SMITH, ACTING C.J. & TEMPLER, ACTING J. 1890. March 3.

[SMITH, ACTING C.J. AND TEMPLER, ACTING J.]

HASSAN ERIKZADE *Plaintiff*,

v.

GEORGHI ARGHIRO *Defendant.*

NUISANCE—OVERLOOKING—OPPOSITE WINDOWS—MEJELLE, 1202.

In an action to compel the defendant to abate an alleged nuisance caused by an overlooking from the windows of his house through the windows of plaintiff's house into an apartment used by women.

HELD (affirming the decision of the Court below): That this was not a nuisance which the law would restrain.

The intention of the law is to protect those parts of a house, *e.g.*, the yard, the door of the living room, the kitchen, etc., which must necessarily be made use of by women in the course of their ordinary occupation of the house, and which the occupier of the house cannot protect from being overlooked, save by the erection of such works as might seriously interfere with the enjoyment of his own property, and occasion him great expense; but the law does not contemplate an overlooking through the windows of a house against which the occupier can protect himself without appreciable expense, and without throwing any burden on his neighbour.

APPEAL from the District Court of Paphos.

Diran Augustin, for the appellant.

Pascal Constantinides, for the respondent.

The facts and arguments sufficiently appear from the judgment of the Supreme Court which was as follows:

Judgment: This is an appeal from the judgment of the District Court of Paphos, and raises a question of some importance and considerable difficulty as to the effect of the law relating to "overlooking" which is dealt with in Section 1202 of the Mejellé.

At the time of the settlement of issue the plaintiff alleged that the defendant had built a new house and had constructed four windows and a balcony which looked into the room which the women of his household occupied.

The answer of the defendant was, that he had not built a new house but had repaired an old one, that that house was older than the plaintiff's, that the windows were in the same position as formerly, and that, as regards those windows, he had lowered the upper sill and raised the lower one in order to make the windows square, and that as regards the balcony, as it opened on to the public road the plaintiff had no right to request that he should be ordered to close it.

The plaintiff in reply admitted that the defendant's house was older than his own, but maintained that the defendant had raised the windows in question.

The plaintiff did not at that time make any mention of the defendant's having constructed new windows, nor does he appear to have alleged that the alteration of the pre-existing windows had in any way enlarged the view which the defendant had previously had from those windows. Nor indeed is it easy to see how merely increasing the height of the windows could enable the defendant to see more of the interior of the plaintiff's room than he did before. It is not suggested that the position of the windows had been changed. No specific issue of fact appears to have been fixed, and the case was remitted to the Court for hearing, for the parties to prove their various contentions.

It is a little difficult to see what issues of fact are raised by these statements, unless it be, whether the defendant had or had not raised the height of the windows, which we should consider immaterial, unless by so doing the defendant had obtained a more extensive view of the plaintiff's premises, which however the plaintiff did not allege.

When the case came on for hearing before the Court both the parties appeared. The plaintiff in explanation of his reply to the defendant's allegations at the settlement of issue, stated that the windows of the defendant were in the same vertical line as before, but that he had raised the height of them about two pics, and he then stated, that only two of the windows were old windows, and that two new ones had been added by the defendant. He stated also that the overlooking he complained of was, that these windows were so directly opposite the windows of his house that they looked into his windows.

The case was then adjourned for the Court to view the premises.

When the case again came on for hearing, the plaintiff further stated that if he opened the windows of his room, the interior of the room and the bed in which he slept would be commanded by the defendant's windows.

The defendant answered that the windows commanded the same view as they had always done.

The Court without any further proceedings being taken by the parties gave judgment, holding that this overlooking from the windows of one house through the windows of an opposite house, was not such an overlooking as was contemplated by the law, and dismissed the plaintiff's claim accordingly.

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Mr. Diran for the appellant, contended before us that there ought to be a re-hearing of this action, as there is a question of fact in dispute and that no evidence had been adduced before the District Court.

We have felt it necessary to go through somewhat at length the proceedings that took place, because a little difficulty arises owing to the way in which the case proceeded before the District Court.

