## ORIGINAL CIVIL.

*Before Mr. Justice Beaman.*

BAI BHICAIJI AND ANOTHER (PLAINTIFFS) *v.* PEROJSHAW JIVANJI KERAWALLA (DEFENDANT).*

1915. *July* 20.

*Nuisance—Legal nuisance—Erection of horse-stables, when a nuisance—The Indian Easements Act (V of 1882), section 15—Degrees of nuisance—Value of expert medical evidence in a case of nuisance—Considerations of policy or abstract public rights, outside the scope of inquiry—License from the Municipal Sanitary authorities for erection of stables, no defence in an action for nuisance—The Indian Specific Relief Act (I of 1877)—Relief by injunction as well as damages—Plaintiffs suing as trustees interested in reversion and as residents—The Civil Procedure Code (Act V of 1908), Order I, Rule 1.*

Prior to the year 1903, the first plaintiff was absolutely entitled to, and possessed of a piece of land with a house standing thereon situate at Thakurdwar Road, Bombay. By an Indenture of Settlement dated the 12th of January 1903, the first plaintiff conveyed the said property to herself and her husband, the second plaintiff, upon trusts for the benefit of herself and her husband and their issue. The defendant was the lessee for a period of 21 years commencing from 1st of January 1911, of an open piece of land adjoining the property of the plaintiffs and situate on the eastern side thereof. The said piece of land was formerly used for many years, and, as the defendant alleged, for nearly a century, for tethering bullocks and keeping bullock carts, up to the year 1908 when such user terminated. In October 1913 the defendant erected a block of stables, parallel to the length of the plaintiffs' house and at a distance of about 20 to 35 feet therefrom for the accommodation of 75 horses, to which was added another block for the accommodation of 35 hack carriages. The plaintiffs complained that the stables erected by the defendant rendered their house uncomfortable and unhealthy and constituted a serious nuisance. They also alleged that in consequence of the nuisance, the tenant on the first floor vacated the same and that the plaintiffs and their family suffered in health and were obliged to remove to another house. The plaintiffs sued in their double capacity as trustees interested in the reversion, and as actual residents, praying for a perpetual injunction to restrain the defendant from the continuance or repetition of the said nuisance and for damages in the sum of Rs. 1,221 for nuisance caused up to the date of the suit, or in the alternative for a sum of Rs. 15,000 as damages for the depreciation in value of the plaintiffs' property, by reason of the said nuisance.

* O. C. J. Suit No. 1288 of 1914.

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The defendant denied that the stables were a nuisance in law and pleaded without prejudice to his aforesaid contention—(1) that the nuisance complained of had been acquired by him as an easement, (2) that the stables were erected in accordance with the Bye-laws of the Bombay Municipality and the license for using them as stables was granted to him after the said premises were inspected and due inquiries made by the Municipal Commissioner and the Health Officer of Bombay, and (3) that the plaintiffs were not entitled to sue in their double capacity.

*Held*, (1) that under the Indian Easements Act, whatever easement may have been acquired by the owners of the land to cause a nuisance to the adjacent servient tenement by the tethering of bullocks on the vacant land admittedly came to an end in the year 1908, i.e., considerably more than two years before the nuisance complained of came into existence and before the date of the suit;

(2) that the nuisance complained of by the plaintiffs was totally different from the nuisance which previously existed, and on general principle the defence of easement could not be sustained;

(3) that if the nuisance existed, it was no answer to say that the defendant had conformed to the latest requirements of the Municipal Sanitary authorities, and had done everything in his power and taken all reasonable precautions to prevent its existence;

(4) that the stables erected by the defendant, having regard to their size and their distance from the dwelling house of the plaintiffs, constituted a nuisance;

(5) that having regard to the comprehensive language of Order I, Rule 1 of the Civil Procedure Code of 1908, there could not be any objection to the plaintiffs suing in their double capacity, and that the plaintiffs were entitled to obtain relief by way of injunction and damages.

A legal nuisance is rather an evasive shifting and intangible thing hard to be pinned down by a verbal definition. It must always be conditioned by time and place and circumstances, and the Court shall have regard to the station in life of the plaintiff and his family, and the locality and the nature of the nuisance complained of. *Walter* v. *Selfe*[1] and *Sturges* v. *Bridgman*[2] referred to.

Where the nuisance was of the kind to injure the health or seriously imperil the life of those complaining of it, the Court would not hesitate to prevent it by way of injunction; but where the nuisance went no further than to diminish the comforts of human life, there would always be a question whether the Court would proceed against him who causes that nuisance by injunction, or compensate the sufferer in damages.

(1) (1851) 4 De. G. & Sm. 315 at p. 322. (2) (1879) 11 Ch. D. 852.

In the absence of statutory enactments, no general considerations of mere policy, or rather abstract public rights, can be allowed to prevail against what the law recognises, and always has recognised, as the legal rights of the individual.

*The Attorney-General* v. *The Town Council of the Borough of Birmingham*,[1] referred to.

ACTION for nuisance.

One Bai Bhicaiji, a Parsee lady (the 1st plaintiff) was absolutely entitled to and possessed of a piece of land with two buildings standing thereon, situate at Thakurdwar, Bombay. On the 12th of January 1903, she conveyed, by an Indenture of Settlement, the said property to herself and her husband, Dorabji Framji Kumana (the 2nd plaintiff), upon certain trusts, for the benefit of herself and her husband, and their issue.

