defendant's land, who covenanted not to use the water on his land unnecessarily, so as to interfere with the plaintiff's right of use of the water. Defendant unnecessarily made excavations on his land, which diminished the flow of water. *Held*, that the excavations, though not interfering with any known watercourse, but drawing the water off by percolation, were yet unlawful, as defendant was by his grant precluded from stopping or in any way lessening the supply of water.

ARTHUR BIDDLE.

RECENT ENGLISH DECISIONS

High Court of Justice. Court of Appeal.

STURGES v. BRIDGMAN.

User which is neither physically preventible by the owner of the servient tenement, nor actionable, cannot found an easement.

A confectioner had for more than twenty years used large mortars in his back kitchen, which abutted on the garden of a physician. Subsequently, the physician erected in his garden a consulting room, one of the side walls of which was the party wall between the confectioner's kitchen and the garden. The noise and vibration caused by the use of the mortars, which had previously caused no material annoyance to the physician, then became a nuisance to him, and he brought an action for an injunction: *Held*, that the defendant had not acquired an easement, and that the plaintiff was entitled to an injuuction.

APPEAL from the Master of the Rolls. Action to restrain an alleged nuisance.

The plaintiff was a physician, who occupied as his professional residence the house No. 85 Wimpole street, the lease of which he purchased in 1865. Wimpole street is crossed at right angles by Wigmore street, and the plaintiff's house, which was the second house from the corner where Wigmore street crosses, had at its rear a garden, at the end of which the plaintiff erected a consulting-room in 1873.

The defendant was a confectioner, who carried on business at 30 Wigmore street, and his kitchen was at the back of his house, having been erected on ground which was formerly a garden, and which abutted on the portion of the plaintiff's garden on which he built the consulting-room. Thus one of the side walls of the consulting-room was the back wall of the defendant's kitchen.

The defendant had in his kitchen two large marble mortars, set in brickwork, built up to and against the party-wall, which separated his kitchen from the plaintiff's consulting-room, and worked by two large wooden pestles, held in an upright position by horizontal bearers, fixed into the party-wall. These mortars were used for breaking up and pounding loaf sugar, and other hard substances, and for pounding meat.

The plaintiff alleged that when the defendant's pestles and mortars were being used—and they were generally used between 10 A. M. and 1 P. M.—the noise and vibration caused thereby was very great, and were heard and felt in the plaintiff's consulting-room, and that such noise and vibration seriously annoyed and disturbed the plaintiff, and materially interfered with him in the practice of his profession; and that in particular the noise prevented him from examining his patients by auscultation for diseases of the chest, and that he also found it impossible to engage with effect in any occupation which required thought and attention.

In his statement of defence the defendant alleged that he and his father had used one of the pestles and mortars in the same place and to the same extent as now for more than sixty years, and that he had used the other pestle and mortar in the same place and to the same extent as now for more than twenty-six years; that if the plaintiff had built his consulting-room with a separate wall, and not against the wall of the defendant's kitchen, he would not have experienced any noise or vibration; and he denied that the plaintiff suffered any serious annoyance, and he pleaded a prescriptive right to use the pestles and mortars under the 2 & 3 Will. 4, ch. 71.

The Master of the Rolls granted an injunction, and from this decision the defendant appealed.

Chitty, Q. C., and *Methold*, for appellant.—A right is acquired by twenty years' user in cases of easements analogous to the present: *Baxendale* v. *McMurray*, Law Rep., 2 Ch. 790; *Crump* v. *Lambert*, Law Rep., 3 Eq. 409; *Ball* v. *Ray*, Law Rep., 8 Ch. 467; Gale on Easements, 4th ed., p. 20; *Elliotson* v. *Feetham*, 2 Bing. N. C. 134; *Bliss* v. *Hall*, 4 Id. 183; *Flight* v. *Thomas*, 10 A. & E. 590; 8 Cl. & Fin. 331; *Wright* v. *Williams*, 1 M. & W. 77; *Gaunt* v. *Fynney*, Law Rep., 8 Ch. 8; *St. Helen's Smelting Co.* v. *Tipping*, 11 H. of L. Cas. 642; *Angus* v. *Dalton*,

Law Rep., 3 Q. B. Div. 85; 4 Q. B. Div. 162; *Partridge* v. *Scott*, 3 M. & W. 220.

Waller, Q. C., and *S. Dickinson*, for respondent.

