9

# Remedies for Breaches of Rights to Light: Averting a Tragedy of the Anticommons

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## I. INTRODUCTION

An occupier who enjoys light through a window in England, Wales or Northern Ireland for 20 years acquires an easement, the breach of which will amount to a nuisance.[1] While other common law jurisdictions inherited the English law on 'ancient lights', such easements have largely been eliminated by legislatures in Commonwealth jurisdictions[2] and rejected State by State by courts in the USA.[3] This chapter explores the concerns generated by such rights and asks whether, in view of these, they should be enforced. It considers, in particular, whether right holders should always, or almost always, be entitled to an injunction or whether they might, instead, often be limited to monetary relief. An examination of reported right to light cases demonstrates the effect that the judicial approach to injunctions has on levels of litigation. A historical perspective emphasises that the courts have, at times, been sensitive to the special difficulties to which rights of light give rise and have been prepared to treat these entitlements as *sui generis*. An approach that, in contrast, insists that those enjoying an

[1] While claimants generally rely on s 3 of the Prescription Act 1832, oddly, that legislation did not abrogate the common law principles of prescription, and claimants occasionally rely on the doctrine of 'lost modern grant' in circumstances in which the Act would not confer protection. Any easement arising under the Act is inchoate until a suit is brought to enforce the right (s 4).

[2] The fate of easements of light in Australia and New Zealand is detailed in Law Commission, *Rights to Light* (Law Com CP No 210, 2013). See also F Burns, 'The Future of Prescriptive Easements' (2007) 31 *Melbourne University Law Review* 3. These rights still exist in the sparsely populated Canadian Provinces of New Foundland and Prince Edward Island, while in Nova Scotia such easements may arise on land not found in cities, or in unincorporated towns. Easements of light have been eliminated in all the other Provinces: see M Bowden, 'Protecting Solar Access in Canada' (1985) 9 *Dalhousie Law Journal* 261, 263–64. Another exception is the Republic of Ireland, which inherited both the common law on rights of light and the Prescription Act 1832 but now regulates prescriptive rights pursuant to the Land and Conveyancing Law Reform Act 2009. Curiously, however, rights of light have given rise to little litigation in that jurisdiction.

[3] There appears to be no extant authority recognising an easement of light in any American State. See *Fontainebleau Hotel Corp v Forty-Five Twenty-Five Inc* 114 So 2d 357, 359 (Fla App, 3d Dist 1959).

easement of light are entitled to an injunction as a matter of course is likely to encourage protracted disputes that will pose a significant obstacle to urban development.[4]

# II. CONCERNS ABOUT EASEMENTS OF LIGHT

## A. The Anomalous Nature of Negative Prescriptive Easements

It appears that rights of light were initially understood to be natural rights appurtenant to the claimant's tenement.[5] Subsequently, however, these entitlements came to be conceptualised as a type of servitude arising by prescription through long use.

Prescription generally results in the acquisition of a positive easement, giving the owner of the dominant tenement a right to make some limited use of the servient tenement. Rights of light, in contrast amount to negative easements, limiting the owners of the servient tenement in their use of their property. Positive prescriptive easements are generally explained on the basis that it is not in the interest of public order to permit land owners to enforce their rights following a long-standing failure to respond to open and continuous breaches. In this vein, Fry J observed:

> [I]t is plain good sense to hold that a man who can stop the asserted right, or a continued user, and does not do so for a long time, may be told that he has lost his right by his delay and his negligence, and every presumption should therefore be made to quiet a possession thus acquired and enjoyed by the tacit consent of the sufferer.[6]

English accounts from the thirteenth century onwards have emphasised the importance of an owner's acquiescence to conduct that is adverse to his rights.[7] There was, as a result, a tendency to deny the suggestion that prescriptive rights might be acquired where the activity of the party claiming an easement was perfectly legal during the period in question.[8] On occasion, the courts have suggested that the owner of the servient tenement burdened by a right of light could be said to have acquiesced by