To the east of the said house was an open piece of land, on which stood a small shed which was used as a fuel depot, and a small groundfloor building used for shops. The rest of this land was vacant, and was used for a number of years for tethering bullocks, and keeping bullock carts. The defendant took a lease of this land for 21 years from 1st of January 1913.

In December 1912, the plaintiffs were informed that the defendant intended to demolish the structures standing on the said land, and in their place to erect stables for hackney carriages and horses. On 23rd December 1912 the plaintiffs, by their solicitors' letter, wrote to the defendant complaining of the nuisance that was likely to be caused to the plaintiffs' property, and requesting the defendant to refrain from erecting the intended stables. Correspondence thereupon passed between the plaintiffs' attorneys and the defendant's attorneys, and the latter denied on the 8th of August 1913 that the stables when erected would prove to be a nuisance.

[1] (1858) 6 W. R. 811.

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In October 1913, the defendant completely erected a block of buildings on his own land covering 550 square yards, parallel to the whole length of one of the aforesaid buildings of the plaintiffs, and at a distance of about 20 to 30 feet therefrom for the accommodation of 75 horses. Beyond that he erected another block for accommodating 35 hackney carriages.

The aforesaid building of the plaintiffs consisted of a groundfloor, and three upper floors. The plaintiffs with their family resided on the 2nd and 3rd floor, while the rest of the house was in the occupation of their tenants. The rent derived from the ground and the 1st floor was respectively Rs. 80 and 100 per month. The portion of the house in the occupation of the plaintiffs and their family would have fetched according to the plaintiffs, if let, a rent of Rs. 125.

In para. 8 of the plaint, the plaintiffs summarised their cause of action thus :—

"The use of the said buildings as stables is a source of continuous noises due to the stamping and kicking of horses, rattling of the stable gear, the grooming and stroking of the horses by their attendants, and the washing of carriages and horses in the open yard, and in also being a source of offensive stenches arising from the droppings of the horses, and the stable litter. The said droppings and the said litter attract huge masses of flies, and the storage of grass and fodder attract large number of rats, and the swarming of flies and rats as carriers of dangerous diseases has proved detrimental and dangerous to the health of those occupying the plaintiffs' premises including the plaintiffs and their family."

The plaintiffs complained that the aforesaid circumstances rendered their adjoining house uncomfortable and unhealthy and that the stables constituted a nuisance, and that in consequence of the said nuisance, they and the members of their family suffered in health and were obliged to remove to another house for some months. They further stated that the tenant on the first floor vacated the same in consequence of the

said nuisance and that they were unable to find a tenant for the 1st floor. The plaintiffs instituted on the 14th of November 1914 the present suit complaining that the nuisance created by the defendant, caused injury to the plaintiffs both in person and property. The plaintiffs prayed for—(*a*) a perpetual injunction to restrain the defendant from using his buildings as stables so as to constitute a nuisance, and from the continuance or repetition of the said nuisance, (*b*) for damages in the sum of Rs. 1,221 for the injury caused to the plaintiffs, (*c*) for damages in the alternative for depreciation in the value of the plaintiffs' property in the sum of Rs. 15,000.

The plaintiffs' dwelling house ran north and south and faced east and west. The defendant's stables ran along the east frontage of the plaintiffs' house.

The defendant denied that the stables constituted an actionable nuisance and relied upon the fact that they were erected in accordance with the Bye-laws of the Bombay Municipality and that a license was given to him after due inquiries were made by the Municipal Commissioner and the Health Officer of Bombay on a protest being lodged by the plaintiff himself. Without prejudice to his said contention the defendant pleaded that the nuisance complained of had been acquired by him as an easement. In support of his plea of easement he alleged that for nearly a century prior to 1908, the land was used for tethering bullocks and keeping bullock carts and it was in an extremely insanitary condition, the smells arising then being more noxious and offensive than the smells arising from the stables which were, however, kept clean and in good order and were inspected every day by the Health department. The defendant also contended at the hearing that the plaintiffs were not entitled to sue in their double capacity.

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The plaintiffs and the defendant relied upon expert medical evidence in support of their respective contentions.

*Bahadurji* (Acting Advocate General) with *Desai* for the plaintiffs.

*Jinnah* and *Wadia* for the defendant.

BEAMAN, J.:—This was a claim by the plaintiffs for injunction and damages, or damages in the alternative, against the defendant, Kerawalla, on account of the nuisance alleged to be caused to the plaintiffs by the stables of the defendant. The plaintiffs are husband and wife, the lady owning the tenement building which is alleged to suffer from the nuisance. This house was built in the year 1907 and Mrs. Bhicaiji Kumana, the first plaintiff, has since settled it on trust. In the meantime, she and her husband, with their family, resided up to a recent period on what are called the second and third floors of it. The suit, therefore, is brought by the plaintiffs in their double capacity, that is to say, as trustees interested in the reversion and as actual residents. The house consists of four floors. The ground floor is let to tenants of the humbler classes. The first floor used to be let to Mr. Katrak at a rent of Rs. 80 a month. The second and third floors, as I have said, were occupied by the plaintiffs and their family. The defendant obtained a lease of the adjoining open land, on which formerly bullocks used to be tethered and bullock carts kept. The evidence is that there was a shed and may be a shop or two on that otherwise vacant land before the defendant built his stables there. These stables were completed in or about October 1913. The stables cover 550 square yards and accommodate seventy-five horses. There are also half as many hack carriages which have to stand about the stables and are washed and cleaned on the spot

reserved for that purpose. The distance roughly between the defendant's stables and the plaintiffs' dwelling house may be said to be anything between twenty and thirty-five feet. Various points in respect of which complaint is made, as, for example, the washing stand, are considerably more distant. But it is quite unnecessary to go into minute details of that kind.