The opinion of the court was delivered by

THESIGER, L. J.—It has been proved that in the use of the mortars before and at the time of action brought, a noise was caused which seriously inconvenienced the plaintiff in the use of his consulting-room, and which, unless the defendant had acquired a right to impose the inconvenience, would constitute an actionable nuisance. The defendant contends that he had acquired the right either at common law or under the Prescription Act by uninterrupted use for more than twenty years. In deciding this question one more fact is necessary to be stated. Prior to the erection of the consulting-room no material annoyance or inconvenience was caused to the plaintiff or to any previous occupier of the plaintiff's house by what the defendant did. It is true that the defendant in the seventh paragraph of his affidavit speaks of an invalid lady who occupied the house upon one occasion about thirty years before requesting him, if possible, to discontinue the use of his mortars before eight o'clock in the morning, and it is true also that there was some evidence of the garden wall having been subjected to vibration; but this vibration, even if it existed at all, was so slight, and the complaint, if it can be called a complaint, of the invalid lady, and can be looked upon as evidence, was of such a trifling character, that upon the maxim *de minimis non curat lex*, we arrive at the conclusion that the defendant's acts would not have given rise to any proceedings either at law or in equity. Here, then, arises the objection to the acquisition by the defendant of any easement. That which was done by him was in its nature such that it could not be physically interrupted; it could not, at the same time, be put a stop to by action. Can user, which is neither preventable nor actionable, found an easement? We think not. The question, so far as regards this particular easement claimed, is the same question, whether the defendant endeavors to assert his right by common law or under the Prescription Act. That act fixes periods for the acquisition of easements; but except in regard to the particular easement of light, or in regard to certain matters which are immaterial to the present inquiry, it does not alter the character of easements or of the user or enjoyment by which they are acquired

This being so, the law governing the acquisition of easements by user stands thus: Consent or acquiescence of the owner of the servient tenement lies at the root of prescription and of the fiction of a lost grant, and hence the acts or user which go to the proof of either the one or the other must be, in the language of the civil law, *nec vi, nec clam, nec precario;* for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbor of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavors to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold that an enjoyment which a man cannot prevent, can raise no presumption of consent or acquiescence. Upon this principle it was decided in *Webb* v. *Bird*, 13 C. B. (N. S.) 841, that currents of air blowing from a particular quarter of the compass; and in *Chasemore* v. *Richards*, 7 H. of L. Cas. 349, that subterranean water percolating the strata in no known channels could not be acquired as an easement by user; and in *Angus* v. *Dalton*, Law Rep. 4 Q. B. Div. 162, 17 Am. Law Reg. N. S. 645; a case of lateral support of buildings by adjacent soil, which came on appeal to this court, the principle was in no way impugned, although it was held by the majority of the court not to be applicable so as to prevent the acquisition of that particular easement. It is a principle which must be equally appropriate to the case of affirmative as of negative easements; in other words, it is equally unreasonable to imply consent to your neighbor enjoying something which passes from your tenement to his, or subjecting your tenement to something which comes from his, when in both cases you have no power of prevention. But the affirmative easement differs from the negative easement in this; that the latter can in no circumstances be interrupted other than by acts done upon the servient tenement; the former constituting as it does a direct interference with the enjoyment by the servient owner of his tenement, may be the subject of legal proceedings as well as of physical interruption. To put concrete cases, the passage of light and air to your neighbor's window may be physically interrupted by you, but gives you no legal ground of complaint against him. The passage of water from his land on to yours may be physically interrupted, or may be treated as a trespass and made the ground of action for damages, or for an injunction, or

both. Noise, then, is similar to currents of air and the flow of subterranean and uncertain streams in its practical incapability of physical interruption, but it differs from them in its capability of grounding an action: *Webb* v. *Bird*, and *Chasemore* v. *Richards* are not, therefore, direct authorities governing the present case. They are, however, illustrations of the principle which ought to govern it, for until the noise, to take the present case, became an actionable nuisance, which it did not at any time before the consulting-room was built, the basis of the presumption of consent, viz., the power of prevention physically or by action—was never present. It is said that if this principle is applied in cases like the present, and were carried out to its logical consequences, it would result in the most serious practical inconveniences, for a man might go, say, into the midst of the tanneries of Bermondsey, or into any other locality devoted to a particular trade or manufacture of a noisy or unsavory character, and by building a private residence upon a vacant piece of land put a stop to such trade or manufacture altogether. The case also is put of a blacksmith's forge, built away from all habitations, but to which in time habitations approach. We do not think that either of these hypothetical cases presents any real practical difficulty. As regards the first, it may be answered that whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances. What would be a nuisance in Belgrave square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, judges and juries would be justified in finding and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong. As regards the blacksmith's forge, that is really an *idem per idem* case with the present. It would be, on the one hand, in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not in the present condition of the adjoining land, and possibly never will be, any annoyance or inconvenience to either its owner or occupier; it would be, on the other hand, in an equal degree unjust, and from a public point of view, inexpedient that the use and value of the adjoining land should for all time and under any circumstances be restricted and diminished by reason of

