific Relief Act the plaintiffs can sue although not in possession; but if not, we say they are in possession. The English cases do not allow a suit based merely on an apprehension of injury, but in India the Specific Relief Act, section 54, allows an injunction where the defendant "threatens to invade the enjoyment of property." There can be no doubt that the erection of this mill close to the defendants' property is

(1) 1 Dr. & Sm. 324.
(2) 10 C. B. N. S. 287.
(3) 2 Ch. Div. 692.
(4) L. R. 20 Eq. 22.
(5) 13 W. R. 983.

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM PÁMÁNAND.

a threat of invasion. It is an interference with the right of property. At the time the suit was brought the longest lease held by any of the plaintiffs' tenants was from year to year. Most of the tenants were only monthly tenants. I submit the Court should have regard to the length of the reversion and consider whether the evil complained of is likely to be in existence when the reversioner comes into possession. It would be absurd to hold that the plaintiffs are precluded now from suing but may sue as each room falls vacant: Gale on Easements, 649. If the property would on sale bring a smaller price that is surely an injury to the reversioner's interest.

[SARGENT, C. J.—The Master of the Rolls in *Jones* v. *Chappell*(1) says: "It appears to me I am not able to overrule *Simpson* v. *Savage*".

He evidently did not very highly approve of the decisions himself. In the cases anterior to *Mumford* v. *Oxford and Worcester Railway Company*(2) the decisions are in our favour. *Jesser* v. *Gifford*(3). Counsel commented on *Simpson* v. *Savage*(4), *Bell* v. *Midland Railway Company*(5), *Crump* v. *Lambert*(6), *Johnstone* v. *Hall* (7), *Hosking* v. *Phillips*(8), *Ball* v. *Ray*(9), *Broder* v. *Saillard*(10), *Simper* v. *Foley*(11), *Wilson* v. *Townend*(12), *Aynsley* v. *Glover*(13), and contended that the decisions were inconsistent.

Next; what is the remedy to which the plaintiffs are entitled? We claim an injunction: Specific Relief Act, section 54 and illustrations (*s*) and (*t*). In every case of noise and pollution of air an injunction must be granted, for it is impossible to assess damages in such cases. An injunction must be granted in all cases which come under section 54, unless section 56 applies. Outside this latter section the Court has no discretion. At any rate if section 54 applies to our case the *onus* of showing that we are not entitled to an injunction is on the defendants. No pecuniary damages

(1) L. R. 20 Eq. 539.
(2) 1 H. and N. 34.
(3) 4 Burr. 2141.
(4) 1 C. B. N. S. 347.
(5) 10 C. B. N. S. 287.
(6) L. R. 3 Eq. 409.
(7) 2 K. and J. 414.
(8) 3 Exch. 168; see p. 182.
(9) L. R. 8 Ch. Ap. 467.
(10) 2 Ch. Div. 692; 45 L. J. Ch. 414.
(11) 2 J. and H. 555.
(12) 1 Dr. and Sm. 324.
(13) L. R. 18 Eq. 544; L. R. 10 Ch. Ap. 283.

would compensate us: *Staight* v. *Burn*(1), a case subsequent to Lord Cairns' Act of 1867; *Stokes* v. *City Offices Company*(2). In *Fritz* v. *Hobson*(3) Fry, J., said that "damages cannot be adequate substitute for injunction unless they cover the whole area which would have been covered by the injunction": *Krehl* v. *Burrell*(4), *Crump* v. *Lambert*(5), *Sturges* v. *Bridgman*(6), *Ecclesiastical Commissioners* v. *Kino*(7). It would be impossible to assess damages.

SARGENT, C. J.—The plaintiffs in this suit are the owners of the two blocks of buildings at Colába known as Grant Buildings, and they seek by their plaint to restrain the defendants as the owners of the mill lying immediately to the south of, and parallel to the said buildings, originally built by the Nicol Press and Manufacturing Company, from working or using the said mill so as to occasion nuisance to the plaintiffs, or any person occupying the said Grant Buildings by reason of (*a*) the noise made in the working of the engines, machinery and gear on the defendants' premises; (*b*) the discharge or escape of dust, fluff, cotton flakes or particles of cotton and of smoke from the defendants' premises; (*c*) the escape of noxious smells and odours from the said premises.

The defendants by their written statement denied that the working of the mill caused any nuisance to the Grant Buildings; but urged that, even if it did, the plaintiffs are now debarred from seeking the relief in the plaint claimed, and subsequently at the raising of issues took the additional objection that the plaintiffs could not maintain the suit.

It is not disputed that the mill was erected by the Nicol Press and Manufacturing Company on the site of a building belonging to the Hydraulic Press Company, and in which presses had been working since 1868 up to the close of 1873, and that it first began working in June, 1876. It further appears that the Nicol Press and Manufacturing Company, after working the mill up to

(1) L. R. 5 Ch. Ap. 163.
(2) 13 L. J. N. S, 81.
(3) 14 Ch. Div. at p. 557.
(4) 11 Ch. Div. 146.
(5) L. R. 3 Eq. 409.
(6) 11 Ch. Div. 852.
(7) 14 Ch. Div. 213.

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

December, 1878, went into liquidation, from which time the mill was stopped until the end of 1880, when it had become the property of the defendants.

The present plaint was filed on 8th February, 1881, almost five years after the mill first began to work,—a long delay which it was incumbent, of course, on the plaintiffs to explain satisfactorily before they could hope to obtain relief by injunction. Now, the evidence shows that as early as the 3rd August, 1874, the plaintiffs had given notice to the Nicol Press and Manufacturing Company that if the business of spinning and weaving was intended to be carried on in the buildings then in course of erection, it would render the Grant Buildings comparatively valueless, and that the plaintiffs would not permit it to be carried on to the detriment of their property. To this the Nicol Company replied by letter of 25th August, 1874 (Exhibit T), in which they express the opinion that "the spinning and weaving business would add considerably to the value of plaintiffs' property, and complain that the plaintiffs had not entered their protest sooner, as they must have known of the Company's intention as far back as the 9th, 10th and 11th February then last, and that under those circumstances the plaintiffs had no right to interfere, and they intended to complete the buildings and use them for the purposes of the Company." Now as to this contention of the Nicol Company it is sufficient, I think, to say that the plaintiffs could scarcely be expected to realize at once the probable effect of the intended mill on their property, even if they could be held bound, when alarm had been created in their minds, to warn the Company against a course, the effect of which could not be ascertained with any certainty until the mill was actually at work, which was not till May, 1876. At this time, however, the eastern block was closed, having been closed as far back as March, 1874, with a view to the more economical management of the property —there being at that time only sufficient tenants to fill one block; and it was not till January, 1878, that any portion of it, and then only the first and most easterly of the four divisions into which it is divided, was re-opened to tenants. In March of the same year the second division was re-opened, and subsequently the third and fourth in the following November and December.

However, in December, 1878, the mill stopped; and although, as appears from Mr. Macpherson's opinion on a case laid before him by the plaintiffs, the Company had contemplated taking proceedings, such intention was, of course, thwarted by the liquidation of the Company.

Now, it is at once evident, from the position of the eastern block with regard to the mill, that it must necessarily be far more affected by the working of the mill than the western block; and, indeed, without calling in aid the evidence in the case, it is obvious that it was not till the eastern block was re-opened in January, 1878, to tenants that there could be any question as to the mill being a nuisance to the plaintiffs' property. Then doubtless, but for the first time, the plaintiffs were in a position to ascertain whether the working of the mill would affect the comfort of the occupants so injuriously as to constitute it a nuisance to their property; but they could not reasonably be expected to venture on litigation until they had had an opportunity of testing the effect of the working of the mill during the succession of seasons into which the Indian year is divided, and more especially during the monsoon, when the Grant Buildings would be more particularly exposed to its action. But as has been already mentioned, at the close of the year, and before proceedings could be commenced, the Company had gone into liquidation. However we find that the Company lost no time in giving notice to the Liquidators of their objection to the mill: and as well on the first occasion when the mill was put up for sale by auction as on the last when it was bought by the defendants, a notice to the same effect was read out aloud in the auction room to the persons present.

This statement of facts explains, I think, satisfactorily the delay in bringing this suit, and not only entirely disposes, I think, of the objection to the plaintiffs' claim on the ground of acquiescence or laches on their part, but shows clearly that both the original and present owners of the mill have been, at every stage, at which either was concerned to know it, perfectly acquainted with the plaintiffs' intention to resist the working of the mill if it proved to be a nuisance.

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

Proceeding to the merits of the case we find the grounds upon which the plaintiffs seek the aid of the Court fully stated in paragraphs 17, 18 and 21 of their plaint, which are as follows:—

(The learned Judge then read those paragraphs of the plaint which have been previously set out, and continued.)

Now what constitutes a legal nuisance of the nature alleged in this suit was stated by Mr. Justice Mellor in summing up to the jury in *Tipping* v. *St. Helens' Smelting Company*(1). He told the jury that the law does not regard trifling nuisances. Everything must be looked at from a reasonable point of view, and that the nuisance, in order to be actionable, must be such as visibly to diminish the value of the property and the comfort and enjoyment of it; that, in determining that question, time, locality and all the circumstances must be taken into consideration; and, lastly, that in places where great works had been carried on, persons must not stand on extreme rights, and bring actions in respect of every annoyance, as, if so, business could not be carried on in such places. This summing up was approved of by the House of Lords(2). Again, in *Walter* v. *Selfe*(3), Knight Bruce, V. C., uses the following language which has often been cited by other Judges with approval. He says: "Both on principle and authority the important point next for decision may properly, I conceive, be thus put—Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort, physically, of human existence; not merely according to elegant or dainty modes and habits of living, but according to sober and simple notions among the English people." Consistently with these principles noise alone has under certain circumstances been held to amount to a nuisance as in the case of the bells of a Roman Catholic chapel—*Soltau* v. *DeHeld*(4), and *Ball* v. *Ray*(5), and *Broder* v. *Saillard*(6), where the nuisance complained of arose from the noise caused by horses in an adjoining stable. In *Crump* v. *Lambert*(7), smoke was relieved

(1) L. R. 1 Ch. Ap. 66.
(2) 11 H. L., 642.
(3) 4 DeG. & Sm., at p. 322.
(4) 2 Sim. N. S., 133, S. C. 21 L. J. Ch. 159.
(5) L. R., 8 Ch. Ap., 467.
(6) 2 Ch. Div., 692.
(7) L. R., 3 Eq., 409.

against, and in *Salvin* v. *North Brancepeth Coal Company*(1) it was assumed that it might amount to a nuisance. Lastly, dust and cotton fluff are analogous to smoke in the character of the annoyance which they cause and are subject to much the same considerations. It was, however, contended that the mill did not create a new state of things. It was said that the hydraulic presses which were at work on the site on which the mill now stands, must have caused noise and must have emitted smoke from the very same chimney which is now used by the mill. No doubt this is true; but the evidence of witnesses, such as Mr. Murrell, who were tenants when it was working, and state that no inconvenience whatever was experienced from it, as well as that of the experts who spoke as to a great difference between hydraulic presses and a spinning mill in respect to noise and consumption of coal, and, lastly, the fact that the Hydraulic Press did not work during the monsoon when the wind blows towards the Grant Buildings, can leave no doubt that, even if some inconvenience may occasionally have been caused by the noise and smoke of the Hydraulic Press, it was incomparably less than that caused by the working of the mill. Indeed, I don't think it was seriously contended by any witness called by the defendants that it would not be so. The plaintiffs don't deny that there was some noise and smoke resulting from the working of the presses, but they say that it was only when the mill was substituted for the presses that the noise and smoke became a nuisance. As was said by Lord Selborne in *Ball* v. *Ray*(2), where the alleged nuisance was the keeping of horses in an adjoining stable: "Supposing it be shown that one or more horses had been kept in it in a different manner so as not to create a nuisance, that would not affect the question. It is shown that at present they do create a nuisance, and a nuisance of a most injurious effect, on the comfort and value of the plaintiff's house calculated to destroy his livelihood."

