to hold that by necessary implication section 8 (1) of the Act applies to orders of the Insolvency Judge arising in administration of the estates of deceased debtors. In my view, that contention fails.

In the result the appeal must be allowed and the case remanded to the Insolvency Court where this application will be reheard in the light of the opinion expressed by the Court with regard to the evidence. With regard to costs, as a great deal of the appellants' argument was directed to the third point raised and it has been decided in favour of the respondent, I think the proper order will be to direct the costs of the appeal to abide the rehearing of the Official Assignee's application.

CORNISH J.—I am of the same opinion and for the same reasons.

G.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Cornish.

1932, May 6.

S. ALWAR CHETTY (PLAINTIFF), APPELLANT,

v.

THE MADRAS ELECTRIC SUPPLY CORPORATION, LIMITED (DEFENDANTS), RESPONDENTS.*

Nuisance—Owner of premises not in occupation of same—Suit by, for injunction and damages for nuisance without joining the occupier of the premises—Competency of—" Permanent "—Meaning of.

An owner who is not in occupation of a house can file a suit for damages for nuisance without joining the occupier if the nuisance complained of is " permanent " and of such a character as to injuriously affect the reversion.

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* Original Side Appeal No. 31 of 1931.

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Where the nuisance is caused by machinery installed in certain premises for the purpose of supplying electricity to a city in pursuance of a licence granted by Government for the said purpose, the nuisance is practically a "permanent" one, i.e., one "which will continue indefinitely unless something is done to remove it."

APPEAL from the judgment of WALLER J. dated 20th January 1931 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 213 of 1930.

Plaintiff (appellant) was the owner of certain premises. Defendants (respondents) were the owners of the adjacent premises. The defendants had obtained a licence under the Indian Electricity Act, 1903, from the Madras Government to supply electricity to the City of Madras for lighting and other purposes. The defendants installed in their premises electric dynamos for the said purpose. Plaintiff filed a suit for injunction and damages on the ground that the noise was interfering with the physical comfort and enjoyment of the occupants of his house, and the vibratory and jarring effects produced by the machinery rendered the walls of his house unsafe. The defendants denied that there was any substantial nuisance, or that the plaintiff's house was affected by the vibratory effects of the machinery. The trial Judge held that, as the plaintiff was not the occupier, the suit was not maintainable. Reference was made to *Cooper* v. *Crabtree*(1) and *Jones* v. *Chappell*(2). His Lordship remarked that the noise of the defendants' machinery was not permanent, and found that it had not been proved that the noise amounted to an actionable nuisance, and that the plaintiff's house was benefited by the new walls erected by the defendants which must have deadened the noise

(1) (1881) 19 Ch.D. 193. (2) (1875) L.R. 20 Eq. 539.

considerably. The suit was dismissed with costs. The plaintiff appealed.

S. Srinivasa Ayyangar and *K. S. Krishnaswami Ayyangar* for *T. C. A. Anandalwan* and *T. C. A. Bashyam* for appellant.

Nugent Grant, V. V. Srinivasa Ayyangar and *O. T. G. Nambiar* for respondents.

Cur. adv. vult.

JUDGMENT.

RAMESAM J.

[His Lordship after setting out the facts discussed the evidence and proceeded as follows :—]

The case was started on account of the apprehension of the safety of the house by the digging for the new foundations north of the plaintiff's house ; when the suit was actually launched, the vibration was added as an afterthought and Exhibit A-1 was altered correspondingly to suit the addition ; there was really no vibration, by which I mean vibration to the ground communicated to the neighbouring house, (not vibration caused by a sound which, unless the sound is very great, can have no effect)—the vibration is practically nil ; the cracks in the house are really due to the house being an old house and have nothing to do with the vibration ; possibly they may be due to the deprivation of the lateral support at the time of digging the foundations, but for two years there is no increase in the cracks ; as to the noise, practically there is none that disturbs sleep between 10–30 p.m. and 5–30 a.m., but when the machines change at 5–30 there is a sudden noise for a minute or two which may disturb one's sleep and there is slightly less noise between 9 and 10–30 p.m. If one should take 9–30 p.m. as the normal hour for going to sleep, one's sleep is disturbed for an hour. This must have been the state of things at the time the action was launched. After the building of the

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deadening wall to the north of the plaintiff's house, the noise is practically not worth mentioning except between 9 and 10-30 p.m. when it is slighter than before but still exists but not in such a substantial manner as to entitle the plaintiff to a relief in a Court of law.