the continuance of acts incapable of physical interruption, and which the law gives no power to prevent. The smith in the case supposed might protect himself by taking a sufficient curtilage to insure what he does from being at any time an annoyance to his neighbor, but the neighbor himself would be powerless in the matter. Individual cases of hardship may, no doubt, occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes. The Master of the Rolls in the court below took substantially the same view as ourselves, and granted the relief prayed for; and we are of opinion his order was right and should be affirmed.

Appeal dismissed with costs.

Nothing is more elementary than this: That in order to gain an easement by prescription, it is absolutely essential that the enjoyment should have been "adverse"; but it is not always so apparent that in order to be adverse, within the meaning of that word, the use must have been one which justified and was capable of immediate prevention by some action, either at law, or *in pais*, or both, of the other party. The claimant of the easement cannot acquire a legal right, unless all the time he is committing a legal wrong; he is not committing a legal wrong unless he is all the time subject to some legal redress. He must be constantly stealing away the original legal rights of the opposite party, and constantly transferring them to himself, and if the other knows of this steady loss of his right and takes no means to prevent it *when he can*, then after the requisite time he has lost it altogether.

Thus the prior occupation and use of a mill-stream in a reasonable manner and extent, *for any length of time*, cannot give the mill-owner any prescriptive right to the exclusive use of the water, as against an upper proprietor, who subsequently erects his mill and dam above, and thus in some degree impedes the water, and interferes with the former free and unimpeded use of the same. Why? Because the upper proprietor could not have had any action during the time for such reasonable use of the water by the proprietor below: *Thurber* v. *Martin*, 2 Gray 394; *Parker* v. *Hotchkiss*, 25 Conn. 321; *Gould* v. *Boston Duck Co.*, 13 Gray 442; *Hoyt* v. *Sterrett*, 2 Watts 327; and see *Platt* v. *Johnson*, 15 Johns. 213; *Keeney and Wood Man'f. Co.* v. *Union Man'f. Co.*, 39 Conn. 576; *Heath* v. *Williams*, 25 Me. 209; *Dumont* v. *Kellogg*, 29 Mich. 420.

But if an upper riparian proprietor *unreasonably* diverts o ruses the water of a natural surface stream, a right of action therefor instantly accrues to every lower proprietor, even though he has no present use for the water, either for mechanical, agricultural or domestic purposes, and consequently has sustained no actual perceptible damage: *Newhall* v. *Ireson*, 8 Cush. 595, and other cases.

And *because* he has an immediate right of action for at least nominal damages, this unreasonable use of the water becomes immediately adverse, and consequently, if enjoyed for a period of twenty years, it becomes a perfect prescriptive right. It does not require twenty years enjoyment from the time of actual damage to the lower proprietor, but only from

the time the unreasonable use originated. The power to commence an action is the test of the commencement of the adverse right.

Whereas, in underground water, percolating through the soil and not collected in any stream, or volume, no length of enjoyment can ever give a person an adverse right against another, simply because the latter never had a right of action against the person so using it, or benefited by it, and so no prescriptive right ever commenced; consequently, although a mill-owner for more than sixty years enjoys the use of a stream of water, which is chiefly supplied by such underground percolating water, he acquires no prescriptive right to such continued underground supply, and can maintain no action against an adjoining landowner, who by digging for an extensive well on his own land, cuts off all such underground supply. The inability of the landowner to sue for using it is conclusive against the acquisition of any right by using it. Such was the well-known case of *Chasemore* v. *Richards*, 7 H. L. C. 49 (1859); 5 H. & N. (Am. ed.) 982; 2 Id. 168. And *Wheatley* v. *Baugh*, 25 Penn. St. 528, is very similar.