[4] In practice the effect of rights of light has been limited by local authorities' use of powers to enable developers to overcome private rights (see below text accompanying nn 134–135).
[5] Janet Loengard provides perhaps the fullest account of the historical development of this area of law in J Loengard, 'Common Law and Custom: Windows, Light and Privacy in Late Medieval England' in S Jenks et al (eds), *Laws, Lawyers and Texts* (Leiden, Brill, 2012) 279.
[6] *Dalton v Henry Angus & Co* (1881) 6 App Cas 740 (HL), 774 (advising HL).
[7] See generally J Getzler, 'Roman and English Prescription for Incorporeal Property' in J Getzler (ed), *Rationalizing Property, Equity and Trusts* (Oxford, Oxford University Press, 2003) 281.
[8] *Sturges v Bridgman* (1879) LR 11 Ch D 852, 863 (Thesiger LJ).

having failed to take steps to obstruct the light in question.[9] The common view, however, is that rights of light are anomalous because, as Willes J in *Webb v Bird* remarked:

> In general a man cannot establish a right by lapse of time and acquiescence against his neighbour, unless he shews that the party against whom the right is acquired might have brought an action or done some act to put a stop to the claim without an unreasonable waste of labour and expense.[10]

For this reason, negative prescriptive easements have generally been treated with suspicion, and the courts have suggested that this class of rights is unlikely to be extended.[11]

Of course, just because this class of easements cannot be explained by reference to notions of acquiescence does not mean that it is indefensible. In *Dalton v Henry Angus & Co*, Blackburn J effectively dismissed as doctrinaire the view of his fellow judges that a prescriptive easement in the form of a right to support for a building should be rejected because it could not be explained in these terms.[12] On the other hand, the burden of justifying such easements is inevitably a heavy one. If the use of land that gives rise to the easement does not involve an interference with the rights of the owner of the servient tenement, not only is it implausible to argue that there is acquiescence, but it is difficult to see that the practice can be supported on the grounds of 'quieting title'. Instead, the creation of an interest out of a use that was not adverse to anyone's rights is likely to sow fresh discord. Some other justification is needed to explain negative easements that arise by prescription.

## B. Justifying Prescriptive Easements: Four Considerations

### (i) The Extent of the Benefit and Burdens Resulting from an Easement

An obvious starting point for evaluating the appropriateness of particular classes of prescriptive easements is that there is no reason why we should develop proprietary rights arising by operation of law if the benefits they conferred did not generally exceed the burdens they imposed. The general rule that, for a prescriptive easement to arise, the use in question should amount to a breach of the owner of the servient tenement's

[9] *Cross v Lewis* (1824) 2 B & C 686, 689, 107 ER 538 (Bayley J).
[10] *Webb v Bird* (1861) 10 CB (NS) 268, 285, 142 ER 455.
[11] *Hunter v Canary Wharf* [1997] AC 655 (HL), 726 (Lord Hope).
[12] *Dalton v Henry Angus & Co* (n 6 above) 817.

rights, serves a useful function in providing a strong indication that the use does not impose a significant burden. It is reasonable to assume that, if it were burdensome, the owner of the servient tenement would have acted to enforce his rights.[13] Equally, the fact that the occupier of the dominant tenement used the servient tenement in a certain way continuously for an extended period is likely to indicate that the benefit derived from that use was substantial.

In the absence of toleration of continuous and apparent adverse use, there can be no assumption that the long enjoyment of light indicates that the benefit such an easement confers normally exceeds the burden it imposes. It does not follow from this that negative easements should never be recognised; rather, their utility has to be established by some fact other than long enjoyment. It might be accepted that a class of negative easements is socially beneficial. However, if this were so, there is no reason to provide that they arise by prescription, as the long enjoyment of the benefit in question adds nothing to the argument for protecting it. Thus, in the case of a right of lateral support for a building – another form of negative prescriptive easement – the benefit in question appears to be compelling and the burden relatively modest.[14] Indeed, as Lord Penzance suggested in *Dalton v Henry Angus & Co*, the real objection to the legal treatment of easements of support is that there is no good reason why they should arise by prescription following long enjoyment rather than being recognised as rights that come into being immediately.[15]