In the face of the above conclusions it is practically unnecessary to discuss any question of law arising in the case, but, as the point has been elaborately argued, I think it is necessary to state my opinion on the matter. The learned trial Judge, relying on *Cooper* v. *Crabtree*(1) and *Jones* v. *Chappell*(2), held that the plaintiff not being the occupier cannot maintain the action. In *Simpson* v. *Savage*(3) it was held that the landlord could not maintain an action for injury to the reversion caused by the erection of workshops and a forge and chimney on adjoining land producing smoke and making loud noise. In *Jones* v. *Chappell*(2) it was held that the owner cannot maintain an action to restrain a temporary nuisance such as the noise of machinery in adjacent premises. The defendant in that case erected steam engines and stone saw-mills and other machinery therein. It was held that the plaintiff could not maintain the action. JESSEL M.R., after referring to *Simpson* v. *Savage*(3), observes:

"The injury is a temporary nuisance, because the saws might be stopped and the steam engines might cease working at any moment. It is only an injury to the occupier, and the landlord cannot bring an action, because before his estate comes into possession the nuisance may have ceased or the person committing it may choose to make it cease the moment the estate comes into possession. Another ground of action on the part of the landlord might be that the existence of a nuisance of a temporary character would render it more difficult for him to let to a future tenant or to sell. But that is said not to be a good ground of action, because the theoretical diminution of

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(1) (1881) 19 Ch.D. 193. (2) (1875) L.R. 20 Eq. 539.
(3) (1856) 1 C.B. (N.S.) 347; 140 E.R. 143.

the value of the property cannot be taken into account, inasmuch as the purchaser or the new occupier would have a right to stop the nuisance, so that he ought not to give less on that account than he otherwise would. It appears to me I am not able to overrule *Simpson* v. *Savage*(1)."

The second paragraph of JESSEL M.R.'s remarks produces the impression that he would have been glad to overrule *Simpson* v. *Savage*(1), but thought he could not. In *Cooper* v. *Crabtree*(2) the defendant put up some poles and hoarding to prevent the plaintiff's house from acquiring a right to the easement of light. The nuisance complained of here is very temporary in its nature. One may regard the defendant's conduct in the case as whimsical, and he may change his whim at any moment. In such circumstances it may perhaps be proper to hold that the absentee owner has no right to maintain the action. The case was affirmed on appeal in *Cooper* v. *Crabtree*(3). But the ground of the appellate judgment is that the poles and hoarding are not of such a permanent character as to injure the reversion and the erection of the poles was too trifling to entitle the plaintiff to an injunction. In Clerk and Lindsell on Torts, eighth edition, at pages 376 and 377, the cases are collected. The criticism at page 377 shows that the English rule itself has not had the acceptance of Judges and text-writers. In Gale on Easements, tenth edition, page 511, the rule is summed up in this form:

"According to modern authorities an interference will be injurious to the reversion if (i) it be something which will in the future continue to the time when the reversion falls into possession or if (ii) it be something which in the present operates as a denial of the right of the reversioner. (Vide Kerr on Injunctions, page 135, sixth edition)."

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(1) (1856) 1 C.B. (N.S.) 347; 140 E.R. 143. (2) (1881) 19 Ch.D. 193.
(3) (1882) 20 Ch.D. 589.

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The remarks of PARKER J. in *Jones* v. *Llanrwst Urban Council*(1) are specially quoted. There he says:

"I take 'permanent', in this connexion, to mean such as will continue indefinitely unless something is done to remove it."

It may be that the poles and hoarding in *Cooper* v. *Crabtree*(2) obviously could not be regarded as "permanent". In *Tinkler* v. *Aylesbury Dairy Company (Limited)*(3) the suit was for restraining the defendants from working an engine on the premises and loading or unloading carts, etc. KEKEWICH J. observed:

"If the existence of a nuisance was conclusively proved, injury to property followed, and if injury to property was proved, there was strong, though not conclusive, evidence of nuisance."

Finally he observed,

"In the day time the cart noise was merged in the greater din of the street traffic."

He found that the noise in the defendants' business had driven people from the neighbourhood and that on the ground of interference with personal comfort there was a nuisance in respect of which relief must be granted. In *Wood* v. *Conway Corporation*(4), a judgment of the Court of Appeal, BUCKLEY L.J. observed:

"If the owner is substantially injured in the reasonable enjoyment of the property so that he sustains that which is equivalent to a legal nuisance, he is entitled to an injunction."

It was there found that the plaintiff's plantation suffered from the fumes and smoke from the defendants' gas-works. As to the argument based upon the nuisance being temporary COZENS-HARDY M.R. observed:

"We have heard a good deal about it being temporary. That argument seems to me to have nothing whatever to do with the case. This is not the case of a man carrying on a business which he may give up next week."

