The acts of the husband which are powerless to defeat, ought not be suffered to impair the value of the wife's dower beyond their necessary results under the American rule. Creditors who take the husband's lands by levy take them subject to the contingency of the wife's claim of dower. Those who derive their title from the levying creditors take it with the same burden as though they derived it directly from the husband by a levy on the parcel which they own. The division by the levying creditors of the tract levied on as the husband's property, and the sale of it to various parties in small lots, and the improvements made by the owners of the other lots must be regarded, if they have tended to enhance the value of the defendant's lot, and consequently of the dower to be assigned therein, as among the "other causes" and "other circumstances" to the benefit of which the dowress is entitled.

The language quoted from the decisions applies only to the lot in which dower is demanded in the suit, and not to other land of the husband, though alienated at the same time and by the same act.

The plaintiff is entitled to have her dower assigned in the lot held in severalty by this defendant precisely as though that lot had been aliened by the husband as a distinct estate and by a separate conveyance.

Judgment for demandant for her dower accordingly.

RECENT ENGLISH DECISIONS.

Court of Appeal.

BRYANT v. LEFEVRE ET. AL.

The access of air to the chimneys of a building cannot, as against the owner of neighboring land, be claimed either as a natural right of property or as an easement by prescription.

The plaintiff and the defendants were occupiers of adjoining houses, and for more than twenty years the occupiers of the plaintiff's house had enjoyed access of air to the chimneys of it. Subsequently the defendants piled timber on the top of their house so as to overtop the plaintiff's chimneys and cause them to smoke. In an action by the plaintiff to recover damages for the nuisance so caused, *Held*, that the action could not be maintained, either on the ground that an easement had been acquired, or on the ground that the defendants had created a nuisance.

THIS was an action to recover damages for a nuisance caused by the defendants having obstructed the free access of air to the chimneys of the plaintiff's house.

At the trial, before Lord COLERIDGE, C. J., judgment was entered for the plaintiff, and the defendants appealed. The facts and arguments fully appear in the judgments.

Gates, Q. C., and *Edward Clarke*, for the defendants, relied on *Webb* v. *Bird*, 13 C. B. N. S. 841.

Staveley Hill, Q. C., and *Cock*, for the plaintiff.

BRAMWELL, L. J.—The plaintiff says that he is possessed of a house, that for more than twenty years this house and its occupants have had the wind to blow to, over and from it, and that he has, as so possessed, the right that it should continue to do so; that the defendants have interfered with this right, and prevented the free access and departure of the wind. He adds that they have committed a nuisance to him as so possessed. He has proved that he is possessed of a house more than twenty years old; that the wind had access to it and passage over it for twenty years without the hindrance recently caused by the defendants; that the defendants have caused a hindrance by putting on the roof of their house (which is as old as the plaintiff's), timber to a considerable height, thereby preventing the wind blowing to and over the plaintiff's house when in some directions, and passing away from it when in others; that this causes his chimneys to smoke, as they did not before, to the extent of being a nuisance. The question is if this shows a cause of action.

First, what is the right of the occupier of a house in relation to air independently of length of enjoyment? It is the same as that which land and its owner or occupier have, it is not greater because a house has been built; that puts no greater burthen or disability on adjoining owners. What, then, is the right of land and its owner or occupier? It is to have all natural incidents and advantages as nature would produce them. There is a right to all the light and heat that would come, to all the rain that would fall, to all the wind that would blow—a right that the rain which would pass over the land should not be stopped and made to fall on it; a right that the heat from the sun should not be stopped and reflected on it; a right that the wind should not be checked, but should be able to escape freely. And if it were possible that these rights were interfered with by one having no right, no doubt an action would lie. But these natural rights are subject to the rights of adjoining owners, who, for the benefit of the community, have and must have

rights in relation to the use and enjoyment of their property that qualify and interfere with those of their neighbors—rights to use their property in the various ways in which property is commonly and lawfully used. A hedge, a wall, a fruit tree, would each affect the land next to which it was planted or built. They would keep off some light, some air, some heat, some rain, when coming from one direction, and prevent the escape of air, of heat, of wind, of rain, when coming from the other. But nobody could doubt that in such cases no action would lie, nor will it in the case of a house being built and having such consequences. That is an ordinary and lawful use of property, as much so as the building of a wall or planting of a fence or an orchard. Of course, the same reasoning applies to the putting of timber on the top of a house, which, if not a common is a perfectly lawful act; and it would be absurd to suppose that the defendants could lawfully put another story to their house with the consequences to the plaintiff of which he complains, but cannot put an equal height of timber.