(The learned Judge then proceeded to describe the Grant Buildings and the Nicol Mill, and their position relatively to one another, and continued.)

It thus appears that the two buildings are not only separated

(1) L. R., 9 Ch. Ap., 705. (2) L. R., 8 Ch. Ap., 467.

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

by a very narrow space, but are also so situated relatively to one another as in a great measure to prevent the free escape of the noise caused by the working of the mill, and which under those circumstances could scarcely fail to be an inconvenience to the tenants of the eastern block. The question is as to the extent of that inconvenience; for I think that few, if any, of the witnesses called by the defendants intended to say they would not rather have been without it.

Now it cannot be doubted that it proved to be a serious diminution of the comfort of many tenants during 1881 and the first three months of 1882, as shown by the evidence of those who deposed to the fact, and also by their having left on that account or changed to the western block. I allude to the evidence of Thos. Quanborough, Charles McWilliam and E. O'Reilly as regards the fourth division; that of William Wright, G. Fowler, Robert Cox, Thomas Canoran and Edward Roberts as regards No. 3 division; and James Vining and Gerald Yates as regards No. 2; and to the several letters they wrote to Mr. Greenwood on leaving.

I think the evidence of these witnesses,—and indeed I may say the same of all the tenants called on either side,—must have impressed every one as being given in perfect good faith, and with every desire to explain how they were affected by the noise. No doubt some of these gentlemen were asked by Mr. Greenwood to put in writing the cause of their leaving, but no one who heard that gentleman give his evidence—and more straightforward evidence I never heard—will suspect anything in the nature of collusion between him and the tenants who wrote those letters, or see anything more than a desire to obtain honest evidence to support the plaintiffs' suit.

On the other hand, the defendants have called witnesses who occupied those divisions during 1881, and who say they were not seriously inconvenienced by the noise—Alfred Boyse, Alfred Foster, and Baretto as regards No. 4; Wm. Batchellor as regards No. 3; B. Pierpoint as regard No. 2; and Thos. Carroll in respect of both No. 4 and No. 2. Of these witnesses, Alfred Boyse and Alfred Foster are pensioners in the Ordnance Department who had

been in the Artillery or Ordnance Department for twenty-five years and upwards, and might be expected, as they themselves say was the case, to become quickly accustomed to the noise of the mill, and to regard it with indifference, but both admit they heard it distinctly at first, and felt it to be a strange noise. The former also admitted that his wife complained of it at first, and the latter that his wife was hard of hearing. Such witnesses are exceptionally insensible to the effect of sound, and their impressions scarcely afford a satisfactory test of the effect upon ordinary persons. A remark, which it will be convenient to mention here, applies in a modified degree to two of the plaintiffs' witnesses, such as Mr. Fowler and Mr. Vining, who suffered from nervous and bilious headaches, and appear to have been in an exceptional state of health whilst they were in Grant Buildings. Of the other witnesses called by defendants, Mr. Batchellor was only a tenant of No. 3 for a month in November last; Mr. Pierpoint was a lodger of a Mr. Smith, one of plaintiffs' witnesses, from November, 1881, to January, 1882, and only had a bed-room in the front. Neither can be regarded as witnesses of much weight. The remaining witness, Mr. Carroll, is no doubt an important witness, having lived with his family in No. 4 from December, 1879, to June, 1881, and in No. 2 from June, 1881, to March, 1882, when he moved into No. 1, where he was examined *de bene esse* on account of bad health. He says he and his family have suffered no inconvenience from the mill since they have been in the eastern block, either in the cold weather or the monsoon; but he admits it was louder in No. 4 and No. 2 than where he is at present in No. 1, where his serious complaint is of the noise of the traffic in front, which is intermittent and always heard more than the continuous noise of the mill.

Now the evidence doubtless shows that the noise of the traffic in front is very considerable in the cotton season, and such as sometimes to overpower the noise of the mill in the front rooms, especially on the first floor; it is quite distinct in its character from that of machinery, and may possibly be regarded by some persons as the greater nuisance of the two while it lasts. But the question is not which is the greater nuisance during the cotton

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

season, but whether the noise of the mill is in itself a nuisance; and remembering the noise in front is but little heard in the back rooms during the cotton season and that the noise of the mill is heard throughout the year, the latter may well be regarded by others as a serious nuisance quite independently of what may be thought of the nuisance in front during the cotton season.

As to the evidence of experts on such a matter, it is necessarily, in my opinion, of less value than that of the tenants themselves. The impression of the moment as to the degree in which a certain noise would interfere with comfort, is not so trustworthy as that of persons who have been subjected to it for a long time. However, Dr. Cook and Dr. Hojel, who paid visits to the Grant Buildings in 1881 in the cold weather, July and September respectively, both describe the noise as one which made them instinctively raise their voices in the back rooms, and state that it would materially interfere with the comfort of a person living in the buildings all day.

I have hitherto considered the evidence as to the noise in 1881 and the first two or three months of 1882, during which time the north windows of the mill were for the most part kept shut (apparently to keep out the dust which injured the machinery), but no special measures or precautions had been taken to diminish the noise. However some time in March the gearing, which causes a very important part of the noise, was enclosed in a wooden box on each floor; a wall had also been built between the engine room and the room facing the Grant Buildings; and by the middle of April double glass windows had been placed in all the rooms facing the Grant Buildings, except one empty room where the windows are boarded up. Now the evidence of tenants has been very scanty on both sides as to the effect of the noise since the alterations were made. The defendants' witnesses on the subject are all tenants of divisions 1 and 5, the circumstances of which are essentially different from divisions 2, 3 and 4, and more especially 3 and 4. The eastern portion of the upper floors is unoccupied by machinery of any description, a circumstance which necessarily causes a very considerable diminution of noise in division No. 1, and moreover both as regard No. 1 and No. 5, the

noise is not shut in, but escapes into open space at either extremity of the funnel caused by the road between the Grant Buildings and the mill: for it is to be remembered that the defendants' buildings, although continued parallel to the western block, are very low. I can scarcely doubt, therefore, that the noise in divisions Nos. 1 and 5 must always have been very much less than in Nos. 2, 3 and 4, and the nuisance experienced by tenants far less in intensity. Dr. Pinkerton, however, visited the buildings at the request of defendants on 29th March and 28th April last, and went into rooms in all the divisions in the eastern block. He says: "I should hardly say the noise in Nos. 2, 3 and 4 when I first went" (he had before stated that most of the windows in the first and second floors were then double) "was worth complaining of. The noise was louder as you went higher: you cannot say how any particular noise will affect any individual. My experience is that the more monotonous the noise is, the more easily you get accustomed to it."

On 17th April at the request of both parties I myself visited the mill and Grant Buildings. Double windows had then been put in throughout the north side of the mill, and they were all closed. The noise from the working of the mill had the character of a deep hum or drone, broken by the sound of the engine in the fourth division. It was distinctly audible in the back rooms on all the floors. In the front rooms the noise on the first and second floors was to a great extent drowned by that of the traffic in front. Indeed, on the first floors it could not be heard without close attention being paid to it, so great was the noise from the traffic. On the third floor, however, it was distinctly audible, overpowering the noise from the traffic. In the middle compartments it was quite audible without listening for it, and distinct from that of the traffic. The impression produced on me was that such a noise lasting continuously throughout the day could not fail to affect seriously the comfort of most ordinary persons residing in divisions Nos. 2, 3 and 4, and more especially on the second and third floors. This effect would, of course, be greatly enhanced out of the cotton season when the traffic in front is not going on. It was said, indeed, that the class of persons who rent rooms in Grant Buildings are not easily affected by noises. This appears to me

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

to be a very questionable theory, and is certainly disproved by a large number of witnesses, both as regards the noise of the traffic and that of the mill. Doubtless people with limited means have to weigh one thing against another; and to obtain the advantage of an open, airy situation, such as that of the Grant Buildings, may be ready to put up with nuisances of this description; but I see no reason to think that the highly respectable persons who inhabit these buildings are indifferent to such matters, or regard them otherwise than as ills to be borne for the sake of countervailing advantages of rent, situation, or other particulars which enter into a man's calculation when he selects an apartment to live in. Fastidious or highly sensitive they probably are not, as a rule, but they have a standard of comfort in which I cannot doubt that peace and quiet and freedom from noise must be very important factors; and the noise of the mill, as heard in the above divisions, I cannot but think is one which must seriously interfere with that standard of comfort. It may be that the noise in front from the traffic is a serious nuisance to some persons, even more so than the noise of the mill, but it is perfectly distinct in cause, character and duration from the latter; and it can scarcely be contended because there is a very objectionable noise in front of Grant Buildings, which lasts for some five or six months and which the plaintiffs presumably cannot get rid of, a perfectly distinct and objectionable noise at the back, which lasts all the year round, cannot be a nuisance, and ought not to be relieved against.

Upon the whole I am of opinion that the noise caused by the working of the mill has always constituted and still constitutes a nuisance to the occupants of divisions 2, 3 and 4.