Speaking generally, the case opens on the admitted facts that this large stable has been brought into existence within a very short distance, indeed, of the plaintiffs' dwelling-house. The plaintiffs' dwelling-house runs north and south and faces east and west. The stables run along the east frontage of the plaintiffs' house.

The defendant's first line of defence was that the nuisance complained of had been acquired by him as an easement. This rests upon such evidence as has been led to show that before the erection of the stables the land on which they now stand was used for tethering bullocks and allowing bullock carts to stand when not in use. The evidence shows that while so used the land was probably in an extremely insanitary condition, and, doubtless, residents in the vicinity might have been expected to suffer at least as much inconvenience from the smells arising from the uses to which the land was put then as from the smells arising from the uses to which it is now put. Reference was made to the case of *Crump* v. *Lambert*[1] in support of the proposition that a right to cause a nuisance might be acquired as an easement. This proposition of law has been affirmed in the Bombay High Court in the case of *Kashinath* v. *Narayan*.[2] If, however, the defence is to rest on easement, it must be governed by the Indian Easements Act and the provisions of

(1) (1867) L. R. 3 Eq. 409.

(2) (1897) 22 Bom. 831.

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section 15 of that Act are fatal to it. Whatever easement may have been acquired by the owners of this land to cause a nuisance to the adjacent servient tenements by the tethering of bullocks, &c., on the vacant land admittedly came to an end in the year 1908. That is considerably more than two years before the nuisance now complained of came into existence and before the date of the suit. Every period of twenty years giving a right of easement under the Indian Easements Act must end within two years of suit. Moreover, the nuisances complained of being of a totally different character, that defence could not, on general principle, I think, quite apart from the special objection I have mentioned, be sustained.

Nor is there anything in the defendant's contention that the plaintiffs cannot be allowed to sue as trustees to protect the reversion and as tenants injured by the nuisance. The plaintiffs are landlords in respect of a considerable portion of the house and they are residents in another portion of it. They claimed to have suffered actual loss of rent by reason of this nuisance and the consequent withdrawal of tenants; and they likewise claim to have suffered considerable personal discomfort and injury as residents. In my opinion, there can be no objection to their suing in the double capacity, having regard to the comprehensive language of Order I, Rule 1. It is true that some difficulty might be experienced in defining nicely, for the purposes of estimating damages between such loss as they may have incurred in their character as residents by actual loss of rent, and prospectively by the general depreciation of the property, and the consequent injury to the reversion. These technical distinctions, however interesting theoretically, do not, I think, occasion much difficulty in practice. What really has to be ascertained here is whether the stables complained of

are a nuisance, and, if so, to what relief are the plaintiffs entitled.

Now, in approaching a question of this kind, we may safely be guided by the often quoted passage in the judgment of Knight Bruce V. C. in the case of *Walter* v. *Selfe*,[1] not that I think there is any great difficulty in disentangling the elements which are the legal ingredients of nuisance or any great need of examining the numerous elaborate attempts at defining and distinguishing the principles which are to be found in the judgments of many very eminent English Judges. It is true that a legal nuisance is rather an evasive, shifting and intangible thing, hard to be pinned down by a verbal definition. It must always be conditioned by time and place and circumstances; and it is little better than a truism to say, as Lord Thesiger said in the case of *Sturges* v. *Bridgman*,[2] that "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey." It is still more difficult in a city like Bombay, where the modes of life, the habits and the whole sanitary apparatus of about eighty per cent. of the vast population, would hardly be accessible to what is ordinarily meant by nuisance in the English law at all, to put anything like precise and legal limits to the notion of nuisance. Doubtless what would be a very real nuisance in a select and refined residential quarter would not be a nuisance in a slum; and what possibly ten per cent. of the population of Bombay might genuinely feel to be a nuisance would never occur to the minds of ninety per cent. of the population to be a nuisance at all. There is probably hardly any part of this city, except specially select residential quarters outside what may be called the native limits, where the bulk of the inhabitants are

(1) (1851) 4 De. G. & Sm. 315 at p. 322; (2) (1879) 11 Ch. D. 852.

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not daily and hourly exposed to malignant odours and incessant noises. Considerations of this kind make a decision of such a case, as I have before me, one of much difficulty. It is also one of considerable importance, I think, to the public. It might, on a first view, be thought to involve something more than what is in issue definitely here between the parties, namely, the much wider question how far the comfort of the individual must be subordinated in certain circumstances and certain conditions to the convenience of the general public. Such a consideration does not really arise in a Court of law. That was very emphatically laid down in the case of *The Attorney-General* v. *The Town Council of the Borough of Birmingham.*[1] It would naturally be contended on behalf of the defendant in a case of this kind that we must have public stables in the city of Bombay, if the public are to have the convenience of the use of hack carriages; and it will surely be asked, where are these stables to be put and how can they be maintained at all, if any discontented and hypersensitive resident in the neighbourhood can come into Court, and, after establishing one or two facts showing that the average comfort of the citizens of his class has been slightly invaded, obtain an injunction which would result in closing the stables. The answer to all this, which at first sounds very plausible, is simply that should there be any such pressing and urgent need, that is the business of the Legislature and not of the Courts. The Legislature can provide for what is necessary in the interests of the public generally by Statutes and the Courts must obey and enforce such Statutes. But in their absence no general considerations of mere policy, or rather abstract public rights, can be allowed to prevail against what the law recognises, and always has recognised, as