These are elementary and obvious considerations, but, if borne in mind, will assist very materially in the decision of this case.

The plaintiff, then, merely as possessed of land or house, has not the right claimed. But he goes further, and says that the house and its owner and occupiers have had the enjoyment of this benefit for twenty years. He, therefore, relies on that as showing a prescriptive title, or title by lost grant. Whether he has so stated his claim as to raise such a case, it is not necessary to say, for we are of opinion that even if he has, he has not established it; that no such right as he claims can be established by mere enjoyment, without interruption for however long a period. It certainly cannot be claimed under the Prescription Act. Nor can it by lost grant, unless of such a character that it could be claimed by the common-law prescription; for the theory of a lost grant is only applicable to cases where something prevents the application of the common-law prescription. We do not say there might not be an express grant or covenant not to interfere with the passage of air over neighboring property, which could be enforced against the grantor or covenantor, and even against his assigns with notice; whether it could be against his assigns without notice it is not necessary to say. But the lost grant doctrine is ancillary to the common-law prescription doctrine. Can this right then be claimed under that? Now, certainly the land as such has enjoyed this as

of right for all time—since the sun first shone and the wind first blew, and it is not a case of twenty, or any finite number of years. But that enjoyment is the result of the natural right of which we have spoken, and not of an acquired right. Then, does the existence of a house on the land for twenty years make any difference? None. The owner of the land enjoyed the free passage of the air over his land when it was a field, subject to the right of his neighbors to build on their own land, or to do on their own land any lawful act. He now enjoys it over his land with a house on it, subject to the same rights. If the house on his land is less commodious, by reason of any lawful act of his neighbor done on the adjoining land, then, to use the expression of the judges in *Bury* v. *Pope*, Cro. Eliz. 118, "it was his folly to build his house so near to the other's land."

It may be said that if this reasoning is correct it is applicable to lights. So it is to a great extent; and any one who reads the cases relating to the acquisition of a right to light will see that there has been great difficulty in establishing it on principle. Mr. Justice WILLES says it is anomalous: *Webb* v. *Bird*, 10 C. B. N. S. 285; and per Mr. Justice BLACKBURN, 13 C. B. N. S. 844. In the case referred to of *Bury* v. *Pope*, it was held that where there are owners of adjoining pieces of land, and one builds a house, and for thirty or forty years has access of light to it, yet the other may build a house adjoining and shut out the light. This shows the general principle, though the law as to light is now different as a right is gained to it by enjoyment. But there is this difference between this claim and the claim to light: The right in that case is always limited to the particular window or aperture through which the light and air have had access. It is one, therefore, against which an adjoining owner can defend himself by blocking it up within the period necessary for the gaining of a right. Lord WENSLEYDALE thought this a very strong thing as a great burden on the adjoining landowner: *Chasemore* v. *Richards*. But here the claim is of such a character that its enjoyment could only be prevented by surrounding the land with erections as high as it might at any time be wanted to build on the land. The principle of *Chasemore* v. *Richards*, 7 H. L. Cas. 349, is applicable, namely, that the right claimed is not one the law allows, being too vague and uncertain, one the acquisition of which the adjoining owner could not defend himself against, and that the remedy of

the plaintiff in such a case as this is to build higher, as in such a case as that it was to dig deeper.

We are of opinion that on principle the plaintiff fails to make out his right as claimed. The authorities are to that effect. *Webb* v. *Bird*, 10 C. B. N. S. 268; 13 C. B. N. S. 841, is really in point. It is true that in that case the mill appeared to have been built in 1829. I believe the date of the building of the plaintiff's house in this case did not appear; it will hardly be supposed to be one hundred years old. But the reasoning in that case would be equally applicable to a claim by prescription from time whereof the memory of man runneth not to the contrary, if the date of the building of the plaintiff's house could not be shown. It is really hardly necessary to notice the other cases, which are sufficiently dealt with by the judges in *Webb* v. *Bird*. We may, however, mention *Roberts* v. *Macord*, 1 Moo. & R. 230, where Mr. Justice PATTESON was of opinion that a claim like the present could not be supported. All the reasoning and all the considerations that prevailed in *Chasemore* v. *Richards*, are opposed to it. Where it has been said that there is a right to air there is good ground for supposing that the wholesomeness of the air has been interfered with, or that there was some peculiarity in the land or building which made the air necessary in a definite place. We are of opinion, then, that the action cannot be maintained on this ground.

