1870 *tober 21.* — *A. No 88 of 1867.*

was made. The defendant's claim, therefore, has no foundation. But we may add that had the document been proved, it would not, we think, have availed to give the defendant a title.

The result of our judgment is, that the plaintiff, as one of the nearest co-heirs of the defendant's husband, is, upon the renunciation of his eldest brother's right, entitled to the possession of the estate. We think the parties should bear their own costs.

APPELLATE JURISDICTION (*a*)

Special Appeal No. 392 *of* 1870.)

(*Civil Miscellaneous Petition No.* 38 *of* 1871.)

AKILANDAMMAL and another.....*Special Appellants.*

S. VENKATÁCHALA MUDALI.....*Special Respondent.*

Plaintiff and defendants, occupants of neighbouring houses were joint tenants of the party-wall. Defendants unroofed their house, raised the wall and placed beams on it to rebuild their house. The Lower Appellate Court found, that, in consequence of this alteration, the rain from the defendant's house descended upon plaintiff's verandah, and caused damage to plaintiff, and decreed that defendant should restore the wall to its former height, and remove the beams placed on it *Held*, on special appeal, that taking the finding to be that the alteration created, "stillicidium" where it did not exist before, or that it rendered more burdensome an existent "servitus stillicidii," it would be very dangerous to hold that every trifling excess in the exercise of a servitude should justify the pulling down of the building creating the excess: that in the present case the damages should be assessed and awarded, and the injunction to remove the defendant not removing the cause of the nuisance. In such a the roof of the house and reduce the wall be made conditional upon the defendant not removing the cause of the nuisance. In such a case the measure of damages is the amount which will induce the defendant to abate the nuisance.

1871. *ruary* 8. — *1. No.* 392 *1870.*

THIS was a Special Appeal against the decision of C. G. Plumer, the Acting Civil Judge of Chittoor, in Regular Appeal No. 117 of 1868, reversing the decree of the Court of the District Munsif of Sholinghur, in Original Suit No. 153 of 1867.

The suit was for trespass committed by defendant on plaintiff's wall.

Plaintiff and defendants were occupants of neighbouring houses. These houses were separated by a wall 1 foot thick

(*a*) Present: Holloway, Ag. C. J. and Kindersley, J.

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which lay to the south of defendants' house and north of plaintiff's house. The plaintiff stated that the former owner of defendants' house, with the consent of the former owner of plaintiff's house, placed a beam upon this wall and built his own house. Plaintiff purchased his house six years before date of plaint from one Sakrapani, the original owner, and had been in enjoyment of it with the wall in question a month before date of plaint. Defendants unroofed their house, raised the height of the wall by a foot, and placed beams on it to build their own house. Plaintiff therefore, prayed that his exclusive right to the wall might be established, and defendants directed to remove that portion of the wall newly raised and the beams thereon placed.

The defendants denied the claim, and stated that the former owner of their house built a house by resting the beams thereof on the wall in question and enjoyed the house and wall. This house and wall were attached in No. 521 of 1833 for a judgment-debt, and purchased by 1st defendant's husband; that the house and the wall in question had since been in defendants' enjoyment; that the wall was their own, and that it was with the consent of 1st defendant's husband that the original owner of plaintiff's house built his verandah against the wall by letting the beams thereof into it; and that they did not raise the wall as alleged, but simply raised the beams a foot higher and repaired what was dilapidated.

The Munsif dismissed the suit.

The plaintiff appealed.

In his judgment the Civil Judge said—

After a careful consideration of the case, I have arrived at the conclusion that there was no distinct proof either by plaintiff or defendant of exclusive property in the wall; that the evidence showed common user of the wall separating the two houses, and that the plaintiff and defendants must therefore be considered as tenants in common (*Cubitt* v. *Porter*, 8 B. & C., 257); that, as plaintiff alleged in the plaint that defendants had altered the height of the wall to his injury, he has a perfect right of action (*Stedman* v. *Smith*, 8 E. & B. 1); but that, for the proper determination of

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this suit, it was necessary that the following issue should be determined, viz :—

Whether the defendants by raising the wall have substantially changed the nature of the property and have thereby caused damage and loss to the plaintiff.

For that purpose the suit was remanded to the Lower Court with directions to try the above issue, and to return its finding thereon, together with the evidence, within 6 weeks from date of receipt of these proceedings, under Section 354 of the Code of Civil Procedure.

The return made by the Lower Court to the above proceedings was, in effect, that the raising of the wall in question by defendants caused injury to the plaintiff's house. A memorandum of objections against the finding of the Lower Court was put in by defendant, and on the appeal coming on for re-hearing the same vakils as before were heard for the respective parties.

The gist of the defendant's objections is that the nature of the wall has not been substantially altered, in consequence of its having been raised, and that the evidence shows that no injury had been caused to plaintiff's house by the raising of the wall.

I agree with the Lower Court. I think the evidence clearly shows that a very substantial alteration has been made in the wall, of which the plaintiff and defendants are tenants in common, without the consent of the plaintiff to the alteration; that, in consequence of the alteration, the rain from defendant's house descends upon the beams, &c., of plaintiff's verandah, and that thus these beams are damaged and loss is occasioned to the plaintiff. It is admitted by the defendant that the wall has been raised by him, and I think that the evidence adduced by plaintiff clearly shows that he (plaintiff) has sustained consequent injury.

I therefore adjudge and decree that the defendants do restore the wall to the height at which it stood before it was lately raised, and that he do remove the four beams which he has placed thereon as mentioned in the plaint, and I further adjudge that defendants do pay the proportionate costs of plaintiff both in the Lower Court and on appeal.