When the parties appeared before the Court at the hearing, the statements they made were not made upon oath, and therefore cannot be treated as evidence, and the issues were supposed to have been fixed, and there does not appear to have been any application for their amendment. We think, however, we are entitled to treat these statements made by the parties in the presence of the Court as admissions, and it is clear from the plaintiff's statement that the overlooking he complains of is, the looking from the defendant's windows through the windows of his own house, which is on the opposite side of the street to the defendant's house, and possibly an overlooking only when he (the plaintiff) opens the windows of his house.

The Court below apparently considered, either that there was no question of fact in dispute, or that whatever the defendant had done to his windows, the overlooking complained of by the plaintiff was not such an overlooking as was contemplated by the law.

It is contended before us by the appellant's counsel that the defendant had so altered his windows as to command a larger view of plaintiff's premises than he had before: and as the defendant at the settlement of issue maintained that all he had done was to make his windows smaller, there seems to be an issue of fact between the parties which would have to be decided upon evidence to be adduced before the Court, for which purpose a re-hearing would have to be ordered, unless the parties could agree before us upon a statement of the facts so as to get a decision on the question of law. The respondent's counsel contends that, whatever the defendant has done to his windows, the appellant is not entitled to the relief he asks, as the overlooking complained of in this case is not such an overlooking as the law contemplated. We took time to consider our judgment and have come to the conclusion that it will not be necessary to put the parties to the expense of a re-hearing of this action, as we are of opinion that the facts necessary to a decision of this case are admitted. The only overlooking complained of by the plaintiff is that from the windows and balcony of defendant's house

through the windows of his house, and if such an overlooking is not prohibited by the law, then it matters not whether the windows are new, or old, or large, or small : and we are of opinion that the contention of the respondent's counsel is correct, and that what the plaintiff complains of in this case is not such an overlooking as the law prohibits.

The law dealing with this subject is contained in a chapter of the Mejellé which commences at Section 1198. The first section to which we must direct our attention is Section 1199 which defines what is meant by a " great nuisance or injury " (" ὑπέρογκος βλάβη "). This is defined to be " everything that causes damage to the house or causes it to fall or prevents the original use," *i.e.*, habitation " which is the object the building has as its object." Then comes Section 1202 the literal translation of the first clause of which from the Turkish runs as follows :—

" It is considered as a great nuisance that a place used by women such as the kitchen, the mouth of the well and the yard of a house should be seen."

The other paragraphs of this section go on to direct in what cases and in what manner such a nuisance is to be abated.

Now it is to be observed that, prima facie, a man is entitled to use his property in any way he pleases ; and he is further entitled to the free access of light and air to his property unless his rights are restricted by any law, or unless the owner of adjoining property has acquired some easement recognized by the law, which interferes with the free exercise of these rights.

Such a restriction on the natural right of a man to make use of his property in any way he pleases, is contained in the section of the Mejellé last above referred to, and we consider that in construing a law which is restrictive of the natural rights of individuals, a strict construction must be placed upon it, that is to say, we must construe it in such a way that the enjoyment of his property by the defendant shall be interfered with as little as possible. What then is the effect of Section 1202 of the Mejellé ? In our opinion it is that the overlooking of the places described in that section, *and places of a similar nature*, is prohibited.

The class of places intended by this section to be protected from overlooking, seems to us to be that which the women must necessarily make use of in order to carry on their ordinary household duties, and the protection of which from overlooking is a matter of difficulty. The mouth of the well and the yard are in most cases open to the air, and, in order to protect them from being overlooked from

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an adjacent house, their owner might have to erect a wall of great height, which would seriously interfere with his enjoyment of his property. In like manner the kitchen is an apartment which the women are continually passing into and from, and it is to protect them from being seen as they enter and come out of that apartment, that it is specially mentioned in the Mejellé. It is clearly not every place that may be used by women, that is protected from overlooking; for instance the garden is specially exempted from protection by Article 1204. Every room of a house may be made use of by women, but it would be giving a very wide interpretation to the law to say, that for that reason the owner of an adjacent house should be compelled so to close his windows that the windows of the rooms of the former house should not be seen. In the present case it was simply alleged in the first instance, that the windows of the defendant's house looked into the rooms occupied by the women of the plaintiff's household, without any explanation of what these rooms were. Subsequently, however, the plaintiff explains what it is that he complained of, viz.: that he was unable to open the windows of his house, as the inside of the room and the bed in which he sleeps would be commanded by the defendant's windows.