Passing to the question whether the smoke and cotton fluff which issue from the mill are a nuisance, it is to be remarked at the outset that the two chimneys through which the smoke and fluff are emitted are so situated relatively to the Grant Buildings that it is only when the wind blows from between south by west and west-south-west that the smoke and fluff would be carried directly towards some part of the eastern block, and when it blows from between south by east and south-east by east, that they would be carried directly towards some part of the western

block. But the observations taken at the Colába Observatory show that it is only for four or five days in the year that the wind blows from between the two last-mentioned quarters. Having regard to this circumstance and to the distance of the chimney from the western block, it is plain that the smoke and fluff, although possibly carried towards the western block a few times in the year, could not amount to a nuisance. With respect, however, to the eastern block, it appears from the same observations that the wind undoubtedly blows for a great many days from between south by west and west-south-west, although the observations do not show the exact number of days: for, according to the note annexed to the diagram, the fifty days which the wind is said to blow from west-south-west would include the days on which it blows between west by south and south-west by west. A great deal of evidence was given by the plaintiffs to show that during the latter part of the monsoon of 1881 the smoke and fluff found their way into the back windows of the rooms, more especially in divisions 2, 3 and 4. Dr. Cook and Dr. Hojel speak to a state of atmosphere between the mill and the Grant Buildings observed by them in September, 1881, which confirms the statement of tenants; and explains the state of the different curtains which were hung up for a week or ten days in September at the back windows of rooms in Nos. 2, 3 and 4, and are in evidence in this case. Nor can the evidence of Mr. DeMonte, the manager of the mill, and of Tom Drewett, the engineer of the Jute Mill, leave any doubt that until the latter part of 1881 the chimney emitted dark columns of smoke very much as the surrounding mills do, although not in so large a quantity after the two new boilers were put in in the middle of 1881. However during the cold-weather season it is difficult to understand how smoke and fluff could possibly find their way, except very occasionally, into the Grant Buildings. The wind then blows between north-east and north-west, and would carry the smoke and fluff away from the buildings, and this fact alone makes it highly probable that the dust and cotton particles which get into the buildings at that season of the year come chiefly, if not entirely, from the traffic in front and the cotton bales which are on all sides of the Grant Buildings. Nor can any one doubt, who has once visited the Grant Buildings

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

in the cotton season, that the material cause of the tenants not being able to keep their rooms and furniture clean at that season of the year is the dust arising from the traffic, chiefly in front, but also in some considerable degree on the road between the two blocks, and in a less degree between the eastern block and the mill itself; and so far as cotton particles are mixed with the dust they must, I think, in the main come from the cotton carts and cotton green. The dark colour of the dust is also probably due in some degree to the coal traffic which is also considerable at that season. These remarks, however, have no application to the rest of the year when there is no cotton or coal traffic and no cotton green: and it is on the state of things at that season that the plaintiffs' evidence has a special bearing; and that evidence leads, I think, irresistibly to the conclusion that during the monsoon of 1881 the smoke and fluff must have been a real nuisance to the tenants of rooms in Nos. 2, 3 and 4. Besides the smoke and soot which, as Mr. Murrell, the foreman at the Gun Carriage Factory, explained, always falls in the vicinity of a chimney, the smoke and soot from a chimney so little above the Grant Buildings, as the mill chimney is, would be driven down by the violent gusts of the monsoon wind between the eastern block and the mill, and so be carried directly against and into the back windows of the eastern block. The same thing would happen more surely to the cotton fluff as it issued from the blow chimney, or adhered to the side of the smoke chimney, as the defendants' own witnesses admit it did.

It was said, however, that although the working of the mill may be a cause of serious discomfort to the plaintiffs' tenants, it causes no actionable injury to their reversion, and is, therefore, no ground for the assistance of the Court by injunction. In support of this contention they rely on *Mumford* v. *Oxford and Worcester Railway Company*(1); *Simpson* v. *Savage*(2); *Mott* v. *Shoolbred*(3), and *Jones* v. *Chappell*(4). The two first cases decide that neither the noise made in workshops and manufactories adjoining the plaintiff's dwelling-house or the smoke emitted from chimneys erected for the purposes of such workshops

(1) 1 H. & N., 34.
(2) 1 C B. (N.S.), 347.
(3) L. R., 20 Eq., 22.
(4) L R., 20 Eq., 539.

and manufactories are of such a permanent character as to constitute an injury to the reversioner, and that, too, although the value of the property may be depreciated, because such depreciation could only arise from the apprehension that the noise and smoke would continue after the termination of the leases for which the defendants could not he held liable. In *Mott* v. *Shoolbred*, where the nuisance complained of was the improper use of a public road so as to be a nuisance to the plaintiff's house, Sir G. Jessel, referring to the above cases at common law, says "that those cases decided that the injury must necessarily be of a permanent character to enable the reversioner to maintain an action, and that a presumed intention to continue the nuisance was not sufficient even where there was evidence that the premises would sell for less if the nuisance were continued." In *Jones* v. *Chappell* the nuisance complained of arose from the noise and smoke caused by the working of the machinery erected on the defendant's premises, which were themselves of a permanent nature, erected for the express purpose; and Sir G. Jessel, considering himself bound by *Simpson* v. *Savage*, held that there was no actionable injury, and, therefore, that no injunction could go. The Master of the Rolls says: "As I understand the doctrine in *Simpson* v. *Savage*, a landlord in such a case cannot bring an action: the injury is a temporary measure, because the saws might be stopped and the steam engine cease working at any moment; it is only an injury to the occupiers, and the landlord cannot bring the action, because before his estate comes into possession the nuisance may have ceased, or the person committing it may choose to make it cease the moment the estate comes into possession." "Another ground of action," he adds, "on the part of the landlord might be that the existence of a nuisance of a temporary character would render it more difficult for him to let to a future tenant or sell. But that is said not to be a good ground of action, because the theoretical diminution of the value of the property cannot be taken into account, inasmuch as the purchaser, or the new occupier, would have a right to stop the nuisance, so that he ought not to give less on that account than he otherwise would. It appears to me I am not able to overrule *Simpson* v. *Savage*, and that the principle upon

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

which it was decided applies as much to weekly tenancies as to other tenancies." It was said, however, that doubt had been thrown on *Simpson* v. *Savage* in *Bell* v. *Midland Railway Company*(1). In that case it was in evidence that the tenants of part of the premises had thrown up their tenancies, and it was in reference to that circumstance that Willes, J., expressed the opinion that an act which causes tenants to depart from their tenures is a permanent injury, and, therefore, an actionable injury to the reversion. In *Jones* v. *Chappell*(2), however, the plaintiff distinctly alleged that, owing to the nuisance, several of plaintiff's tenants had left, and yet the Master of the Rolls held that the noise and smoke gave the reversioner no cause of action. It is probable, however, that there was no evidence in support of the allegation. However in the recent case of *Cooper* v. *Crabtree*(3) it is plain, from the concluding part of Mr. Justice Fry's judgment, that he did not consider *Simpson* v. *Savage* and *Jones* v. *Chappell* as preventing the reversioner from proving actual injury to the reversion from tenants having left, but as deciding that machinery, although of a permanent description and erected for the purpose of carrying on a trade which was likely to be permanent, was not of such a permanent character as necessarily to create an injury to the reversion, because the machinery might be stopped at any moment. I may add that in *Simpson* v. *Savage*(4), Williams, J., alluding to this point in the course of the argument, said that "the law assumed, although it could hardly be mentioned without a smile, that it was mere caprice on the part of the tenant leaving, as he had the power to get full compensation for the injury." Willes, J., I apprehend, would not have admitted that such was the law.

In this state of the authorities I feel myself bound to hold that the only cause of action on which the plaintiffs can at present rely in support of their claim for an injunction is the diminution of the value of their property owing to the working of the mill being a nuisance in respect of the four or five sets of rooms now vacant in divisions Nos. 2, 3 and 4. As to those rooms, the conclusions I have already arrived at with respect to the divisions

(1) 10 C. B. (N.S.) 287.
(2) L. R., 20 Eq., 539.
(3) L. R. 19 Ch. Div., 193.
(4) 1 C. B. (N.S.), 347.

Nos. 2, 3 and 4 generally, are applicable, *viz.*, that the noise caused by the working of the mill always has constituted and still does (notwithstanding the double windows) constitute a legal nuisance, and also that the smoke and fluff (independent of the question as to the effect of the new contrivances introduced into the mill) also constitute a nuisance during the monsoon.

The important question then arises, whether these conclusions as to the effect of the working of the mill on the plaintiffs' buildings is such as to enable them to ask for the preventive relief which the Court affords by injunction. Now it was contended by the defendants that, even assuming the nuisance had existed, it had ceased to do so since the changes and improvements introduced into the mill; that no smoke of any importance had issued from the chimney since Cardiff coal had been used exclusively in the furnaces, and attention had been paid to the firing, and that, as regards the fluff, the wire netting placed below the floor of the scutching room, the steam jet by which the cotton fluff becomes saturated and so falls back under the scutching room, and the introduction of a baffle into the fluff chimney which interrupts such of the fluff as has escaped up to the chimney and forces it into an exhausted pipe by which it is carried into the sea:—that these contrivances have stopped the emission of fluff from the chimney almost entirely, and; therefore, whatever may have been the state of things before the above changes were made, the smoke and fluff have now ceased to be a nuisance. Now, that the introduction of the two new boilers in April and May 1881 have considerably reduced the quantity of smoke, is admitted by the experts on both sides, some say by one-third and others by a half; but the evidence of Dr. Cook and Dr. Hojel, who visited the Grant Buildings in June, and the state of the curtains after being up for a fortnight in September in several rooms in divisions 2, 3 and 4, can leave no doubt that it did not put an end to the nuisance. However, since the hearing of the suit commenced, Cardiff coal, which emits very little smoke, has been used exclusively, and it was admitted by plaintiffs' own witnesses that with very careful stoking there need be no smoke of any importance, except when getting up the fires, and I can feel very little doubt that it is in the power of the defendants, if so willed, to prevent

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

altogether the nuisance from smoke, or, at any rate, to make it of no appreciable importance; but whether the nuisance will continue in some degree or other, or disappear altogether, depends, it is clear, upon the care taken by the defendant and his servants in carrying out the necessary measures to insure it. Now the remedy to be applied, it is to be remarked, is not of a permanent nature such as might possibly be a raising of the mill chimney, which when once done would always have the desired effect, but consists in the exclusive use of a particular sort of coal at whatever price it may be in the market, and further in careful firing throughout the day, both of which depend upon the will and carefulness of the defendants, exercised not only from day to day, but from hour to hour. What guarantee have the plaintiffs that this will be done? It was said, indeed, that it was the interest of the millowner to do so. Theoretically it may be, under certain circumstances, but it is impossible to allow one's vision to range over the numerous mills and presses at work at Colába and throughout the island of Bombay without concluding that millowners find it expedient, for practical reasons best known to themselves, to disregard it. The same remarks apply to the contrivances adopted for reducing the quantity of the fluff which issues from the blow chimney. There can be no doubt that it has been very considerably reduced by them, so much so as probably to be of little or no importance, but their efficiency entirely depends upon the continuous care in seeing that they are each and all in working order. I cannot think, therefore, that the changes and improvements made at the eleventh hour, and the efficacy of which depends so much on the good intention and constant personal care of the defendants and their servants, ought to influence the question of injunction when once the nuisance is distinctly proved to have existed, as is the case here. Lord Justice Turner says in *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*[1]: "The interference of the Court in cases of prospective injury very much depends, as I apprehend, upon the nature and extent of the apprehended mischief, and upon the certainty or uncertainty of its arising or continuing; and the fact of the nuisance having commenced, raises a presumption of its continuance."

(1) L. R., 1 Ch. Ap., at p. 354.

Now the plaintiffs rely upon section 54, cls. (*b*) and (*c*), of the Specific Relief Act which (subject to the discretion of the Court as provided by section 52) determines the cases in which a perpetual injunction may be granted where the defendant invades or threatens to invade the enjoyment of property.

Section 54 of the Specific Relief Act provides that where the defendant invades or threatens to invade the plaintiff's enjoyment of property, the Court may grant an injunction, "where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion," and also "where the invasion is such that pecuniary compensation would not afford adequate relief." In applying these provisions we shall do well to be guided by the decisions of the Court of Chancery in England which, it cannot be doubted, are the source from which the above provisions have been drawn. In *Jackson* v. *Duke of Newcastle*[1] Lord Westbury says: "The foundation of the jurisdiction appears to be that injury to property which renders it in a material degree unsuitable for the purpose to which it is applied, or lessens considerably the enjoyment which the owner has of it. The Court considers that injury of this nature does not admit of being measured and redressed by damages." This statement of the law was adopted by Lord Hatherly in *Dent* v. *Auction Mart Co.* [2]. Those were cases of obstruction of light. In *Goldsmid* v. *Tunbridge Wells Commissioners* [3]; *Salvin* v. *North Brancepeth Coal Co.*,[4] where the nuisances sought to be abated were akin to those complained of in the present case; and in *Kino* v. *Rudkin*[5] we find the same rule substantially laid down for determining whether the Court should relieve the plaintiff by injunction, or leave him to recover damages in a Court of law. In the former case Lord Justice Turner says: "I think that it ought not to interfere where the injury is merely temporary and trifling, but that it ought to do so in cases in which the injury is permanent and serious; and in determining whether the injury is serious or not, regard must be had to all the consequences which may flow from it, and in this particular

(1) 3 DeG. & J., 275.
(2) L. R., 2 Eq., 238.
(3) L. R., 1 Ch. Ap., 349.
(4) L. R., 9 Ch. Ap., 705.
(5) L. R., 6 Ch. D., 160.