(1) (1858) 6 W. R. 811.

the legal rights of the individual. Keeping this principle clearly in view will assist us not only to narrow down the case with which I have to deal but to understand better the limitations thus imposed upon persons situated, as the defendant is situated, in regard to the rights of others in their immediate vicinity. For, I trust that I have now made it clear that the only question I have to answer is really an extremely simple question of fact, namely, whether the stables built and maintained by the defendant do constitute a nuisance of such a real character as would entitle the plaintiffs to relief in law against it. In answering that question I shall certainly not omit any of the considerations I have indicated in the foregoing observations. I shall have due regard to the station in life of the plaintiff, Dorabji Framji Kumana, and his family, to the locality of the stables, and the nature of the nuisance complained of. I shall also have to consider whether, in view of the indubitable fact that the greater part of what I may call the native city of Bombay is pervaded and permeated in all directions by smells and noises, the nuisance caused to the plaintiff, as he alleges by these stables, is more than a fanciful nuisance. It will have to be measured by standards suitable to the circumstances and conditions I have stated and not confined to elegant, refined and dainty modes of life.

I may at once brush away about sixty per cent. of the evidence in the case as being utterly useless. That is almost invariably the result of these strenuously contested suits. I could wish that it had been possible to confine the trial within a narrower compass. But in dealing with an alleged nuisance, it is very difficult at an early stage of the case, indeed at any stage until it is nearing completion, to say what effect evidence which is about to be offered may or may not have, upon some one or other ingredient of the total notion of

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nuisance, but it is quite certain that the defence has rather misconceived one aspect of nuisance. Virtually the whole expert evidence of the Municipal Health Officers, brought here in support of the defendant's case, goes no further than saying that the stables, kept as they are kept, do not constitute any danger to the life or health of the plaintiffs and their family. Now, in all nuisances there must be many degrees. There may be nuisances which endanger life; there may be others which endanger health; and there may be, again, nuisances which do no more than diminish the comforts of the plaintiffs. But the last class, no less than the first two, are undoubtedly nuisances, and there is no distinction whatever in principle between them that I can see beyond this, that I apprehend that where the nuisance was of a kind to injure the health or seriously imperil the life of those complaining of it, the Court would not hesitate to prevent it by an injunction, but where the nuisance was of the third kind, going no further than diminishing the comforts of human life, there would always be a question whether the Court would proceed against him who causes that nuisance by injunction or compensate the sufferer in damages. Before attempting to appreciate the evidence, very briefly, for what it is worth, let me say that almost the whole of it becomes superfluous when we consider the admitted facts. I cannot myself conceive how a large stable of this kind, standing within twenty or thirty feet of a gentleman's dwelling-house, could possibly be anything less than a nuisance. How much of a nuisance it might be would depend entirely upon the sensibilities of those occupying the adjacent dwelling-house. But that it must be a nuisance to some extent appears to me *prima facie* almost certain. I do not see how seventy-five horses stabled on 550 square yards of land within thirty feet of a decent dwelling-house could be other than a very serious annoyance to

the inmates of the house if they were at all sensitive either to sound or smell. And as soon as the question is removed from the sphere of danger to life or injury to health, and kept within the limits of the third and lowest class of nuisance, it appears in the first instance almost to answer itself. I entertain no doubt whatever, but that the plaintiff, Dorabji Framji Kumana, and his witnesses, particularly the expert witnesses, have done their very best to exaggerate the case against the defendant; but, then, one expects little else from expert witnesses. I do not mean to say that in this case they are particularly bright examples of the lengths to which that kind of evidence is sometimes carried. Indeed, I think that, on the whole, the plaintiff's expert witnesses were moderate and cautious, and this was particularly the case with Major Glen Liston. The result is that a careful analysis of their evidence shows that they have really confined themselves, for the most part, to medical generalisations, the truth of which nobody is ever likely to question. Col. Jackson entertains very Utopian ideas, and Bombay is far indeed from being Utopia. Major Hutchinson also evidently entertains strong antipathies to stables in crowded localities. Unfortunately in this city stables could hardly be put anywhere except in crowded localities, or at such a distance from the places where the horses need to be used that they would become utterly useless. For, it may safely be said that the less crowded parts of the city within a reasonable distance of the areas over which hack carriages ply are occupied by a relatively few superior and refined classes, and they would be the very first to protest against the nuisance of large public stables being set up close to their residences. And if the stables are to be confined, as it then appears almost inevitable they should be, to the lowest slums, where, although the surrounding population would not be the least likely to complain of nuisance, I should think the