The easement of lateral support for one's land furnishes another illustration. Every one has a natural and original right of supporting his land by the adjoining land of his neighbor, this being naturally limited to support of his land in its *natural state*, without any buildings, or other artificial improvements, or weights placed upon it. He may acquire, however, by express grant, an additional right or easement for the support of buildings as well as land; but he cannot do that by *prescription*. Why? Because having a legal right to erect buildings on his land, he does not thereby render himself liable to any action by his neighbor, and his neighbor has no right or power to prevent it. Enjoyment, therefore, for any length of time cannot destroy or create any rights. This result, apparently so obvious and simple, we had reached in this country long before it was announced in England, by COCKBURN, C. J., in *Angus* v. *Dalton*, and even while the English courts were constantly deciding the very opposite. For as early as 1838, the Supreme Court of Pennsylvania, in *Richart* v. *Scott*, 7 Watts 462, in speaking of this subject declared, "It is difficult, if not impossible, to conceive how an implication or presumption of such license or grant can be made, where there is no adverse user, encroachment upon or possession had or taken of any rights or thing belonging to another, and nothing done to which any other can make even the slightest color of objection."

And Georgia still more emphatically declared in *Mitchell* v. *Mayor*, 49 Ga. 19 (1873), that "it is difficult, if not impossible, to see how this doctrine (of prescription) can be made to apply to those instances of easements, so called, when there is no possession of anything belonging to another, no encroachment upon another's rights, no adverse user: in fact nothing done whatever against which another could complain, or for which an action could be brought; and no remedy existing whereby to prevent such a presumption from arising."

While in Massachusetts, C. J. GRAY, in *Gilmore* v. *Driscoll*, 122 Mass. 207, in 1877, is reported to have said: "It is difficult to see how the owner of a house can acquire by prescription a right to have it supported by the adjoining land, inasmuch as he does nothing upon, and has no use of, that land, which can be seen, or known, or interrupted, or sued for, by the owner thereof, and therefore no assent of the latter can be presumed to the acquirements of any rights in his land by the former."

The alleged prescriptive right to flow of air furnishes another example of the same principle. Thus if one erects a windmill on his own land, and maintains the same over twenty years, and enjoys, all that time, a current of air across the

land of adjoining proprietors, he does not, and cannot thereby acquire a prescriptive right to a continuance of such flow, or prevent adjoining proprietors from erecting buildings or other structures on their land, which shall entirely intercept the winds and currents of air to his mill. Why? Because during the twenty years he has done nothing of which adjoining owners can legally complain. They can bring no action; they cannot abate his mill, and so he cannot be acquiring any adverse rights to them in the winds or air currents. This was distinctly settled in *Webb* v. *Bird*, 10 C. B. (N. S.) 268, in the Exchequer Chamber, 13 Id. 841.

In like manner, in a still more recent case, A. had enjoyed for more than twenty years, a free current of air to his chimneys over the adjoining lower building of B., who after that period raised his building another story, and piled timber upon it, by which the passage of air to A.'s chimneys was cut off, and they consequently smoked and became useless. In an action by A. against B. for such obstruction it was held that A. could not acquire any right by prescription against B., for it was not "adverse." And BRAMWELL, B., added: "It may be said the reasoning by which this conclusion is reached, if correct, is applicable to lights; so it is to a great extent, and any one who reads the cases relating to an acquisition of a right to light, *will see there has been great difficulty in establishing it on principle*:" *Bryant* v. *Lefever*, 4 Law Rep. C. P. D. 172 (1879).

It seems singular how the English courts, in the light of these analogies, ever established the doctrine that a right to light could ever be acquired over the land of another by prescription or long enjoyment. How generally such a notion is repudiated by the American courts was shown in a note to *Stein* v. *Hauck*, 17 Am. Law Reg. 440. And since that note was published the Supreme Court of Kentucky has pronounced its judgment in favor of what may be called the American doctrine: *Ray* v. *Sweeney*, 14 Bush 1. And see *Hayden* v. *Dutcher*, 31 N. J. Eq. 217; *Guest* v. *Reynolds*, 68 Ill. 478.

The Queen's Bench of Ontario also, in a well-considered case, evidently approves the American and not the English view on this point. See *Hall* v. *Evans*, 42 Up. Can. Q. B. 190.

And the English judges have not hesitated, in recent cases, to declare the doctrine anomolous, difficult to sustain, and not to be extended.

EDMUND H. BENNETT.

District Court of California; Fourth District.

ROSENBERG ET AL. *v.* FRANK ET AL.

The phrase *pro rata* means ordinarily "according to a certain rate or proportion;" and is presumed to be used in that sense in a will, unless a contrary intent of the testator clearly appears.

A testator having left specific sums differing in amount to certain relatives, directed that the residue of his estate should be divided *pro rata* among the same relatives, naming them; *Held*, that the phrase *pro rata* must be construed as meaning according to the rate already established by the testator, in the specific legacies to the same persons.