But it is said, and the jury have found, that the defendants have done that which has caused a nuisance to the plaintiff's house. We think there is no evidence of this. No doubt there is a nuisance, but it is not of the defendants' causing. They have done nothing in causing the nuisance. Their house and their timber are harmless enough. It is the plaintiff who causes the nuisance, by lighting a coal fire in a place the chimney of which is placed so near the defendants' wall that the smoke does not escape, but comes into the house. Let the plaintiff cease to light his fire, let him move his chimney, let him carry it higher, and there would be no nuisance. Who, then, causes it? It would be very clear that the plaintiff did, if he had built his house or chimney after the defendants had put the timber on theirs, and it is really the same, though he did so before the timber was there. But (what is in truth the same answer) if the defendants cause the nuisance, they have a right to do so. If the plaintiff has not the right to the passage of air, except subject to the defendants' right to build or

put timber on their house, then his right is subject to their right, and though a nuisance follows from the exercise of their right, they are not liable. *Sic utere tuo ut alienum non lædas* is a good maxim. But, in our opinion, the defendants do not infringe it. The plaintiff would, if he succeeded. We are therefore of opinion, that judgment should be for the defendants.

COTTON, L. J.—This is an appeal of the defendants from so much of a judgment of Lord COLERIDGE in favor of the plaintiff as was given in respect of the interruption of air to the plaintiff's chimney, caused by the defendants. The jury have found—1. That there had been for more than twenty years free access of air to the chimneys of the plaintiff's house; 2. That the defendants interfered with it; 3. That the erection of the defendants' wall sensibly and materially interfered with the comfort of human existence in the plaintiff's premises; 4. That the plaintiff sustained damage—40*l.* by the building of the defendants' wall, and 20*l.* by falling of timber and other matters from defendants' stacks, on the plaintiff's premises.

The first question is, whether the plaintiff has, either as a natural right of property or as an easement, a right as against the defendants to have the access of air to his chimney without any interruption by the defendants. In my opinion, he has no such right.

In my opinion, it would be a contradiction in terms to say that a man has a natural right against his neighbors in respect of a house which is an artificial addition to, and not a user of, the land. That the owner of a house has, as against his neighbor, no natural rights in respect of his house, is shown by the cases as to subjacent and lateral support. These show that while every owner of property has, independently of user, a natural right to support for his land, if he adds buildings to his land, and thereby requires an increased support, he, in the absence of express grant, can only acquire a right to such support by user, that is, by way of easement.

The right (if any) of the plaintiff to the uninterrupted flow of air to his chimney must therefore be by way of easement. Cases to prevent, or claim damages for interference with ancient lights, are frequently spoken of as cases of light and air, and the right relied on as a right to the access of light and air. But this is inaccurate. The cases, as a rule, relate solely to the interference with the access of light, and in no case has any injunction been

granted to restrain interference with the access of air. It is unnecessary to say whether, if the uninterrupted flow of air through a definite aperture or channel over a neighbor's property, has been enjoyed as a right for a sufficient period, a right by way of easement could be acquired. No such point is made in this case; and I am of opinion that a right by way of easement to the access of air over the general unlimited surface of a neighbor's property, cannot be acquired by such enjoyment. For this *Webb* v. *Bird* is an authority. As the last decision in that case was in the Exchequer Chamber, it would be sufficient to rely upon the authority of that case. But I think it better to say that I entirely agree with that decision, and with the reasons given in this case by Lord Justice BRAMWELL.

In my opinion, therefore, the plaintiff has no right in respect of the flow of air to or from his chimney. Every man has a natural right to enjoy the air pure and free from every noxious smell or vapors, and any one who sends on to his neighbor's land that which makes the air there impure, is guilty of a nuisance. Here it is found that the erection of the defendant's wall has sensibly and materially interfered with the comfort of human existence in the plaintiff's house, and it is said that this is a nuisance for which the defendants are liable. Ordinarily this is so; but the defendants have done so not by sending on to the plaintiff's property any smoke or nauseous vapor, but by interrupting the egress of smoke from the plaintiff's house in a way to which, as against the defendants, the plaintiff has no legal right. The plaintiff creates the smoke which interferes with his comfort. Unless he has as against the defendants a right to get rid of this in the particular way which has been interfered with by the defendants, he cannot sue the defendants because the smoke made by himself, for which he has not provided any effectual means of escape, causes him annoyance. As if a man tried to get rid of liquid filth arising on his own land by a drain into his neighbor's land, until a right had been acquired by user, the neighbor might stop the drain without incurring liability by so doing. No doubt great inconvenience would be caused to the owner of the property in which the liquid filth arises; but the act of his neighbor would be a lawful act, and he would not be liable for the consequences attributable to the fact that the man had accumulated filth without providing any effectual means of getting rid of it.