(1) [1911] 1 Ch. 393, 404.
(2) (1881) 19 Ch.D. 193.
(3) (1887) 5 T.L.R. 52.
(4) [1914] 2 Ch. 47.

(It may be said that in the case of *Cooper* v. *Crabtree*(1) the poles and hoarding may be removed in a week).

"It is the case of a corporation which succeeded a parliamentary gas company . . . as is quite clear from the Act of Parliament, an obligation was imposed on the corporation to supply gas from their works to their customers."

The last remark of Cozens-Hardy M.R. is very important to the present case. In the present case the defendants have been authorized by licence from the Madras Government to supply electric light to the City of Madras, and one may observe it is practically impossible that the defendants' works will cease within a week or even years. In *Shelfer* v. *City of London Electric Lighting Co.*; *Meux's Brewery Co.* v. *City of London Electric Lighting Co.*(2) it was held that both the reversioner and the owner could maintain an action. In the particular case only damages were given. In *Heath and others* v. *Mayor, &c., of Brighton*(3) it was found as a fact that the sound of the electric lighting works did not generally distract the attention of ordinary healthy persons and was not a legal nuisance. In *Wilson* v. *Townend*(4) it was held that the jurisdiction of the Court is not confined to restraining injury to the enjoyment and comfort in the occupation and it is not necessary that a plaintiff should be in the actual occupation of the property. In my opinion in this case, if there had been a substantial nuisance to the tenants and therefore of a kind which could be regarded as detrimental to the letting value of the plaintiff's house, the plaintiff would be justified in maintaining the action. In Halsbury's Laws of England, Vol. XXI, section 943, the rule is stated in almost identical terms as was

(1) (1881) 19 Ch. D. 193.
(2) [1895] 1 Ch. 287.
(3) [1908] 98 L.T. 718.
(4) (1860) 1 Dr. & Sm. 324; 62 E.R. 403.

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stated in Gale on Easements already quoted. If on the facts I had found that there is a substantial injury in the terms described I would have held that the plaintiff could maintain his action. But on the facts I have found that there is no such nuisance as would justify either the occupier or the landlord in complaining of the defendants' works as a legal nuisance. Such little justification as might have existed before the deadening wall was erected had ceased after the erection of that wall. If the contemplated erection of that wall was not known to the plaintiff, that will be a ground for disallowing costs to the defendants in the trial Court. From 1926 onwards, complaints were received by the Municipal Corporation from the residents of the locality about the noise caused by the machinery. In the various replies that the defendants gave to the Municipal Corporation Engineer contained in Exhibit O series beyond saying that arrangements would be made to cause as little unnecessary noise as possible there is no further information as to the manner by which the noise was to be minimised. Even in October 1929 when the defendants gave an assurance that the noise would be minimised there is nothing to show the nature of the steps intended to be taken for minimising the noise. Again in April 1930 when the plaintiff gave a notice of action to the defendants it is obvious that he was under the impression that the object of the defendants was to instal new machinery and it was for this purpose that the old wall was being demolished and the foundations for the new wall were being prepared. It refers to the "electric plant and machinery you are putting up and enlarging in the adjacent premises." In neither of the two replies, dated 9th and 15th April, is there any reference to the contemplated erection of a deadening wall which will

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diminish the annoyance caused to the plaintiff's house by the noise. The letter of 15th April merely says that the new building proposed to be erected will not interfere with the plaintiff's rights as the owner of his house. This is entirely different from saying that the new wall will actually diminish the noise that was theretofore caused to the residents in plaintiff's house. It is true that the plaintiff knew the building of the wall, but there is absolutely nothing in the whole record to show that the plaintiff knew or that it was pointed out to him that the effect of the building of the new wall would be to diminish the noise and the annoyance caused by it particularly in the evening hours between 9 and 9-30 p.m. If the defendants had pointed this out to the plaintiff and asked him to wait until the wall was finished and then judge the state of things, the plaintiff would have had no justification in going to Court after such a reply. As it is, it is difficult to say that the plaintiff was wrong in going to Court though, as the nuisance had ceased to exist in a substantial manner during the pendency of the action on account of the finishing of the wall, the plaintiff has now become disentitled to any relief. If the deadening wall had not been built, the plaintiff would have a cause of action entitling him to at least damages if not injunction. I think the defendants are to be blamed for not pointing this out to the plaintiff and asking him to wait until the wall is finished. If he did not listen to such advice then he would not be entitled to rush to the Court. On these grounds I would disallow the costs of the defendants in the trial Court. But as these reasons did not exist for the plaintiff's filing the appeal, I dismiss the appeal with taxed costs and with the modification as to costs in the Court below (certify for two counsel).