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

case regard must not be had merely to the comfort or convenience of the occupier which may only be interfered with temporarily and in a partial degree; but regard must also be had to the effect of the nuisance upon the value of the estate and upon the prospect of dealing with it to advantage."

In the present case it might be said that there can be no material diminution of the value of the property arising from the working of the mill so far as the plaintiffs are entitled at present to complain of it, as the actionable nuisance is confined to only four out of the sixty-eight entire sets of rooms in the buildings. However this might be if the nuisance as a matter of fact only affected the four sets of rooms, I ought not I think to disregard the fact that the injunction, if granted, would practically render it unnecessary for the plaintiff to bring actions in respect of all the other rooms in divisions 2, 3 and 4, after giving the tenants notice to quit, in which the question of a nuisance would be substantially the same as now, and so prevent that multiplicity of suits which is one of the grounds on which an injunction is authorized by section 54 of the Specific Relief Act. Whatever, therefore, might have been my opinion if the working of the mill affected only the four sets of rooms, I think that, under the special circumstances of this case, the question, whether an injunction should go, must be dealt with as if the plaintiffs had a right of action at the present moment in respect of all the rooms in divisions 2, 3 and 4.

Now, regarding the nuisance as affecting all the divisions 2, 3 and 4, no one, I think, would be bold enough to say that the value of the plaintiffs' property has not been seriously affected by it. It is true that the plaintiffs have not hitherto suffered any diminution in the number of their tenants; indeed, it was admitted by Mr. Greenwood that their rooms had never been fuller than they had been since the mill resumed working at the beginning of 1881. This however may be satisfactorily explained by the fact that the nuisance had not been experienced before 1881, and by the increased demand in the last two or three years for the class of accommodation afforded by these buildings as stated by Mr. Greenwood and by Mr. Flower, the house agent, both of whom are specially qualified to speak on the subject. Their statements

have not only not been disputed by the defendants, but were to a great extent confirmed by the evidence of several tenants and they were also in no little degree corroborated by the admission of Mr. Batchellor, a civil engineer, one of the defendants' witnesses, that he and his partner, Mr. Hewson were contemplating getting up a Company to build semi-detached cottages for Europeans. Moreover, the rent-roll of 1882 shows a sensible falling off in the number of tenants in Nos. 2, 3 and 4 as compared with those in the corresponding divisions 6, 7 and 8 in the west block. This is the more important, as it has taken place after the nuisance has had time to produce its effect on the class of people who rent rooms in Grant Buildings; and, indeed, it can scarcely be seriously contended that the rooms in Nos. 2, 3 and 4 are not rendered materially less suitable for letting purposes than they were before the mill began to work, albeit persons may at the present moment give the preference to them for certain advantages they may possess over such accommodation as the Fort may afford at the same rent. The fact that three-eighths of the entire buildings have become materially less suitable for letting cannnot fail to diminish the value of the buildings and to render it less easy for the plaintiffs to dispose of their property on favourable terms. Nor, again, can I entirely disregard the fact as admitted by Mr. De Monte, and the defendants' witnesses Mr. Tom Drewet and Mr. Scott, who were consulted on the subject as professional engineers, that the defendants have seriously contemplated fitting up the vacant space in the mill with some 15,000 additional spindles, which could scarcely fail to increase the noise, however much opinions may differ as to the degree in which they would do so.

The remarks of Turner, L. J., in *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, already referred to, have a bearing on this part of the case. "The interference of the Court in the case of prospective injury very much depends, as I apprehend, upon the nature and extent of the apprehended mischief and upon the certainty and uncertainty of its arising or continuing." Here, with such a large amount of vacant space in the mill and a driving power admittedly adequate for a much greater number

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

of spindles, coupled with every inclination on the part of the defendants to enlarge the mill so as to work it to the greatest advantage, there would appear to be such a prospect of increased mischief as may well influence the mind of the Court in determining whether it will interfere by injunction. I cannot, therefore, doubt, apart from the very special circumstances to which I am about to refer, that this is a case in which the plaintiffs would be entitled to preventive relief by injunction.

Now, it is to observed that the Specific Relief Act whilst laying down the general principles upon which such relief may be granted, still leaves it entirely in the discretion of the Court whether the Court will give relief by injunction or damages, and in so doing, has placed the Court very much in the same position as the Court of Chancery found itself after the passing of Lord Cairns' and Mr. Rolt's Acts, which enabled that Court to award the plaintiff compensation in lieu of, or in conjunction with, preventive relief. Sir G. Jessel discusses the effect of the former Act upon the practice of the Court in *Aynsley* v. *Glover*[1]. He says: "It will deserve the most serious consideration hereafter as to what class or classes of cases this enactment is to be held to apply. Although in terms so wide and so long, it never could have been meant, and I do not suppose it will ever be held to mean, that in all cases, the Court, of its own will and pleasure, or at its own mere caprice, will substitute damages for injunction. I am not now going, and I do not suppose any Judge will ever do so, to lay down a rule which, so to say, will tie the hands of the Court. The discretion being a reasonable one should, I think, be reasonably exercised, and it must depend upon the special circumstances of each case whether it ought to be exercised. The power has been conferred, no doubt usefully, to avoid the oppression which is sometimes practised in these suits by a plaintiff who is enabled—I do not like to use the word 'extort'—to obtain a very large sum of money from a defendant merely because a plaintiff has a legal right to an injunction; I think the enactment was meant in some sense or another to prevent that course being successfully adopted. There may be

(1) L. R., 18 Eq., 544.

some other special cases to which the Act may be safely applied, and I do not intend to lay down any rule upon the subject."

It is to be observed in this case that the plaintiffs are not only a financial Company whose only interest in the buildings can be their money value; but that throughout the long correspondence which took place between the head office in London and Mr. Greenwood and Mr. Martin Wood, acting for the defendants, it is plain that the matter had never been regarded from any other point of view. To begin with Exhibit No. 1, it shows that in July, 1875, they were contemplating selling the property, but postponed doing so then in pursuance of the advice they received from their agent here that they should first obtain damages from the Nicol Mill Company, which, it is worthy of remark, had not then commenced working; and the subsequent correspondence between the head office and their agent here leaves no doubt that they set themselves assiduously to work to establish such a claim: indeed, in the beginning of 1878 the eastern block, which had been closed for some years, was opened at the advice of Mr. Greenwood for the express purpose of supplying them with the requisite evidence, as appears from his letters of 22nd January, 1877, and August, 1878. After the filing of the plaint in February, 1881, we find from the letter of 14th April, 1881, that the manager of the Company had been suggesting that the defendants should buy the Grant Buildings with the view of putting an end to the litigation; and in his letter to Mr. Greenwood of 23rd September, 1881, he informs him that Mr. Wood had been told the Bank would entertain an offer for the purchase of the buildings for about four lákhs, and concludes with the expression of a hope "that a satisfactory arrangement under a sale of the property might yet be come to."

This correspondence can leave no doubt, without imputing improper motives to the plaintiffs, that their object has been to secure the highest value for their property, and nothing else. Under these circumstances, and remembering what important interests are involved on the part of the defendants, and that from the very nature of the case an injunction such as the plaintiffs ask, would place them entirely in the power of the plaintiffs, I

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

think that, so far as the damage done, or likely to be done, to plainiffs' property can be assessed, the relief should assume the form of pecuniary compensation rather than of an injunction. It has been said, indeed, that there exists no standard for ascertaining the damage caused, or likely to be caused, by the invasion, and, therefore, that the case falls under clause (*b*) of section 54. The Court of Chancery has directed an inquiry to ascertain the damage where the nuisance was the obstruction of the plaintiff's light. It was done in *Jackson* v. *Duke of Newcastle*(1) and *Senior* v. *Pawson*(2). It is undoubtedly a much more difficult matter in a case of this nature, and must to a great extent be matter of opinion; but there are, I think, *data* upon which experienced persons may form an estimate. It is not altogether like the case of *Imperial Gas Company* v. *Broadbent*(3), where the nuisance consisted in injury to the vegetables grown by the plaintiff, who was a market gardener, and where Lord Campbell remarked it was impossible to say what customers the plaintiff would lose.

I, therefore, propose adjourning the final decision for all parties to give evidence as to the diminution in the value of the plaintiffs' property caused, or likely to be caused, by the nuisance so far as it affects divisions 2, 3 and 4 of the eastern block. It should be based on the supposition that the mill will be worked with open windows, with such ordinary regard to firing and the quality of the coal as experience shows is usual in working mills in this country, but without the aid of the special contrivances for diminishing fluff, which might, it is obvious, at any moment be abandoned if there were no injunction.

Case adjourned for further evidence.

On the 15th, 21st and 22nd July 1882 the evidence required by the learned Judge was taken as to the diminution in value of the plaintiff's property caused or likely to be caused by the nuisance as far as it affected divisions 2, 3 and 4 of the eastern block. Mr. Greenwood stated that the present gross annual rental of those three divisions (including the godowns) amounted to

(1) 3 De G. & J., 275. (2) L. R., 3 Eq., 330.

(3) 7 H. L. 600.

Rs. 14,867-4; that their net annual rental, after allowing all charges and expenses and an allowance of five per cent. for vacancies from ordinary causes, amounted to Rs. 10,071-8. That with a perfect freedom from all nuisances an additional 15 per cent. on the present gross rental might now be obtained when the gross rental would amount to Rs. 16,719-5 and the net rental to Rs. 11,775,3, but that with the mill working as it did at the time the suit was brought the raising of the present rental would be out of the question, and even at the existing rates a loss of at least 50 per cent. on the present rental of the dwelling rooms must be expected, which would reduce the present net rental obtainable from those divisions from Rs. 10,071-8 to Rs. 3,897-14; so that comparing the estimated net annual revenue with a total exemption from any mill nuisance, viz., Rs. 11,775-3, with the estimated net annual revenue with the mill nuisance unrestrained, viz., Rs. 3,897-14, there must be expected an annual loss of revenue on those three divisions of Rs. 7,877-5. In arriving at this figure the probable effect of rival accommodation, if such should come into existence, was not taken into consideration.