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consequences would be far more disastrous to public health generally than if the stables were allowed to exist in quarters where they are likely to be more zealously watched and supervised. These are, again, general considerations, considerations of policy rather than of law. The evidence of the experts for the plaintiffs, Major Hutchinson, Major Glen Liston, Col. Jackson and Dr. Desai, if the latter be called an expert, proves, I think, that a certain amount of unpleasant smell was perceived by more than one of these gentlemen within the plaintiffs' house and dwelling apartments and that is about all. The rest of the medical evidence, excluding, for a moment, Dr. Desai, will be seen on examination to be almost always entirely inferential. Where there are horses, there is likely to be horse-dung : where there is horse-dung, there are likely to be flies and possibly mosquitos. Flies are dangerous carriers of disease. Therefore, there is enhanced danger to the inmates of the adjacent houses. All that may, or may not, be true, but it is rather evidence by conjecture or evidence on general principles, than evidence on actual facts. I am not neglecting those statements in the depositions of these medical gentlemen where we find them saying that they actually noticed a large number of flies, larger number than they expected at that time of the year in the rooms of the plaintiffs' dwelling-house. Their evidence as to the condition of the stables appears to me to be of little or no value, because I cannot doubt that taking the evidence as a whole the conclusion must be as stated by more than one witness that as stables go in Bombay, these stables are extremely well kept and may indeed be said to be, as I think Dr. Turner said they were, the very best public stables at present to be found in the whole city. The laudable efforts of the plaintiffs' experts to discover the minutest flaws in the defendant's stables may be attributed to that peculiar attitude of mind

which has placed expert evidence in the opinion of many eminent Judges in a class by itself. It will be observed that Col. Jackson declares that he saw one rat-hole, and the plaintiff has attempted to make a very great grievance of the danger to his health and life caused by an invasion of rats from the stable granaries. I refer to this to show what every Judge knows very well is the nature and value of expert evidence. It is on another ground, however, that these experts are perhaps equally emphatic against the stables. They are all agreed that want of sleep at night lowers vitality and predisposes one to every form of disease. Now, not one of them is in a position to say at first hand whether the dwellers in the plaintiffs' house have been really deprived of their sleep at night by stable noises. Here, again, we may cordially agree with these medical expert gentlemen. Doubtless, if you deprive human beings, for a considerable time, of sleep, they will suffer in health; but that will go but a little way to help in answering the question whether this group of human beings has been deprived of sleep by the noise occasioned in or around the defendant's stables. And here, again, I must touch upon one argument used by the defendant, namely, that even assuming the hack victoria drivers do make considerable noise in bringing their carriages in at all hours of the night, that is no fault of his and he cannot be charged with nuisance on account of it. He says that he is only answerable for keeping up his stables and keeping them up in the best sanitary state possible and that he cannot be called upon to account for noises made by those who frequent his stables as they come and go. Up to a certain point, I do not doubt that there might be some force in that argument, but it has to be examined specially with reference to the question whether or not the noises complained of are necessarily incidental to the up-keep

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of the stables. If they had occurred a hundred yards from the stables, then it might fairly be contended that the owner of the stables was not answerable for them. Still less can he be held answerable for the noises in the adjacent chawls and liquor shops, as deposed to by the plaintiff and his witnesses, made by the syces and drivers of these carriages. I do not know that it is a nuisance to set up the stables merely because the class of people attracted by the stables may cause noise and brawls in their vicinity. I do not say that it might not be so. That will be a very nice and delicate question to answer. But I entertain no doubt at all that if some of the noises complained of are necessarily incidental to the existence of the stables, then the stable-keeper must answer for them as for any other nuisance originating in his stables. For it would seem to me to be as absurd to contend that he was not, as to say that those who built a railway station are not answerable for the noise the trains make as they come in and go out.

I thus find that there are two main grounds of complaint revealed in the expert evidence for the plaintiffs: first, the odours emanating from the stables; and next, the noises made in the stables which deprive the plaintiffs, their family and tenants, of their natural sleep. And the question is, how far these grounds are made good. Either of them alone would doubtless constitute a nuisance. Both together might constitute a very serious nuisance.

Now, if we turn to the non-expert evidence on behalf of the plaintiffs, and I would include in that the evidence of the family physician, Dr. Desai, we have a very overcoloured picture of the extreme sufferings and hardships to which the dwellers of the plaintiffs' house have been exposed. The case of Mr. Katrak is typical. It also has another important bearing upon the question

I am trying, because Mr. Katrak contends that he was driven away from the plaintiffs' house by the propinquity of these stables and the plaintiffs on that account sustained all the loss in rent which they have suffered since Mr. Katrak left. I do not believe for a moment that the ailments of which Mr. Katrak personally complains and which he describes as having frequently afflicted his rather numerous family can be attributed to the exhalations of the stables. If we collate the medical evidence as a whole, there can be no doubt but that the general opinion is decisively against the conclusion that any of the inmates of the plaintiffs' house, notwithstanding the account they gave of their own sufferings, could possibly have been injured in health by such odours as were wafted when the wind blew from the north-east into the plaintiffs' house. In the first place, there is no ground whatever, I believe, medically speaking, to the idea which was first started and busily disseminated by Dr. Desai that the sore throats of Mr. Katrak and the other witnesses of the plaintiffs, who complained of it, were directly caused by the smells of horse-dung or horse-urine. I suppose there is no more common complaint in Bombay than sore throat; and if we must indulge in the very dangerous practice of ascribing causes, I think the general opinion would lean to the view that the too abundant dust with which this city is usually supplied is the cause, if there be a single cause, of the prevalence of this, and cognate affections of the eyes. Mr. Katrak, who appears to be an extremely delicate and highly strung, not to say neurotic, individual, would probably suffer from some ailment or other whether he lived close by stables or whether he did not. And because of that very nervous temperament of his, it is quite likely that he suffered more than the rest of the tenants from the noises, if noises there were, made in the stables during the night. But I cannot believe for one