It is to be observed that the Mejellé does not mention specifically the living apartments of a house, and though we should consider that the doors of those apartments which are inhabited by women would be protected, it seems to us that a distinction may be drawn between the windows of dwelling rooms and the class of places mentioned in the Mejellé. Whilst it is difficult to protect the latter without executing works which might seriously interfere with the free circulation of light and air, the person whose windows are commanded by those of his neighbour, can always protect himself at a minimum of expense without throwing any burden on his neighbour's property, and without interfering with the circulation of light and air, by the erection of blinds or the placing of curtains.

In construing this law we think it is our duty to see that the mischief complained of by the plaintiff comes clearly within the scope and intention of the law, and that the enjoyment of his property by the defendant is interfered with as little as possible. In such cases as the present where the overlooking complained of, is that from the the windows of one house through the windows of another house, it is extremely easy for the plaintiff to protect himself, by fixing blinds or curtains to his own windows, so as, whilst not depriving himself to any undue extent of light and air, to screen himself and the inmates of the house from the view of persons resident in the defendant's house.

If when the plaintiff's own windows are closed the interior of his rooms are not visible from the defendant's windows, which seems probable from his statement that if he opens them they are so visible, we should question whether he would then have any right to complain of overlooking from the defendant's windows. Suppose the plaintiff chose to take out the windows altogether, leaving their apertures entirely open, would he then be in a position to make any complaint of overlooking from the defendant's house? We should say clearly not: for then the case would be analogous to that mentioned in Article 1209, being something done by the plaintiff to his own property which occasioned the injury complained of.

In the same way if he chooses to leave his windows open and then allow his neighbours to obtain a view of the interior of his rooms, a nuisance which it is within his own power to obviate, we think he has no right to complain that those neighbours can see into his rooms, and to ask that they should be compelled to close up the windows. If this be the real nature of the plaintiff's complaint we should have no doubt whatever about the case, but we take even a wider view yet of the law.

We think it cannot have been the intention of the law that the owner of a house should have the right to force his opposite neighbour (whose house was built subsequently), so to close his windows as that the windows of the former house should be screened from view. So to hold would, in our opinion, be to stretch the law and to give it a very wide interpretation indeed. If that view of the meaning of the law be correct, it is an extraordinary circumstance that actions like the present have not arisen by the score, but after enquiry we have been unable to find that a case similar to the present has been previously decided.

We have made what enquiries we can as to the interpretation of this part of the law, and the only light we have had thrown on the matter is that in certain commentaries on the Mejellé, in addition to the places specifically mentioned in the Mejellé, the verandah and the door of the living room are stated to be amongst the places which the law intends to protect from overlooking. So far as the commentary is of any value, it strengthens the view we have taken that the silence of the Mejellé as to overlooking through the windows of a house (and this overlooking would in the streets of a town be the most common form of overlooking), is intentional.

We consider the intention of the law to be that that overlooking is to be prohibited which a man cannot avert except by incurring considerable expense, and by executing

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such works upon his property, as might seriously interfere with his enjoyment of it, but that the overlooking through the windows of the house, which a man can protect himself from without incurring any appreciable expense, and without throwing any burden upon his opposite neighbour's property, does not come within the scope of the law. To hold otherwise would be productive of considerable public inconvenience, and would cast a heavy burden on the owners of house property in towns, building houses facing other houses, by necessitating the fixing of permanent screens in front of their windows which commanded the windows of the opposite and previously existing houses, which would have to be permanently closed; for if such owners had a right at any time to open the screens they would have the right to keep them open, and then the occupants of the opposite houses would complain of overlooking.

Acting on the principles we have above enunciated, we think that what is complained of in this case is not a nuisance or injury which prevents the habitation of the house by the plaintiff, and that it does not constitute an overlooking within the meaning of Section 1202 of the Mejellé.

We are therefore of opinion that the decision of the District Court was right and that this appeal must be dismissed with costs.

When discussing the effect of this law we have spoken only of windows, but the same reasoning as applies to the defendant's windows applies also to the balcony, which is not alleged to command any other view than that obtained from the windows.

Appeal dismissed.