As to the increase in the rental of 15 per cent. Mr. Greenwood stated that the rental of the buildings had not been altered since 1872 and that they would now well bear such an increase. He was confirmed in this opinion by the evidence of Mr. Forde and two other engineers, Mr. McEwan and Mr. Bedford, who arrived at the same conclusion on this point by an independent calculation based on the value of the land and buildings and a comparison of the sum which would represent a net rental of 6 per cent. on that value and the actual net annual rental at present obtained. The ultimate result arrived at by these three gentlemen was roughly speaking in accord with the result arrived at by Mr. Greenwood, namely,—a net annual loss of rental of something over Rs. 7,000. This too was arrived at without taking into consideration the probable effect of the creation of rival accommodation. Mr. Campbell and Mr. Hewson, engineers called on behalf of the defendants, were of a different opinion on this head. Mr. Flower, a House Agent of great experience in Bombay, who was also well acquainted with the Grant Buildings inasmuch as he had the letting of them, thought that the rents

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

could be raised 10 per cent. without affecting the letting and that could have been done a year back, and stated that equally roomy and airy accommodation in the Fort of Bombay was 50 to 100 per cent dearer. In this last statement he was confirmed substantially by Mr. McEwan who had considerable local experience, and also by Mr. Pestonji Byramji, a House Agent, called on behalf of the defendants.

As to the 50 per cent. of vacancies likely to be caused by continuance of the nuisance Mr. Greenwood stated that he arrived at that figure after inquiring of the tenants whether they would remain or not if the mill nuisance was allowed to continue. It was proposed on the part of the plaintiffs to call the tenants of divisions 2, 3, 4, and some who had left since the hearing commenced, to say in the case of the former whether, if the nuisance continued to be as it was when the plaint was filed, it would affect their remaining on in the building, and as to the latter the reason of their leaving; but Sir Charles Sargent rejected the evidence as being merely evidence of opinion as to the tenants' feelings in a hypothetical state of things and that both would be irrelevant to the question of compensation. Mr. Greenwood added: "The vacancies for the west block for the first six months of this year have been only two or three per cent. I think it would have been about the same with the east block, if there had been no mill nuisance. I think the east block would be as full as the west block, if there were no mill. I think 5 per cent. reduction is well up to the mark for (ordinary) vacancies. The percentage of vacancies in Nos. 2, 3 and 4 is now 29½. I think the vacancies would be more than doubled, if the mill worked as it did, when the plaint was filed. In fact I feel certain they would become empty." He was confirmed in this opinion by Mr. Flower. Mr. Flower said: "All the rooms in the west block are full now. There are eight vacancies in divisions Nos. 2, 3 and 4 of east block. The tenants in the east block are temporary tenants, of quite a different character from those in the west block. If there were no nuisance affecting the east block there would be no difference in the rents which could be obtained for the two blocks. The accommodation is precisely the same. Setting apart the mill, 5 per cent. would be a fair deduction to make for vacancies. With the mill working, as it has been doing,

with no new buildings, there would be a deduction of at least 50 per cent. in divisions Nos. 2, 3 and 4. I base this on the following considerations:—First, what I have been told by present tenants; second, my knowledge of the class of tenants and their requirements; third, the difficulty of their getting accommodation elsewhere; fourth, their probability of their places being taken by others willing to put up with the nuisance for a time, and of their places being taken by others, and so on from time to time; fifth, the fact that over thirty-two per cent. (one more tenant had left since Mr. Greenwood gave his evidence) of the rents of the rooms are now not obtained owing to the mill nuisance. If equally good accommodation were provided elsewhere it would empty the three divisions. If there were no mill such additional accommodation would not make any material difference.* * * Tenants leave the east block as fast as they can get rooms in the west block. As soon as there is a vacancy in the west block, there are five or six applications for it." In answer to the Court Mr. Flower added: "The west block was always slightly preferred, but there never was such a desire to get from the east to west block as there is now. The preference began to show itself when the mill began to work in the beginning of 1881. The tenants did not leave in 1881, more than in 1880, because they could not. It is seldom there is a vacancy in the west block. Applications were made by tenants in the east block for rooms when they might become vacant in the west block. * * * I consider the market value of the east block is very much diminished in value by the mill nuisance." Mr. Forde also stated that apart from the effect of the mill the Grant Buildings even with a rental raised 15 per cent. need fear no rivalry inasmuch as no such building could now be built so as to make it pay at even that advanced rental.

Mr. Campbell, called on behalf of the defendants, arrived by his method of calculation at Rs. 560 as the estimated net annual depreciation, the difference between his result and that arrived at by the engineers called by the plaintiffs being mainly due, firstly, to Mr. Campbell allowing nothing for enhancement of rent; secondly, to his deduction of 40 per cent. instead of 15 per cent. for depreciation; and thirdly, to his basing his expectation of

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

vacancies likely to be caused in future by the continuance of the nuisance on a comparison between the average gross rental of divisions 2, 3 and 4 for 1881 and first half of 1882 with that of the corresponding divisions in the west block for the same period. Mr. Hewson, another engineer called on behalf of the defendants, agreed in the conclusions at which Mr. Campbell arrived. The defendants also called four tenants of the Grant Buildings, one of whom said that if rent was raised 10 per cent. he would leave, the other three of whom said if it was so raised they should try to find other accommodation cheaper and equally good. All four however admitted that they could not say where such other accommodation was to be found.

Lang on the evidence:—The calculation made by the plaintiffs' witnesses is based on the merest speculation. The Court must be guided by facts. The plaintiffs have not yet raised their rents, from which it must be concluded that they could not have done so. As to the effect of the mill on the rents in future the only safeguide for the Court is its effect in the past. The present comparison of the east block with the west block drawn by Mr. Greenwood and Mr. Flower is misleading, as several vacancies in the east block were caused by the departure of tenants who had already given evidence on behalf of the defendants that they find the mill no nuisance. Mr. Campbell's method of calculation is the only safe one. The result which he arrives, viz., an annual loss of Rs. 560, is the conclusion which the Court should accept. That should be capitalised at 7 per cent. and that would give the utmost that should be awarded to the plaintiffs.

Anderson, contra.—The plaintiffs' figures are necessarily based on speculation, but that is an argument not against their soundness but against the possibility of assessing damages at all. The plaintiffs have always said that damages in this case are incapable of being assessed. But if they can be assessed, it is only by accepting the plaintiffs' figures. On the evidence the Court must conclude that at least 10 per cent. additional rent might now be obtained. That the rents have not yet been raised is easily understood. The time when the tenants are being harrassed by a nuisance which the landlord is prosecuting a suit to remove is scarely the time to raise the rents. As to the probable amount of vacancies to be expected

Mr. Greenwood and Mr. Flower are the best persons to form an opinion. The west block is now quite full, whereas over thirty-two per cent. of divisions 2, 3 and 4 are empty. This result has been reached after sixteen months' experience of the mill. The evidence shows that the effect of the mill is progressive and points to the loss being much increased as time goes on. That some of the tenants have left the defendants' premises goes for nothing if others will not come to fill their places. Mr. Campbell's conclusion is absurd; Rs. 560 is less than the rent of one average room. The net annual revenue which will be lost the Court must conclude will be not less than Rs. 7,000, which should be capitalised at least 5 per cent. which is the percentage allowed on sums payable as compensation under the Land Acquisition Act.

17*th August* 1882 :—SARGENT, C. J.—Since the last adjournment the parties have given the evidence I suggested, and the conclusion I have arrived at is that the case will be best dealt with by a combination of damages and injunction which is expressly provided for by Lord Cairns' Act, and may well be adopted under the Specific Relief Act if the circumstances require it. I fear that my not having mentioned that such was the course I might possibly adopt, may perhaps have led the parties to incur somewhat greater expense than they would otherwise have thought necessary in giving evidence as to damages; but it was scarcely possible to come to any definite conclusion until it was known what evidence would be forthcoming. The character of that evidence and further consideration of the whole case have shown me that it would be impossible to fix on any sum as the fair assessment of the damage likely to be caused to plaintiffs' property into which mere opinion did not enter in a most material degree.

It is to be remembered that, if damages alone are to be given, they must be assessed on the supposition that the mill may be worked without any regard to the interests of the plaintiffs; *i. e.*, without closed double windows to the north, with no further regard to firing and the quality of coal than may suit the convenience and interest of the defendants, and with perfect liberty for them to continue, or not, the use of the several contrivances for diminishing the fluff. Now, during no period since

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

the opening of the mill in 1881 has the nuisance been experienced in the degree which it is possible it might assume if the plaintiffs were thus left to the mercy of the defendants. In the early part of 1881 the windows were, for the most part, closed. In the monsoon the mill was closed for a considerable time whilst the new boilers were being put in, and during the first half of this year the mill has for the most part been worked under the most favourable circumstances for the plaintiffs as regards the three sources of nuisance. We have, therefore, no *data* to guide us as to the possible diminution of tenants which might be caused in the future by the working of the mill. I think, therefore, that, so far as the nuisance can be abated by injunction without seriously impeding the working of the mill, it would be better to give relief in that form. I have already remarked in my judgment that there was little or no difficulty in the mill being worked so as not to interfere with the letting of the divisions in question on account of the smoke and fluff, and that by the use of proper coal, proper firing, and by those appliances which have been recently introduced into the mill for the purpose of diminishing the fluff, it was quite within the powers of the owners of the mill to work the concern so that the smoke and fluff would only be an occasional inconvenience to the tenants. Indeed, the defendants contended that with those improvements there would be no nuisance. I think, therefore, that, so far as the question of smoke and fluff is concerned, it might be adequately dealt with by granting an injunction restraining the owners of the mill from allowing the smoke and fluff to issue from the mill in such a manner as to be a nuisance.

Then there remains the question of nuisance which arises from the noise, and I propose to issue an injunction to restrain the working of the mill otherwise than it is at present worked,—that is to say, that the double windows are to be continued and the windows of the mill to be kept closed, which will leave damages only to be assessed for the nuisance as I have found it, notwithstanding the closed double windows; and as to this we have some *data*, I think, for forming an opinion as to the future. The year 1881 affords a very inadequate test of the effect of the noise on the letting power of the Grant Buildings. There was admit-

tedly a great demand for accommodation; and it would necessarily take some time before the public could be expected to estimate the effect of the nuisance. By the end, however, of 1881 people had had nearly a whole year's experience of it as regarded the noise, and certainly might be expected by that time to have formed some definite opinion as to how far it would be a nuisance. I think, therefore, that the first half of the year 1882 affords some test of the effect of the nuisance arising from the noise on the letting of the buildings.

The question we might now consider, therefore, would be a comparison of the rent which had been earned by divisions 2, 3 and 4 in this block with what had been earned by the corresponding divisions 6, 7 and 8 in the other block; and if we make that comparison we find that there is a difference of something like Rs. 674, which—remembering that there was a great demand for accommodation, and that the western block was full—I think may be fairly attributed to the noise, for it is to be remembered that during the first three or four months of the year the wind does not blow towards the plaintiffs' buildings, and it is impossible, I think, that the public could have regarded the smoke and fluff as of any importance, or that it could have weighed with them at all in determining whether they should take rooms in the buildings. As to the two or three last months when the wind doubtless blows some days in each month towards the buildings, still the extraordinary care which was admittedly taken by the defendants to diminish the smoke and fluff during the hearing of the suit must have prevented any appreciable nuisance from those sources. Doubling this we have an annual loss of Rs. 1,348. This, however, might be enhanced if a competition were to arise either from other buildings being erected or from diminished demand, and the evidence shows that the former is a possible contingency. I do not, therefore, think it would be right to make the plaintiffs accept a sum based upon a less annual loss than Rs. 2,000 a year, which would give a margin to meet possible eventualities. This at twenty years' purchase would be Rs. 40,000. At the same time, as this sum is based to a certain extent on opinion, I do not think I ought to compel the defendants to accept it if they do not like to do so.