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moment that any of his family suffered from diarrhœa, or low fever, or sore throat, more than I believe that the plaintiff's wife suffered from giddiness, vomiting and the like, merely because of such odours as were generated in these stables. We may, however, take it, on the medical evidence, I suppose, and on the testimony of these people, that a certain amount of horse effluvia did occasionally penetrate the plaintiffs' premises. I am the more ready to believe that, because I do not see how it could possibly be otherwise. The question would then have to be answered whether the occasional discomfort of being invaded by smells of this kind was such a diminution of the ordinary human comfort of men and women in the plaintiff's position of life in this city as would in law amount to nuisance. Did the matter rest there, I should entertain considerable doubt whether they did. As I say there are few parts of this city, even in the most fashionable localities, where residential quarters are not at times invaded by peculiarly penetrating and malignant smells. We should all prefer to be without them, but provided they are not continuous and provided that every precaution is taken to diminish them, reasonable people, I suppose, have to put up with inconveniences which long experience shows are inseparable or were hitherto inseparable from life in close proximity to masses of Orientals. I do not doubt that with growing civilisation and better living, the standards of comfort will be raised and by degrees even the lowest orders in the city of Bombay would become accustomed to more sanitary and more pleasing conditions of life than those in which they have passed their lives from their infancy and their fore-fathers for thousands of years before them. But we are here dealing with a Parsi gentleman and his family, and another Parsi gentleman who tenanted his flat thus representing a class of tenants whom the proprietor might reasonably hope to

retain, should there be no invasion in the shape of a nuisance of those amenities and comforts which existed when he built his house. Mr. Katrak was a mathematical teacher and is now head accountant in the Accountant General's Office. He paid a rent of Rs. 80 a month, that is to say, roughly some £70 a year ; and tenants paying £70 a year in London are of a very respectable class, entitled to all reasonable comforts and amenities as much as the best in the land. The plaintiff, again, and his wife and family are well-to-do Parsis of what I might without offence call the upper middle class ; and having regard to the style of the building and the rents the plaintiffs expected to obtain from their upper flats, I should say that the ordinary comforts and decencies of human life to which they are entitled would certainly involve their protection against being exposed night and day to the odours of horse-urine and dung, and worse still having their night's rest disturbed and broken by the stamping of horses and bringing in of carriages with all the noises which invariably attend in this country the taking out and grooming of horses. Now, the noises at night are attributed principally to these hack carriages coming in and the horses being then unharnessed and taken to the stables and there groomed. Everyone in this country knows that the grooming of a horse at the hands of an Indian syce is by no means a silent affair ; and in addition to that there is evidence that the horses stamp a good deal at night and that there is much loud shouting among the syces as the hack gharries come in at the close of their daily labours. This, I think, must be the case here, and I see no reason to doubt the evidence of the principal witnesses for the plaintiff, that is to say, the plaintiff himself, his wife and Mr. Katrak, on this point. I confess to some doubt whether the other tenants of the ground floor, Simoens, Rosario Alfonso and D'Abreo are entitled to much weight.

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They belong to a very different class. There can be no doubt that Simoens did give notice to quit on the ground that proximity to the stables was an intolerable nuisance. Whether that was due to the nuisance, or whether he meant to quit in any case, as the defendant asserts, and in order to oblige his landlord, gave as a reason the nuisance caused by the stables, are questions which I should feel some difficulty in answering with positive confidence. Certain it is that he left on this notice, and presently his salary was raised and he is now occupying quarters for which he pays more than double the rent he was paying for the room on the ground floor of the plaintiffs' house. It is true that his new quarters are in a locality bearing the somewhat forbidding name of Dukerwadi (pig-sty), but he declares they are clean and quiet. I think that there is considerable probability in the suggestion of the defendant that in contemplation of this rise in salary, he meant to take better quarters and the occasion was availed of by the plaintiff to induce Simoens to assist him in making evidence for this case. I do not believe a word of the evidence of Rosario Alfonso, if he means to say that he would suffer anything either in health or nerves, or that his sensibilities have been offended by anything that was being done in the stables. The case of D'Abreo is quite different. He appears to be extremely delicate and overstrung. Major Gordon Tucker, who saw him, says that he gave him the impression of being in the early stages of pthisis. Now, if that were so, his physical condition alone might well account for his not sleeping at night. He has continued living there still. He is certainly a very remarkable man if his story be true that for about two years he has never been able to sleep for more than two or three hours a night. What has actually happened is that the plaintiff has given him a better room at the same rent, and notwithstanding the terrible sufferings he must have endured during

all those long, long months, he still lives in the house irrespective of the smells and sounds of the stables, that is to say, in spite of his former agonising sufferings he continues to live there for the consideration of rupee one a month deducted from the full rent of the room he is now allowed to occupy. I mention all these details to show how deliberately the plaintiff and his witnesses have exaggerated, wherever they dared, the case against the defendant. The plaintiff himself appears to be an extremely robust and virile old gentleman, who does not exhibit any signs of impaired vitality caused by the noises and smells emanating from the defendant's stables, and I should not imagine from his healthy appearance that he has suffered much in any other respect than, possibly, temper. His wife, again, although she complains of a series of ills which ought to be enough to shatter an iron constitution, appeared to me to be in the enjoyment of very excellent health. She alone tells us of a plague of rats from which the house is suffering since the stables have been built. She declares that she saw nine in one day, though she cannot say whether she saw nine different rats or one rat nine times ; and as far as I remember she is the only witness who has seen a rat, although the danger from rats is put in the fore-front in the medical reports. One rat-hole has been seen by Col. Jackson, although he admits that he is not prepared to swear that it was a rat-hole, and still it was a hole and a hole might accommodate a rat. That is undeniable. As to flies and mosquitos, the evidence, where it is intended to be direct, appears to me to break down entirely. Unfortunately, the defendant's evidence consisting, on the whole, of very good material, indeed, was necessarily of a negative kind. But neither Dr. Turner, nor Dr. Goldsmith, nor Dr. Darabsett, nor Dr. Ibrahim Abdul Hussein, nor Dr. Gordon Tucker, noticed any unusual number of flies or mosquitos on their visits to the