Easements of light place a burden on the servient tenement which generally outweighs the benefit conferred on the dominant tenement. Thus, typically the 'book value' of the light lost by the owner of the dominant tenement is a fraction of the value gained by the owner of the servient tenement as a result of developing his property in breach of the easement.[16]

It is probable that the notion that easements of light were socially beneficial was plausible when these rights were first recognised. Demographic pressures were less

[13] As Lord Blackburn observed 'presumably such rights if not exercised are not of great value': *Dalton v Henry Angus & Co* (n 6 above).
[14] A factor stressed by a number of their Lordships in *Dalton* (ibid) 804 (Lord Penzance) and 827 (Lord Blackburn).
[15] ibid 804.
[16] This explains the growing interest in release fee awards which effectively provide a way for the owner of the dominant tenement to capture some of this difference in value. See, below nn 120–121 and accompanying text.

acute and a sensible accommodation was afforded whereby the common law respected a custom of the City of London that permitted owners within that area to build without restriction on 'ancient foundations'.[17] There was little in the way of building regulations, let alone the comprehensive planning system that was established in the middle of last century.[18] Natural light was particularly highly prized because alternative sources of illumination were relatively expensive and unpleasant.[19] In the Wisconsin Supreme Court in *Prah v Maretti***Error! Bookmark not defined.**, Abrahamson J explained the extinction of rights to light in American law thus: 'Since artificial light could be used for illumination, loss of sunlight was at most a personal annoyance, which was given little, if any weight by society.'[20]

### (ii) The Identifiability of these Interests

The courts have emphasised that we should be wary of recognising interests if their existence would not be readily apparent to interested parties.[21] There are several reasons for concern. For one thing, we need to consider the position of owners of servient tenements. On the one hand, prescriptive rights of light generally arise without owners being aware of the danger and having the opportunity to take steps to stop the process (by, for example, developing their property while they still have the right to do so). On the other hand, once these rights have come into being, further unfairness may result for owners of servient tenements who may invest resources in developing their property only to find their plans thwarted when the existence of an easement of light is brought to their attention.

In addition, the identifiability of an easement is an issue for potential purchasers of an affected property for at least two reasons. First, there is a risk of unfairness resulting from purchasers' acquiring land in the belief that there are no limits on their right to develop it, only to discover that their options are limited by a prescriptive

[17] The Prescription 1832 Act, s 3 effectively abrogated the 'ancient foundations' custom for most purposes: *The Salters Company v Jay* (1842) 3 QB 109.
[18] The Town and Country Planning Act 1947**Error! Bookmark not defined.**.
[19] In cases decided before the twentieth century, much is often made of the inconvenience of having to light more candles (eg *Wells v Ody* (1836) 7 Car & P 410, 410, 173 ER 182) or to 'burn gas' (eg *Cooper v Hubbuck* (1862) 12 CB (NS) 456, 461, 142 ER 1220).
[20] *Prah v Maretti* 321 NW 2d 182, 189 (Wis 2d, 1982).
[21] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL), 1247–48 (Lord Wilberforce); *Hunter v Canary Wharf* (n 11 above) 726 (Lord Hope).

easement.[22] Secondly, there is a general concern that the presence of rights that are difficult to identify encourages parties to investigate the matter, and difficulties in satisfactorily determining the existence of a right mean that such investigations are liable to be relatively expensive. In this vein, Merrill and Smith argue that the *numerus clausus* principle reflects a policy that property rights should be standardised in order to limit costs that would come from the need to investigate title. Unusual rights *in rem* are liable to impose externalities on subsequent potential purchasers of the land in question.[23]

Where the traditional preconditions for prescriptive easements are fulfilled, such policy concerns are unlikely to be acute. The principle that a use should be open, continuous and adverse for a prescriptive easement to come into existence should ensure that it occurs to affected owners and any interested third parties that there is an issue to be addressed. In contrast, the fact that a neighbour's windows enjoy a good level of natural light is not likely to give either the owner or a potential purchaser of land a moment's pause.