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRAM RÁMÁNAND.

Therefore the order that I propose to make is this:—The Court doth order that an injunction do issue restraining the defendants, their workmen, servants and agents from making, or causing to be made, noises in the mill buildings in the plaint mentioned so as to occasion nuisance, disturbance or annoyance to the plaintiffs as owners, or to their tenants for the time being, of divisions 2, 3 and 4 of the Grant Buildings in the plaint mentioned, or of any part thereof, and also from allowing smoke and cotton fluff to issue from the said mill so as to occasion nuisance, disturbance or annoyance to the plaintiffs as such owners, or to their tenants as aforesaid. Such injunction not to issue in case the defendants pay to the plaintiffs the sum of Rs. 40,000 before the expiration of a fortnight from this day. In the event of the defendants paying to the plaintiffs the said sum, then this Court doth order that an injunction do issue restraining the defendants, or either of them, their workmen, servants and agents from working the said mill, otherwise than with closed double glass windows on the side towards the said Grant Buildings, and also restraining the defendants from allowing any smoke and cotton fluff to issue so as to cause such nuisance as aforesaid, with liberty to plaintiffs to apply in case the noise be materially increased beyond what it is at present.

Plaintiffs' costs to be paid by defendants.

The decree was drawn up in the following form:—

This Court doth order that the defendants and each of them, their servants, workmen and agents be and they are hereby perpetually prohibited and restrained from making or causing to be made noises in the said mill known as the Nicol Mill in the plaint mentioned so as to occasion nuisance, disturbance or annoyance to the plaintiffs as owners of the divisions 2, 3 and 4 of the eastern block of the premises known as Grant Buildings in the plaint mentioned or to the tenants for the time being of such divisions or of any part thereof, and also from allowing smoke or cotton fluff to issue from the said mill premises so as to occasion nuisance, disturbance or annoyance to the plaintiffs as such owners or to their tenants as aforesaid unless the defendants do within fourteen days from the date hereof pay to the plaintiffs the sum of Rs. 40,000 as damages as aforesaid, and in the event of the defendants' paying the said sum of Rs. 40,000 to the plaintiffs within the time aforesaid, this Court doth order that the defendants and each of them, their servants, workmen and agents be and they are hereby perpetually prohibited and restrained from working or using the said mill of th defendants otherwise than ith closed double glass windows on the said side of

the said mill towards the said Grant Buildings, and also from allowing smoke and cotton fluff to issue from the said mill premises so as to occasion nuisance, disturbance or annoyance to the plaintiffs as such owners or to their tenants as aforesaid with liberty to the plaintiffs to apply in case the noise be materially increased beyond what it is at the date hereof; and this Court doth lastly order that the defendants do pay to the plaintiffs the cost of this suit when taxed.

The defendants appealed. The appeal came on for hearing before Bayley, C. J. (Acting), and West, J., on the 30th March 1883.

Lang and *Russell* for the appellants.—The conduct of the plaintiffs disentitles them to an injunction. Mere notice does not contradict the presumption of acquiescence: *Birmingham Canal Company* v. *Lloyd*(1), *Clegg* v. *Edmondson*(2), *Lehmann* v. *Macathur*(3). As to delay: Kerr on Injunctions, 46; *Johnson* v. *Wyatt*(4).

[BAYLEY, C. J.—When do you say the injunction should have been sought?]

Before the foundations of the mill were put in. As to whether the plaintiffs can maintain this suit, the Court below held that the plaintiffs are only entitled to sue in respect of the two or three rooms actually vacant at the time of the suit, but damages have been given for injury to the whole buildings: *Mumford* v. *Oxford and Worcester Railway Company*(5), *Simpson* v. *Savage*(6), *Mott* v *Shoolbred*(7), *Jones* v. *Chappell*(8), *Cooper* v. *Crabtree*(9). The plaintiffs who are reversioners have suffered no damage. The only injury for which damages can be given is injury done up to date of filing plaint.

[WEST, J.—Is there any authority for having regard to prospective improvement in the value of property?]

Latham referred to *Goldsmith* v. *Tunbridge Wells*(10) and *Ecclesiastical Commissioners* v. *Kino*(11).

Lang referred to *Jackson* v. *Duke of Newcastle*(12) *per* Lord Westbury.

(1) 18 Ves. 515.
(2) 8 DeG. M. & G. at p. 801.
(3) L. R. 3 Ch. Ap. 496.
(4) 2 DeG. J. & S. 18.
(5) 1 H. & N. 34.
(6) 1 C. B. N. S. 347.
(7) L. R. 20 Eq. 22.
(8) L. R. 20 Eq. 539.
(9) 19 Ch. Div. 193.
(10) L. R. 1 Ch. Ap. 349.
(11) 14 Ch. Div. 213.
(12) 3 DeG. J. & Sm. 275.

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

[WEST, J.—That case is partly overruled by *Yates* v. *Jack*[1] and *Aynsley* v. *Glover*[2].]

Lang.—On the authorities it is clear that the plaintiffs are not entitled to sue. They were not occupiers and the right of suit is a personal right and not a right of property. It arises from possession and user.

[WEST, J.—If the building were empty because no tenants could be got by reason of the nuisance, could not the plaintiffs sue? Is there any case which says that a landlord in possession but not in enjoyment cannot sue?]

Jones v. *Chappell*[3], *Broder* v. *Saillard*[4]. Further the plaintiffs have not proved damages. Only two rooms were vacant when the suit was brought and there is no evidence that these were vacant because of nuisance. If, however, they were vacant because of nuisance, small damages will compensate. An injunction at all suits cannot be granted: Specific Relief Act (I. of 1877), section 54. There is a clear distinction between damage to property and annoyance to enjoyment: *St. Helen's Smelting Company* v. *Tipping*[5]; Kerr on Injunctions, pp. 28, 174; *Stanley* v. *Shrewsbury*[6]; *Low* v. *Innes*[7].

Latham, Inverarity and *Anderson* for respondents.—We contend this is a case for an injunction. Defendants say that only the occupiers could sue. If so, a company could never sue in a case like this. Pollution of air or water is an injury to property just as deprivation of light is. The reason why in some cases it is held that a reversioner cannot sue is, not because there is no injury to the property, but because the injury may cease before he comes into possession: Addison on Torts (5th ed.), ch. 7. Constructive possession is enough: *Ibid* pp. 372—375; Kerr on Injunctions (ed. 1878), p. 165; Gale on easements, p. 483; *Sturges* v. *Bridgman*[8]. The plaintiffs are not reversioners. If the Act done is an injury to a right, *i.e.*, one which by length of time will give a countervailing right, a cause of action arises at once. See Addison on Torts, p. 375, as to when a reversioner can sue: *Pomfret*

(1) L. R. 1 Ch. Ap. 295.
(2) L. R. 10 Ch. Ap. 283.
(3) L. R. 20 Eq. 539.
(4) 2 Ch. Div. 692.
(5) 11 H. L. C. 642.
(6) L. R. 19 Eq. 616.
(7) 4 DeG. J. & Sm. 286.
(8) 11 Ch. Div. at p. 859.

v. *Ricroft*[1]. As to the cases cited, *Mumford* v. *Oxford and Worcester Railway Company*[2] and *Simpson* v. *Savage*[3] are the only Common Law cases in favour of the defendants. Counsel distinguished *Mott* v. *Shoolbred*[4], *Jones* v. *Chappell*[5], *Broder* v. *Saillard*[6], *Cooper* v. *Crabtree*[7]. In England the Courts appear to be inclined to regard it as a question of fact for a jury (therefore for the Judge in India) whether or not the alleged injury will depreciate the saleable value of the property. The Indian Limitation Act (XV of 1877), sections 26 and 27, does not reserve the reversioner's right unless there is a three-year tenancy. Section 27 states the only exception to section 26 of the Limitation Act; so that the above English cases are distinguishable. But see also *Dobson* v. *Blackmore*[8], *Kidgill* v. *Moor*[9], *Metropolitan Association* v. *Petch*[10], *Bell* v. *Midland Railway Company*[11], *Johnstone* v. *Hall*[12], *Wilson* v. *Townend*[13], *Crump* v. *Lambert*[14], *Clowes* v. *Staffordshire Waterworks Company*[15]. Next, have the plaintiffs sued too late? There has clearly been no laches. Mere delay will not prevent even an interlocutory injunction: *Rochdale Canal Company* v. *King*[16] approved of in *Archbold* v. *Scully*[17], *Ball* v. *Ray*[18], *Smith* v. *Smith*[19], *Fullwood* v. *Fullwood*[20], *Sturges* v. *Bridgman*[21]. As to what constitutes acquiescence: *Wilmott* v. *Barber*[22], *Gullick* v. *Tremlett*[23], *Saville* v. *Kilner*[24], *Cooper* v. *Barber*[25], *Jamnádás* v. *Atmárám*[26], *Tipping* v. *St. Helen's Smelting Company*[27], *Crossley* v. *Light*[28], *Birmingham Canal Company* v. *Lloyd*[29], *Clegg* v. *Edmondson*[30], *Lehmann* v. *McArthur*[31].

(1) 1 Wms. Saunders 322.
(2) 1 H. & N. 34.
(3) 1 C. B. N. S. 347.
(4) L. R. 20 Eq. 22.
(5) L. R. 20 Eq. 539.
(6) 2 Ch. Div. 692.
(7) 19 Ch. Div. 193.
(8) 9 Q. B. 991.
(9) 9 C. B. 364.
(10) 5 C. B. N. S. 504.
(11) 10 C. B. N. S. 287
(12) 2 K. & J. Ch. Ap. 414.
(13) 1 Dr. & Sm. 324.
(14) L. R. 3 Eq. 409.
(15) L. R. 8 Ch. Ap. 125.
(16) 14 Q. B. 135.
(17) 9 H. L. 360.
(18) L. R. 8 Ch. Ap. 467.
(19) L. R. 20 Eq. 500.
(20) 9 Ch. Div. 176.
(21) 11 Ch. Div. 852.
(22) 15 Ch. Div. 96.
(23) 20 W. R. 358.
(24) 26 L. T. N. S. 276.
(25) 3 Taunt. 108.
(26) I. L. R. 2 Bom. 133.
(27) 4 B. & S. 608; 11 H. L. Ca. 642 L. R. 1 Ch. Ap. 66.
(28) L. R. 3 Eq. 279; 2 Ch. 478.
(29) 18 Ves. 515.
(30) 8 DeG. M. & G. at p. 801. LR. 3 Ch. Ap. 496.

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RA'MA'NAND.

As to our remedy. The Act which give power to award damages was 21 and 22 Vic., c. 27. The damages permitted to be given are prospective damages, so that they may cover the same ground as an injunction. Courts will not give damages in a case like this, for they would regard them as speculative damages: *Imperial Gas Company* v. *Broadbent*(1), *Jackson* v. *Duke of Newcastle*(2), *Stokes* v. *City Offices Company*(3), *Dent* v. *Auction Mart Company*(4), *Goldsmid* v. *Tunbridge Wells Commissioners*(5), *Attorney Gen.* v. *Colney Hatch*(6), *Aynsley* v. *Glover*(7), *Smith* v. *Smith*(8), *Krehl* v. *Burrell*(9), *Pennington* v. *Brinsop Hall Coal Co.*(10), *Fullwood* v. *Fullwood*(11), *Ecclesiastical Commissioners* v. *Kino*(12), *Fritz* v. *Hobson*(13).