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The defendants preferred a special appeal on the ground—

That the facts found by the Civil Judge did not constitute any legal injury nor warrant the decree given by him.

Mayne, for the special appellants, the defendants.

The *Advocate General* and *Craig*, for the special respondent, the plaintiff.

The following judgment was delivered by

HOLLOWAY, ACTING C. J. :—In this case the suit was originally brought alleging that the wall in question belonged to the plaintiff, and that the alteration of it by the defendant was therefore wrongful. The final decision was that the plaintiff and defendant were joint tenants of the wall, but on the ground that through the alteration rain water has been thrown upon the plaintiff's verandah, so as to damage the bamboos, and that such damage is therefore an injury, the removal of the addition to the house was ordered. *Stedman* v. *Smith* (8 E. & B., 1), was a case of ouster, and has no bearing upon the relief finally given in this case.

There is a finding that the change in the character of the wall has produced damage. *Penruddock's Case*(*a*), referred to in the argument, was a case of eaves over-hanging a neighbour's house, but I do not understand this to be found in the present case. After some hesitation, I have come to the conclusion that we must take the finding to be that the alteration has created "stillicidium," where it did not exist before, or has rendered more burdensome an existent "servitus stillicidii." Roman Law remedied this injury by the "actio aquae pluviae arcendae," and it is also held to be an injury by English law (*Battishill* v. *Reed*, 18 C. B., 696, in which all the cases are referred to). This case is important as showing the measure of damages, and the extent of the common law remedy in such cases. The test is what amount of damages will induce the defendant to abate the nuisance. The extent of the possible remedy at common law is re-

(*a*) 5 Rep. 101a.

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peated actions on the case, the old suits based upon the Roman law having disappeared.

That disappearance is not to be lamented. The Roman character was one of disciplined egotism, and the stern logic of the law knew of no principle upon which a man should abandon any portion of his abstract rights on account of other men." The indiscriminate adoption of Roman doctrines is not the road to the improvement of the science of law, although the only one which the most advanced advocates of improvement in England seem to have devised. It is well that the evil of the present state of things is beginning to be recognized, lamentable that the real remedy should be so little understood. Those who know that law best and can appreciate its marvellous qualities have also best gnaged its defects (Ihering. Geist. des R. Rechts. I., 312—40 and § I). A rule is not necessarily a fit rule for adoption, because it is one of Roman law. In this particular case a better one is derivable from the decisions of some of our own Courts. That scarcely any case occurs which does not contradict or explain some other, arises from the English being a law of propositions and not of principles.

The remedy here given could only have been obtained in equity by injunction, and a very eminent judge has very recently laid down the principles on which it should be granted. (1) Material injury to a clear legal right. (2) Damages not a sufficient compensation. (*Staight* v. *Burn*, V. L. R., Ch. Ap., 163.) Now it seems to me impossible to say that either of these propositions is found to be true, and certainly not the latter of them. It would be a very dangerous extension of the principle on which such relief ought to be given to hold that every trifling excess in the exercise of a servitude should justify the pulling down of the building creating the excess. I am of opinion that, in the present case, the damages should be assessed and awarded, and the injunction to remove the roof of the house and reduce the wall, be made conditional upon the defendant not removing the cause of the nuisance to the satisfaction of the Court within two months. It is quite possible that a gutter will effect all that is needed, but the plaintiff will

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certainly have every protection which the Court should grant if the injunction is granted on these terms, and compensation given for the damage which has already accrued. The defendant, too, must be careful not to trifle with the order of the Court. The defendant should pay the costs.

KINDERSLEY, J: :—I concur in the decision of the Acting Chief Justice upon the case before us.

APPELLATE JURISDICTION (*a*)

Special Appeal No. 249 *of* 1870.

SHUNGUNY MENON and another.....*Special Appellants.*

KALAMPULLY VALIA NAIR.....*Special Respondent.*

Suit brought by plaintiff against the first three defendants as his tenants on kanom, and the 4th, the representative of a rival jenmi, to obtain a declaration of title as jenmi. Plaintiff had previously sued the first three defendants to establish the relation of jenmi and kanomkar and to recover the land. He failed and then brought the present suit.

Held, that this was a case of the employment of the device of a suit for a declaration of title in order to get back land by a crooked and not legal process after failure to recover by proper legal means. The intention being to cut off the defendants (the tenants) from the plea of res judicata.

The Court which had a discretion as to whether such a suit should be permitted, ought at once to have said that it should not.

Where there are no interest to be protected, there is no foundation for a suit for a declaratory decree.

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S. A. No. 249 of 1870.

THIS was a Special Appeal against the decision of C. R. Pelly, the Civil Judge of Calicut, in Regular Appeal No. 69 of 1869, reversing the Decree of the Court of the Principal Sadr Amin of Calicut in Original Suit No. 1 of 1868.

Plaintiff sued to establish his jenm right over certain property. 1st and 2nd defendants allowed the suit to proceed *ex-parte*.

The 3rd defendant pleaded that the land was the jenm of the Cochin Pundáram. The 4th defendant, the Dewan of the Pundáram, represented his circar to be the jenmi, and pleaded that plaintiff was estopped, having already unsuccessfully sued 1st to 3rd defendants on an alleged kanom said to have been granted by his predecessor.

Original Suit No. 134 of 1865 (exhibit A) was instituted in the Temelprom Munsif's Court by present plaintiff, against defendants to 3, for recovery of a portion of the lands now in dispute with arrears of net rent, on the

(*a*) Present : Holloway, Ag. C. J. and Innes, J.