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stables and the plaintiffs' house. None of these witnesses detected any smell in the plaintiffs' house and they all agree that the stables were admirably kept. They all agree that they conform to the highest standard of construction yet enforced by the Municipal authorities. Indeed they have been made to conform by anticipation to certain Bye-laws which are shortly expected to be passed. There is, therefore, no fault attributable to the defendant either in respect of construction or maintenance of his stables. Unfortunately that is no defence in an action for nuisance. If the nuisance exists, it is no answer to say that the defendant has done everything in his power and taken all reasonable precautions to prevent its existence. I have not dwelt particularly upon the evidence of Dr. Desai which was extremely long and in parts of a very peculiar and striking character. He is a family physician to the plaintiff and Mr. Katrak, and he has managed to persuade himself, I do not doubt quite honestly, that all the ailments, and they seem to be of varied kinds, afflicting this group of persons, are all attributable to the proximity of stables. From what we have seen of the samples, with the exception of Mr. Katrak; of the residents of the plaintiffs' house, I can only say that they appear to have been wonderfully well able to withstand what, according to him, was the continuous operation of dangerous causes. I give him credit for the best of intentions; but I confess there are parts of his evidence which make me doubt his intelligence. On the other hand, it is quite impossible for the unfortunate defendant to bring in any evidence at all except of a kind which is not likely to carry very much weight. The point being whether certain facts exist at certain times and in certain places, the evidence of gentlemen of the most unimpeachable character that they did not observe those facts because they did not happen to be there at those times is obviously a little

wanting in conclusiveness. But of all the testimony in the case, that which was given in the clearest and most convincing manner was, in my opinion, that of Major Gordon Tucker. But he is only speaking inferentially and as a result of a very brief inspection when he declares that, in his opinion, the stables could not possibly be a nuisance to those dwelling in the plaintiffs' house. I do not myself believe that the smells have created any very real, much less serious, nuisance. I am not at all sure about the noises at night and as to this none of the witnesses for the defence can say a word. I do not even except Dr. Nariman, who was an extremely enthusiastic expert witness on behalf of the defendant. On the way to attend a sick patient in the small hours of the morning, he appears to have dropped in *en passant* on the stables and he says that he did not hear then any particular noise. He has to admit that he was not there for more than fifteen minutes. Unfortunately that proves little. In all other respects he is in the same position as his confreres. He is perhaps singular in being an enthusiastic advocate of stables in the immediate vicinity of residential quarters. He lives near stables himself, and he appears to entertain an opinion that if stables are reasonably well kept they are rather a sanitary than an insanitary influence.

I think, after giving my best attention to the whole matter, that the existence of these stables, although they have been constructed according to the very latest requirements of the Municipality and have been maintained with the utmost care and under the most diligent supervision and in the best possible condition and have in every respect satisfied all the Municipal Sanitary authorities and have obtained a license from the Municipal Commissioner himself, they being where they are, do inevitably and are proved in this case to

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constitute a nuisance against which the plaintiff is entitled to obtain relief.

The question, then, arises, whether he should be granted an injunction or whether it will be sufficient to compensate him in damages. The English Courts never appear to find any difficulty in combining these two forms of relief, and that was the course adopted by Sir Charles Sargent in the case of *The Land Mortgage Bank of India* v. *Ahmedbhoy Habibbhoy*.[1] In cases of the kind I am dealing with there are additional reasons for adopting that course, for here the plaintiffs are complaining of actual damage by loss of rent and loss of comfort and can put no limit to the damage they anticipate in future, should the nuisance be allowed to continue. It must be admitted that on the first view there seems to be something a little inconsistent, having regard to the terms of the Indian Specific Relief Act in combining an award of damages with an injunction. But I shall not hesitate to follow Sir Charles Sargent after duly considering many English cases which appear to me to support that course. Thus, for instance, in the case of *Rapier* v. *London Tramways Company*[2] the claim for relief was founded on various grounds and the chief nuisance was abated before the trial. The Judge gave 40*s*. in costs and added an injunction to protect the plaintiff against further injury in future, and that was upheld on appeal.

I am, therefore, now to consider as best I can upon the materials before me, what, if any, damages the plaintiffs are entitled to here. Their claim for damages is chiefly founded upon their loss of tenants, actual and prospective. It is admitted that the ground floor is still fully tenanted and that no loss has been suffered

[1] (1883) 8 Bom. 35.