Difficulties of identification have been exacerbated by a judicial insistence that these rights persist in circumstances in which it would have been difficult even for an observer well versed in the law to identify the possibility of the existence of an easement of light. The courts will protect rights of light even where there is no longer a window of longstanding that might serve to signal the existence of the interest. Thus, the owner of the dominant tenement might rebuild a structure that he has chosen to demolish or that was destroyed in a fire and still enjoy protection for 'ancient lights' provided that the number, size and location of the new windows broadly correspond to those in the original building.[24] A purchaser of the servient tenement would only be likely to see that his neighbour's premises were recently constructed and, in the unlikely event that

[22] As legal easements likely to have been used in the year prior to the transfer of the servient tenement, rights to light will in practice be protected as overriding interests and thus bind successors in title even in the absence of the entry of a notice on the register (Land Registration Act 2002, Sch 3, para 3).
[23] TW Merrill and HS Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 *Yale Law Journal* 1. See too the discussion of the *numerus clausus* principle in this volume: S Pascoe, 'Re-evaluating Recreational Easements: New Norms for the Twenty-First Century?' (Chapter 10) and B France-Hudson, 'The Recognition of Covenants in Gross in New Zealand: A Dangerous Advancement?' (Chapter 11).
[24] *Cooper v Hubbuck* (1862) 30 Beav 158, 54 ER 849; *Tapling v Jones* (1865) 20 CB (NS) 166, 144 ER 1067.

he was alert to the issue, he could be forgiven for assuming that he was within his rights in building without fear of any easement of light.[25]

Equally, the courts were traditionally very loath to infer from the fact windows were blocked up for many years that an easement had been abandoned.[26] Even more strikingly, the courts held that an easement remained even if the original building was demolished, there was no structure on the site of the dominant tenement and there was no guarantee that anything would be rebuilt.[27] Other signs that an objective observer might have interpreted as militating against prescription were treated as irrelevant. Thus, prescription might operate even if, for much of the relevant 20-year period, the dwelling on the dominant tenement was unused and uninhabitable.[28] It is, however, likely that, following recent reforms designed to limit overriding interests, no easement of light would now be enforceable against a purchaser of property in such cases in the absence of a notice being entered on the register of the servient tenement. Rights of light will now bind a purchaser only if they have been 'exercised' in the year leading up to the relevant disposition of land.[29]

### (iii) Uncertainty as to the Scope of Rights

A second source of uncertainty concerns the scope of protection provided by an easement of light. The difficulty in this case is not in determining whether an easement has arisen but in judging at what point obstruction of light by the owner of the servient tenement would become actionable.

From its inception, an actionable interference with an easement of light was treated as a nuisance.[30] After considerable judicial indecision on the matter, the House of Lords in *Colls v Home and Colonial Stores*[31] early last century settled on an entitlement of 'sufficient light according to the ordinary notions of mankind'.[32] The

[25] See *Newson v Pender* (1884) 27 Ch D 43 (CA). *Moore v Rawson* (1824) 3 B & C 332, 107 ER 756 is a rare case in which the court held that owner of the dominant tenement's actions amounted to an abandonment of his easement. Abbott CJ observed that the plaintiff's actions 'may have induced another person to become the purchaser of the adjoining ground for building purposes' (ibid 336).
[26] *Stokoe v Singers* (1857) 8 EL & BL 31, 120 ER 12.
[27] *Ecclesiastical Commissioners for England v Kino* (1880) 14 Ch D 213 (CA).
[28] *Courtauld v Legh* (1869) LR 4 Exch 126 (Ex).
[29] Land Registration Act 2002, Schedule 3, para 3.
[30] For discussion of the implications of this for different models of nuisance law see D Nolan, 'The Essence of Nuisance', Chapter 5 in this volume.
[31] *Colls v Home and Colonial Stores Ltd* [1904] AC 179 (HL).
[32] ibid 204 (Lord Davey), 208 (Lindley LJ). The phrase was first formulated by James LJ in *Kelk v Pearson* (1871) LR 6 Ch App 809, 811 (Ch App).