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CORNISH J.—I agree that the appeal fails. The plaintiff has put his case upon two grounds: firstly that the vibration produced by the defendants' machinery has rendered the walls of his house unsafe; and, secondly, that the noise of the machinery has so interfered with the comfort of the plaintiff's tenants in the house as to constitute an actionable nuisance.

If the cracks in the wall of plaintiff's house have, as alleged, been caused by the vibration of the machinery, then, the nuisance being one which is actually damaging his property, the plaintiff, as owner, would undoubtedly be entitled to sue and to obtain an injunction; *Wood* v. *Conway Corporation*(1). But I agree with the learned trial Judge that the plaintiff has failed to prove his case. The plaintiff has not gone into the witness-box to say that the cracks were caused by the vibration, and his expert witnesses do not say so. None of them was able to detect vibration in the plaintiff's house or in the passage between it and defendants' premises. The utmost that one of these witnesses, P.W. 14, says is that vibration would aggravate the cracks; and he gave the opinion that the major reason for the cracks was the settlement of the wall owing to its foundation having been disturbed by excavation. But that is not the case in the plaint.

Turning to the second ground of complaint, a suit is not maintainable by a non-occupying owner in respect of a nuisance which is only alleged, as in paragraph 10 of the plaint, to be personally injurious to the occupier; see *Jones* v. *Chappell*(2) and *House Property and Investment Company* v. *H. P. Horse Nail Company*(3). An owner, as distinguished from the occupier, can sue without joining the occupier if the nuisance is such as

(1) [1914] 2 Ch. 47.
(2) (1875) L.R. 20 Eq. 539.
(3) (1885) 29 Ch. D. 190.

to cause injury to the reversion; and a nuisance from noise or smell, apart from causing personal discomfort, may, as pointed out by BUCKLEY L.J. in *Wood* v. *Conway Corporation*(1), be of such a character as to injuriously affect the value of the reversion. But the nuisance must be of a permanent character and injurious to the property. This is clear from the judgment of PARKER J. in *Jones* v. *Llanrwst Urban Council*(2) where he says:

> "If the thing complained of is of such a permanent nature that the reversion may be injured, the question of whether the reversion is or is not injured is a question for the jury. I take 'permanent', in this connexion, to mean such as will continue indefinitely unless something is done to remove it. Thus, a building which infringes ancient lights is permanent within the rule, for, though it can be removed before the reversion falls into possession, still it will continue until it be removed. On the other hand, a noisy trade, and the exercise of an alleged right of way, are not in their nature permanent within the rule for they cease of themselves, unless there be someone to continue them."

In the present case, there is no doubt that the noise complained of is "permanent" within the meaning of the rule. The defendants are under a statutory duty to supply electricity, and it appears upon the evidence that in the fulfilment of their obligation it would be impracticable for them to alter the working of the machines or to instal a different system of machinery. The alleged nuisance is, therefore, incapable of being regarded as of a temporary character, which is likely to be stopped at any time; *Wood* v. *Conway Corporation*(1). The plaintiff, however, in order to succeed in this suit must prove that the noise has injuriously affected the value of his property. He has produced no proof of injury to the property as a consequence of the noise; and, with regard to the alleged nuisance to

(1) [1914] 2 Ch. 47. (2) [1911] 1 Ch. 393, 404.

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the occupier, the learned trial Judge has come to the conclusion that the noise does not amount to a nuisance. He finds that in point of fact the comfort of the residents in the immediate neighbourhood of the defendants' premises is not materially diminished by the noise. The learned Judge was entitled to come to that conclusion upon the evidence, and I see no reason to differ from it.

But I think that the slowness of the defendants in carrying out the assurance which was given by them to the Madras Corporation in 1926 to do something to meet the complaints about the noise was in large measure responsible for this suit, and justifies the special order as to costs which my brother RAMESAM has proposed.

Attorneys for respondents.—*Moresby and Thomas.*

G.R.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Mockett.

1932, July 29.

RAGHUNATHA DESIKACHARIAR (DEFENDANT), APPELLANT,

v.

RANGASWAMI PILLAI (PLAINTIFF), RESPONDENT.*

Madras Estates Land Act (I of 1908), *sec.* 24—*Enhancement of rent by private contract—Permissibility—Sec.* 112—*Suit by ryot under—Muchilika previously executed accepting puttah containing an enhancement—Legality of—Ryot's right to contest, in the suit—Secs.* 52 *and* 53 *of the Act—Effect of.*

A landholder cannot enhance the rent without a suit, and independently of the Madras Estates Land Act, by agreement with his tenant. Section 24 of that Act is absolute and peremptory, and it leaves no room for enhancement otherwise than

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* Second Appeal No. 1272 of 1930.