[2] [1893] 2 Ch. 588.

on that account. That is only natural having regard to the class of persons who occupy the plaintiffs' rooms on that floor. There then remains the first floor, which was formerly occupied by Mr. Katrak and has remained unoccupied since he left for a period of eight months before suit. The plaintiffs also claim that but for the stable nuisance they would have let the first, second and third floors (including those which they themselves occupy) to the Head Club at a rent of Rs. 275 a month. As to that we have the evidence of Moraes and Coutinho; and the evidence shows that Moraes, who appears to be the Director of this so-called Club, did contemplate taking the plaintiffs' first, second and third floors; but after consulting the Club Doctor, Dr. Coutinho, the idea was abandoned. Dr. Coutinho has given evidence here. I attach little or no importance to his opinion. He is a man of relatively small professional attainment, limited practice, and, I should say, limited intelligence. But he has a very definite idea that stables in close proximity to residential quarters do not enhance their salubrity and amenities; and to that extent I think, most people would agree with him. The members of this club, however, I gather, are of a class who are not very sensitive either on the score of mere comfort or refinement; and but for their Doctor's solicitude on their behalf I should think there was no reason why Moraes should not have taken these premises if he intended apparently to crowd in some forty-five or more of his club mates on the first, second and third floors of this building. I cannot doubt that in fact the bargain went off because of the opinion, whether well or ill-founded, expressed by Dr. Coutinho. But I must remark on this that it is, in my opinion, quite inconsistent with a part at least of the plaintiffs' case as expressed in the very emphatic evidence of the plaintiff, Bai Bhicaiji. If that part of her evidence is read, it will be seen that she expresses,

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and doubtless with a very clear idea of its legal bearing on the question of damages, an almost romantic attachment to this particular building. She was doubtless advised that that might have helped the plaintiffs' case in one or two points and increase the measure of damages. But if she says that she would rather die than give up residing in that house, I do not quite understand why Moraes's proposals were ever entertained at all. But I put all that down as being of a piece with the plaintiff's general scheme of over-colouring and exaggerating in every point the discomfort, injury and damage which he has suffered. On this ground, then, there is the fact, the undoubted fact, that Mr. Katrak left the house and that his flat has remained vacant ever since. I think that I must take it to be true, and he swears, that he left because he could not endure the proximity of the stables. It has been suggested by the defendant, and not without force, that this is not the true reason but that he really left when the chawl was put up because in its present position its inmates are able to overlook his premises and so destroy his privacy. That too is quite possible. But assuming that he did leave, as he said he did, on account of the stable nuisance, then doubtless the plaintiff would have suffered loss to that extent, since he has not been able, although he swears he has done his best to obtain another tenant. I do not attach much importance to his loss of the Head Club as tenant at a rent of Rs. 275 a month, because it is, as I just now said, entirely inconsistent with a great part of his own evidence, namely, that he has always been particularly desirous of retaining the second and third floors of the house for the residence of himself and family. But it appears to me that some consideration must be given to the defendant's offer, which was made at the earliest stage and has since been adhered to of taking the entire building at Rs. 315 a month for the remaining portion

of his lease, that is, for the next sixteen years. He has also made in Court an offer to take Mr. Katrak's flat at the old rent for the same period. Now, according to the estimate given by the plaintiff himself of the rental value of his house, it would not come to more than Rs. 315 a month ; but he says that he anticipated getting Rs. 400 for it as time went on and that the offer of the Head Club showed that this anticipation would have been realized but for the existence of the stables ; and it is contended on his behalf that the defendant's offer is not to be taken into consideration in diminishing the plaintiffs' damages since it really amounts to compelling him by the existence of the nuisance to forego his preferences and deliver his property into the defendant's hands. But again I say he cannot thus blow hot and cold. If he wishes to estimate his damages for the loss of rent by the offer of the Head Club, he then cannot turn round and say that the defendant's offer should not be considered in this connection because it involves the withdrawal of the plaintiff and his family from the house. It would have been equally necessary for the plaintiff and his family to vacate their floors if he had accepted Moraes's offer. So that, on the whole, I do not think that there is any real reason why, if they declined to accept the defendant's offer, they should now be heard to complain that they have been damnified in pocket by their dwelling-house or any part of it remaining tenantless.

There remains the question whether the plaintiffs are entitled to any damages on account of the discomfort to which they have themselves been subjected as a consequence of the nuisance on account specially of having been obliged to leave their house and incur the expense of taking up quarters elsewhere. I think, in view of what I have already said, I must hold that they have been exposed to a considerable amount of

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discomfort and unpleasantness. I doubt whether it was really necessary for them to leave their flats and take up new quarters as they say they have done elsewhere. I attach no importance whatever to the fact that on the first occasion they left in the hot weather to reside in Bhicaiji's brother's house. I expect that that was a family arrangement and had nothing more to do with the nuisance caused by the defendant's stables than perhaps indirectly with the intention of making evidence in this suit. I am not, therefore, disposed to base the award of damages upon any definite sums which, they may allege, they paid in rent or otherwise. As for the alleged discomfort and unpleasantness which they have suffered, that is again a matter which is extremely difficult to assess in terms of money. But I think the justice of the case would be sufficiently met if I award the plaintiff Rs. 500 in lump as damages, and further add an injunction in the ordinary form which appears to be invariably used in England, restraining the defendant from carrying on his stables in such a way as to occasion a nuisance to the plaintiff. This too is to carry all the costs of the suit.

The decree will be drawn accordingly.

A reasonable time must be given to the defendant to comply with this injunction.

Attorneys for the plaintiffs : Messrs. *Jehangir, Seervai, Minochehr and Hiralal.*

Attorneys for the defendant : Messrs. *Merwanji, Kola, Romer Billimoria and Co.*

*Suit decreed.*

G. G. N.