WEST, J.—The first point contended for on behalf of the appellants was that, by not taking active steps to give effect to the protests and threats of their managers, the Land Mortgage Bank had already forfeited all claim to an injunction when the Nicol Mill Company failed in December, 1878. It cannot reasonably be denied that the projectors of the mill were promptly informed of the objection felt to its construction and working by the Land Mortgage Bank, and from that time to this the Mill Company and the present proprietors have never been without clear actual notice that the Land Mortgage Bank intended, if the working was carried on, to take legal proceedings as on a nuisance to its property, the Grant Buildings. But it is said that, so long a time having been allowed to elapse, the right, if ever it subsisted, to an injunction has failed. Now, no doubt, where the positive law assigns certain consequences to a particular possession or enjoyment for a specified term, that result is not defeated by any mere assertion of a claim without the alleged right's being reduced to *res litigiosa* by proceedings in Court. I had occasion to consider that question in the Kánara Forest

(1) 7 H. L. 600.
(2) 3 DeG. J. & Sm. 275.
(3) 11 Jur. N. S. 560; S. C. on ap. 13 L. T. N. S. 81.
(4) L. R. 2 Eq. 238.
(5) L. R. 1 Ch. Ap. 349.
(6) L. R. 4 Ch. Ap. 146.
(7) L. R. 18 Eq. 544.
(8) L. R. 20 Eq. 500.
(9) L. R. 7 Ch. Div. 551; 11 Ch. Div. 146.
(10) 5 Ch. Div. 769.
(11) 9 Ch. Div. 176.
(12) 14 Ch. Div. 213.
(13) 14 Ch. Div. 542.

Case—*Bháskarúppá* v. *The Collector of North Kánara*[1], and I find that my view might have been supported by the authority of Turner, L.J., and of Selwyn, L.J., in *Lehmann* v. *McArthur*[2]. But what specific effect does the law give to a nuisance through its continuance for five or six years? We are not aware of any. If there had been such negligence on the plaintiff's part as had naturally led the defendants into an expenditure of money through a false confidence thus induced, there might be a reason for saying that an injunction could not properly be sought or granted when there had been a culpable want of diligence in applying for it. But here the plaintiffs certainly gave notice, and intended to proceed against the Nicol Mill Company. They gave notice to the defendant Ahmedbhái before he purchased the mill, and within a short time (a couple of months) of his renewing its working they filed the present suit. There is nothing, therefore, to deprive them, on the ground of acquiescence—(see judgment in *De Bussche* v. *Alt*[3])—or undue and misleading delay, of any remedy to which they may otherwise be entitled—see *Hogg* v. *Scott*[4]; *Johnson* v. *Wyatt*[5].

The nature and extent of the alleged nuisance come next to be considered. A great mass of evidence on this subject was laid before the learned Judge in the Court below. He has carefully weighed it, and there seems to be no sufficient reason for pronouncing his conclusion incorrect, that the smoke, cotton fluff and noise proceeding from the mill caused serious inconvenience to the inhabitants of divisions Nos. 2, 3 and 4 of the eastern block of the Grant's Buildings. We have been invited, on behalf of the plaintiffs, to find that this impairment of comfortable habitation extends also to divisions No. 1 in the eastern block and No. 5 in the western block. The evidence is contradictory and has manifestly been influenced by the very different sensibilities and preconceptions of the witnesses. In such a case there should be strong indications of an entirely erroneous view of the testimony, or the principles on which it ought to be appreciated to warrant a Court of Appeal in reversing the judgment arrived

(1) I. L. R., 3 Bom., at p. 783.
(2) L. R., 3 Ch. Ap., at p. 504.
(3) L. R., 8 Ch. Div., at p. 314.
L. R., 18 Eq., 444,
2 DeG. J. & S., 18.

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND— KESOWRA'M RA'MA'NAND.

at by the Court of first instance. No such ground appears in the present case; the evidence has been carefully weighed, and the conclusions arrived at by the learned Judge below, being well sustained by it, are not to be disturbed on a mere impression might reasonably that particular point a somewhat different view that on this or be taken.

The question next arises of whether the plaintiffs in this case had a right to sue, and how, if at all, that right was limited? It appears that at the institution of the suit there were vacant in the divisions Nos. 2, 3 and 4, to which only the nuisance extends, one room with a terrace in division No. 3, and one passage room, in No. 4. When Mr. Flower's evidence was taken at the hearing, one apartment was retained vacant together with two staircase or passage rooms. For the defendants it is urged, in appeal, that the right to sue is one that arises only on some personal damage or inconvenience sustained by the party complaining. The Land Mortgage Bank, it is said, cannot sustain a personal inconvenience, and as a proprietor it can sue only for a nuisance in its nature permanent. In Comyns' Digest, however ("Action upon the case for nuisance") it is said that the action lies for a nuisance to the habitation or estate of another, and as an instance is given the case of a man who erects a wash-house or stable and puts filth in it to the annoyance of a garden; an other instance is a parson's allowing tithes to remain unremoved, whereby the grass there is corrupted. In the former of these instances the injury was not to a person as inhabiting a particular house; in the latter the injury was not of a permanent character. In both instances possession appears to have given the right to undisturbed and unimpaired enjoyment, the infringement of which constituted the actionable wrong. That possession will support an action of trespass, is shown by *Graham* v. *Peat*[1], and the distinction between this and the class of cases just considered is not one resting on a difference of the right, but of the injury to the right giving a cause of action. It is commonly said that the tenant has a right of action for the injury to the present enjoyment, and the reversioner only for an injury to the reversion,—that is, some injury which will affect

(1) 1 East, 244

the property permanently or beyond the terms of the lease or tenancy; but this does not mean that an owner in possession on his own account, in whom therefore the two rights concur, has not the same remedy as a tenant—see *Leader* v. *Moxon*(1). The tenant's rights are, in fact, derived from his landlord's, and limited by these, as otherwise the landlord would be able to convey a greater right than he himself held. The right to sue arises when the injury arises, and that, to a person in actual possession is when his power to enjoy for all ordinary purposes is impaired by an act on the part of another going beyond his right, or, in the case of an occupant of neighbouring property, by an immoderate use of it, or acts within it extending in their effects beyond the property, and causing discomfort, or calculated to cause discomfort, in the ordinary use of land lying near it.

The English Common Law in its earlier stages did not assign an estate in the land, or possession, to a mere termor. His interest was a mere personal right against the lessor; his occupation was a possession on behalf of the lessor(2). The changes which took place under Henry VII and Henry VIII gave the tenant an interest (though but a chattel interest) in the land and a possession which he could recover *in specie*. Since then the ownership has for some purposes been looked on by the law as divided, and possession being attributed to the tenant, actions resting on possession have become competent to him, and to him alone—*Baxter* v. *Taylor* Thus the right to sue for an injury to the convenient use and occupation of a house has been considered as exclusively rested in the tenant. He holds in his own right, and is the proper person to guard against any infringement of that right—*Simpson* v. *Savage*(4). To permit a landlord to sue on the same act of the defendant would be to allow a plurality of suits on the same cause of action. The landlord has parted with present possession and its incidents, and must not proceed as if he retained them. The cases referred to by Willes, J., in *Bell* v. *Midl. Railway Company*(5) are not opposed to this. They rest on an injury to the landlord through his tenants' being incapacitated for fulfilling their duty to him, or prevented by

(1) 3 Wills, 461; S. C. 2 Wm. Bl. 925.
(2) See Butler's note to Co. Lit. 330 *b*.
(3) 4 B. & Ad., 75.
(4) 1 C. B. N. S., 347.
(5) 10 B. C. N. S., 87.

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

threats from doing it—*Broder* v. *Saillard*[1]. These considerations seem quite to sustain the position taken by the Courts in England, though it has been questioned by some text-writers, that the landlord's right of action is limited to the case of an injury in its nature of a permanent character, or of a duration extending in the ordinary course beyond the tenant's term. A wall built against a window will remain, without any further act, as long as the window itself. There is an injury at once to the term and to the reversion. A competitive exhibition of the modes of dealing with sewage manure, limited to a week, may cause infinite annoyance to the tenant, and entirely prevent his comfortable enjoyment of his possession during the time without at all injuring the reversion. The tenant only, therefore, is the right person to proceed for an abatement of the nuisance. And if, instead of a single exhibition, the neighbouring occupier advertises a series of them one every three months, though the series taken collectively will, if not interrupted, certainly damage the landlord by lowering the letting value of his house, yet this connexion in a series is merely an act of the mind. There is no physical continuity; each holding of the exhibition is a separate act, and a separate nuisance evanescent in its physical effects, and touching only the occupant for the time being. Him it will touch, and a remedy cannot be denied to him; therefore, it is denied to the landlord, who has parted with so much of his ownership as makes the tenant's right, and, having parted with, it cannot sue upon it as for an infringement of it. The reversion is not injured, because, on any repetition of the nuisance after the estate has come into possession, the lessor can get it stopped by a suit in his own name, or, by arrangement, in that of his tenant —see *per* Pattison, J., in *Baxter* v. *Taylor*[2]; *Broder* v. *Saillard*.[3]. So in the case of trades and manufactures, if the alleged injury arises from a series of acts, such as the operations of a furnace or a forge, these may cease at any moment. They require a fresh activity for each repetition, and each instance of discomfort caused is transient in the annoyance it occasions. Collect these acts mentally down to a particular time when

(1) 2 Ch. Div., 692.

(2) 4 B. & Ad. *per* Pattison, J., at p. 76.

(3) 2 Ch. Div., 692 at p. 698.

an action is brought into a single series, and still no harm is done to the reversion, which is still future—see *Mumford* v. *Oxford and Worcester Railway Company*(1). The reversioner can take care of himself when he comes into possession; in the meantime, each single instance of injury being to the tenant, the right of action, too, is his, and his alone—*Mott* v *Shoolbred* (2). *Jones* v. *Chappell*(3). It cannot be his and the landlord's, too, since his right as against third parties is wholly derived out of the landlord's and, as far as it extends, forms a deduction from the landlord's right.

We have not been asked, if indeed we could have been asked, to deal with this case on other principles than those of the English law. According to that law developed logically from its own premises, the owner of property, of which he has leased the whole, cannot, as we have seen, maintain an action for an injury of an evanescent kind, merely because it may and probably will be, repeated. If he has leased a part, and retains a part, he, as occupier, has the same right to sue as any other occupier—*Bell* v. *Midl. Railway Company*(4); nor is his right lessened, because he does not personally dwell on the premises—*The Lovegrove Case*(5); *Saville* v. *Kilner*(6); *Ecclesiastical Commissioners* v. *Kino*(7). A man, again, with a large family cannot claim double the damages for a nuisance by stench which a man with a small family may claim, nor a man who is all the twenty-four hours at home, double the damages claimable by one who spends twelve hours out of doors. People's occupations and peculiarities have been introduced by way of aggravation, but the right is, in all cases, to such forbearance on the part of the neighbour as will be consistent with an exercise and enjoyment of the recognized rights of property, an ordinarily convenient use of one's possession without regard to special idiosyncracies or circumstances—see *per* Knight Bruce, V.C., in *Walter* v. *Selfe* (8), quoted by Sargent, C. J. (9). No suitability

(1) 1 H. & N., 34; S.C. 25 L. J. Ex., 265.
(2) L. R., 20 Eq., 22.
(3) L. R., 20 Eq., 539, 543.
(4) 10 C. B. N.S., 287.
(5) Unreported.
(6) 26 L. T. N. S., 277.
(7) 14 Ch. Div., 213.
(8) 4 DeG. & Sm., 315.
(9) *Ante*, p. 54.

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNNAD.

of place increases the natural right of either of two occupiers of neighbouring areas with antagonistic interests—see *Bamford* v. *Turnley*(1). Nor is it dependent on personal character. Otherwise a deaf occupier might have no action for noise; and it might be said that a corporation, as such, having no nose or ears could not be annoyed by a stench or noise, and, being thus deprived of right of action, must in every case submit to the nuisance until the nuisance under the name of an easement had become established as a right of the neighbour by user for twenty years—see Specific Relief Act XV of 1877, sec. 26. The dividing line which in one case Pollock, C.B., recognized as existing between nuisances and easements, and which might be thought well founded, has by recent decisions been broken down. Hence a corporation owning real property would hold it shorn of some of its ordinary and important incidents. This cannot be the law, unless it has been expressly provided by the Legislature which has not been urged before us.

The Land Mortgage Bank, then, can sue on its possession—*Cooper* v. *Crabtree*(2), but at the same time it *must* sue on its possession. The operations of the defendants' mill are not a physical change made once for all, and then operating for the future by itself to the plaintiffs' detriment. It has not been shown that the smoke, dust, or vibration cause, as in one or two of the English cases, a positive deterioration in the plaintiffs' structure. As itself in actual possession of the two rooms in divisions Nos. 3 and 4, the plaintiffs' Company could properly bring this suit—; as owning the whole mass of the Grant Buildings it could not. The Limitation Act makes no difference, since it prevents a right from being acquired against a reversioner who cannot sue within three years. We must deal with its claim on this limited basis. The learned Judge below seems on this point to have taken the same view of the law; but first recognizing that an injunction on account of the vacant chambers would operate in the same way as one on account of the whole building, and then taking the ground that damages might be awarded instead of an injunction, he estimated the damages, not

(1) 3 B. and Sm., 62., S.C. 31 L. J. Q. B. 286. (2) L. R., 19 Ch. Div., p. 193.

on the basis of the plaintiffs' actual cause of action and right to sue, but on that of the incidental operation, or supposed operation, of the injunction, should one be granted. He thus arrived at a sum of Rs. 40,000 as the damage sustained by the plaintiffs' Company. Failing payment of this sum, the defendants were prohibited from working their mill so as to be a nuisance to the plaintiffs, or their tenants. Should the money be paid, the injunction was limited to prohibiting the defendants from working, except with closed double windows and with a prevention of the escape of smoke and cotton fluff so as to cause a nuisance. As to the noise, no direct injunction was made; but the plaintiffs were to be at liberty to apply in case the noises were materially increased.

Now the reasons given by the learned Judge for regarding a money payment as an adequate compensation to the plaintiffs' Company, when combined with an injunction reducing the nuisance to a tolerable minimum, seem to be irrefragable. The Land Mortgage Bank has no special sensibilities about the Grant Buildings. The associations connected with that property are probably not at all of an endearing character. The correspondence, at any rate, makes it perfectly clear that the bank has no other than a pecuniary interest in the premises, and would always have been satisfied with a liberal *solatium* for its violated rights. Where that is the case, damages may properly be substituted for an injunction—*Isenberg* v. *E. I. H. Est. Company*[1]; *Senior* v. *Pawson*[2]. In the present case damages have been combined with a limited injunction. This particular combination of relief is not expressly provided for in the Specific Relief Act. But by section 52 of the Act, "preventive relief is granted at the discretion of the Court." By section 54 "an injunction may be granted to prevent a multiplicity of judicial proceedings", which embraces as well repeated suits by the same plaintiffs as a series by different plaintiffs. On the other hand, section 56 says an injunction cannot be granted "when equally efficacious relief can certainly be obtained by any other usual mode of proceeding." A mere award of damages in this case would not prevent future

(1) 3 DeG, J. & S., 263. (2) L. R., 3 Eq., 330.

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

claims for future injuries. Preventive relief may, therefore, properly be given; but being given to a certain extent, it appears that for the residual injury—which, as the learned Judge below has found(1), is really small—damages will afford an efficacious relief—equally efficacious as relief though not so efficacious in delivering over the defendants to the tender mercies of the plaintiffs' Company. The judgment of Bramwell, B., in the *Stockport Waterworks Company* v. *Potter*(2) shows that it is an important ingredient in the wrong occasioned by carrying on an offensive business if all possible remedial measures are not adopted. We think this Court may prescribe such measures as the condition of continuing a business, and give damages for the inevitable injury where these will suffice, though Rolt's Act and Lord Cairns' Act are not in force here. At any rate, the defendants, who are the persons to be affected by the injunction, may, if they dislike the combined remedy, avoid it by submitting to an injunction which will apparently close their factory. If the defendants submit, the plaintiffs' Company cannot complain that in addition to damages it obtains a further discretional relief, leaving it to the necessity of further litigation only should a reasonable use of their premises be exceeded in future by the defendants.

The modified conditional injunction framed by the learned Judge below is calculated in its intention to provide the requisite remedy in this case by reducing the annoyance caused by the working of the mill to such a moderate and perhaps irreducible minimum as will be fairly compensated by damages for the premises occupied by the plaintiffs' Company affected by it. It will only be necessary to mould the wording so as distinctly to provide against any increase of smoke, cotton, fluff, or noise of machinery beyond what subsisted at the date of the decree—see *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*(3) and to add that the injunction does not free the defendants from any necessity they may be under of working always so as to cause the least annoyance reasonably possible to the occupants of the premises with respect to which the decree is made. It may be that inventions will be made by which the now inevitable

(1 P. 46, P. Bk. (2) 3 H. L. 326; 31 L. J. Ex., 16.
(3) L. R., 1 Ch., 349, S. C. 35 L. J. Ch., 382.

annoyances may be easily diminished; and should a right then arise for the neighbours to a working of the mill so as to be less offensive, they ought not to be precluded from that right by an injunction intended for their benefit.

The remaining question is that of the amount of damages. The learned Judge has estimated these on the loss likely to be sustained by the plaintiffs' Company on the whole of the compartments, Nos. 2, 3 and 4 of Grant Buildings. Admitting, however, that money compensation was a right form of relief, it should obviously be compensation measured by the premises not owned, but occupied, by the plaintiffs; in other words, the rooms unlet. It was only in respect of these that the plaintiffs' Company was competent to sue, and suing on a limited ground it could not be entitled to compensation on one greatly more extensive. It was only in respect of the rooms in question that its suit and the decree therein could guard the defendants against further actions. An award of Rs. 40,000 to the plaintiffs cannot prevent any tenant of the rooms affected by the nuisance complained of from suing the present defendants on the grounds successfully taken by the plaintiffs' Company in this suit. It would be unreasonable that the defendants should be made to pay as damages in bulk to persons not legally entitled, what they may have to pay in portions over again to those who are or may be entitled. For the damage arising to the plaintiffs' Company on account of the couple of rooms unlet at the institution of the suit, the sum of Rs. 1,000 will afford sufficient compensation, and the sum awarded by the Court below should be reduced to that amount. The decree is to be modified accordingly, and in the sense already indicated as to the second alternative injunction.

The parties are to bear their own costs of appeal.

The decree of the Appellate Court was in the following form:—

This Appellate Court doth order that the said decree, dated the 17th day of August 1882, be varied, and as varied be as follows, that is to say, this Court doth declare that at the date of the institution of this suit the plaintiffs were only entitled to bring this suit for an injunction and damages in respect of the rooms in the said Grant Buildings which were unlet at the date of the filing of this suit, that is to say, one room with a terrace at the back thereof, the present monthly rent whereof is Rs. 50, which room is situated on the right hand side of the second floor or upper story of division No. 3 of the eastern block of the Grant Buildings, the said division being the third division counting from the Harbour side, and one

1883

THE LAND MORTGAGE BANK OF INDIA v. AHMEDBHOY HABIBBHOY AND KESOWRÁM RÁMÁNAND.

passage or stair head room, the present monthly rent whereof is Rs. 15, which said room is situated on the first floor or upper story of division No. 4 of the eastern block of Grant Buildings of the said division, being the fourth division counting from the Harbour side; and this Court doth order that the defendants and each of them and their servants, workmen and agents be and they are hereby perpetually prohibited and restrained from making or causing to be made noises in the said mill known as the Nicol Mill in the plaint mentioned so as to occasion nuisance, disturbance or annoyance to the plaintiffs as owners of the afore-mentioned room and terrace and passage room in divisions 3 and 4 respectively of the eastern block of the premises krown as Grant Buildings in the plaint mentioned or to the tenants or tenant for the time being of the said rooms and terrace or either of them respectively or of any part thereof, and also from allowing smoke and cotton fluff to issue from the said mill premises so as to occasion nuisance, disturbance or annoyance to the plaintiffs as owners of the said two rooms and terrace or to the tenants or tenant thereof as aforesaid unless the defendants do within fourteen days from the sealing hereof pay to the plaintiffs the sum of Rs. 1,000 as damages sustained by the plaintiffs as owners of the said room and terrace and passage room afore-mentioned, and in the event of the defendants paying the said sum of Rs. 1,000 to the plaintiffs, as aforesaid, this Court doth order that the defendants and each of them, their servants, workmen and agents be and they are hereby perpetually prohibited and restrained from working or using the said mill of the defendants otherwise than with closed double glass windows on the side of the said mill towards the said Grant Buildings, and also from allowing smoke and cotton fluff to issue from the said mill premises so as to occasion nuisance, disturbance or annoyance to the plaintiffs as owners of the said room and terrace and passage room afore-mentioned or to the tenants or tenant thereof as aforesaid to a greater extent than subsisted at the date of the said decree, that is to say, on the 17th day of August 1882. Provided that if by reason of any new inventions or invention being hereafter discovered and brought into working operation in India the noise, smoke or cotton fluff proceeding from the said mill can easily be dinimished so as to become still less in degree than the same or either of them were or was at the date of the said decree, viz., the 17th day of August 1882, this decree shall not be taken or deemed to prejudice such right as may exist for the plaintiffs as owners of the said two rooms and terrace or the tenants or tenant thereof or of either of them as aforesaid to require the defendants to introduce such inventions or invention into the said mill so as to cause the least annoyance reasonably possible to the plaintiffs as owners or to the tenants or tenant of the said two rooms and terrace or either of them respectively; and this Appellate Court doth confirm the order of the lower court as to costs, and doth further order that each party do bear their own costs of the appeal; and this Appellate Court doth further order that the Prothonotary of this Honourable Court do pay to the appellants the sum of Rs. 500 deposited with him as security for the costs of the appeal.

Attorneys for plaintiffs.—Messrs. *Tobin and Roughton.*

Attorneys for defendants.—Messrs. *Jefferson, Bhaishankar and Dinsha.*