judiciary long explored the possibility of favouring a more or less quantifiable threshold for determining when an obstruction of light becomes a nuisance. In the late nineteenth century, there was an attempt to derive guidance from a standard prevalent in building regulations of the time. It was suggested that there would not be an actionable nuisance if sunlight reached the sill of the window in question at an angle of not more than 45 degrees from the horizontal. The suggestion met with a mixed response from the judiciary.[33]

Eventually, a considerable degree of predictability was ensured by experts generally adopting a methodology finalised by Percy Waldram in the 1920s. According to this approach, at least 50 per cent of a room should enjoy illumination of one lumen at the height of a standard table, essentially the amount of light received at a distance of one foot from a candle in a darkened room.[34] However, in *Ough v King*,[35] Lord Denning MR emphasised that Waldram's method was a rule of thumb rather than a definitive test and that judges were entitled to reach their own view on the matter.

One concern with uncertainty in identifying the existence and/or scope of rights of light is that individuals may be deterred from developing land because of the possibility of a breach, even if it is likely that an easement of light either does not exist or would not be breached by the contemplated development. In this way, such uncertainty effectively adds to the burden imposed on the servient tenement by such easements.

### (iv) The Risk of Holdouts – A 'Tragedy of the Anticommons'?

Private property is often justified by reference to the 'tragedy of the commons', which focuses on the potential of proprietary rights to ensure that users bear the costs as well as enjoying the benefits of exploiting resources that could be unsustainably over-exploited if held in common.[36] More recently, however, scholars have noted that

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[33] *City of London Brewery Co v Tennant* (1873) LR Ch App 212, 220 (Ch App) (Lord Selborne viewed the 'rule' as prima facie evidence that there was no actionable interference); *Hackett v Baiss* (1875) LR 20 Eq 494 (Ch) (standard favoured by Jessel MR); *Ecclesiastical Commissioners for England v Kino* (1880) 14 Ch D 213 (CA) (James, Brett, and Cotton LJJ rejecting the relevance of the standard); *Parker v First Avenue Hotel* (1883) 24 Ch D 282 (Ch) (North J issued a prohibitory injunction that the defendant should respect the standard); *Colls v Home and Colonial Stores* (n 31 above) (standard endorsed by Lord Lindley).

[34] The essential tenets of Waldram's method were accepted by Eve J in *Charles Semon & Co v Bradford Corporation* [1922] Ch 602 (Ch).

[35] [1967] 1 WLR 1547 (CA).

[36] G Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

difficulties can arise too from a proliferation of property rights. If there are too many people with property rights that confer a power of veto over the use of a particular resource, the problems in securing the consent of all those with an interest are liable to result in that resource being under-utilised, a fate that Michael Heller characterises as the 'tragedy of the anticommons'.[37] This spectre looms large for easements of light, which tend to place much greater constraints on the potential development of the servient tenement than, for example, a right of way.

The objection to the fact that the burden imposed by easements of light typically outweighs the benefit might be regarded as essentially a question of distributional fairness if owners of servient tenements could easily negotiate a relaxation of such rights. As Ronald Coase postulated, if legal rules allocate rights to someone who is not the most valued user of a resource, in the absence of transaction costs, that misallocation will be corrected in the market.[38] As Coase himself recognised, however, transaction costs are often a problem. For example, a development scheme will often obstruct the light enjoyed by several dwellings, thereby giving rise to risks of strategic behaviour that are present when a buyer has to secure the consent of numerous sellers. As Calabresi and Melamed noted, each seller has an incentive to exaggerate the value he attaches to his right and to 'hold out' in order to maximise his own share of the gains from trade. If all sellers act in this way, the likelihood is that they will collectively demand too much and the negotiations will break down.[39]

Other commentators have observed that, in the absence of a market price for the right at issue, there can be substantial obstacles to bargaining even when there are only two parties who need to reach an agreement. One difficulty when bargaining in 'thin markets' is that one party's valuation of the entitlement at issue is 'private information' that the other party cannot objectively verify.[40] In addition, such bargains might break down simply because there is no obvious basis for dividing up the potential gains from trade that would result from a concluded agreement.[41] Finally, the dangers of parties not reaching agreement are heightened by any uncertainties as to the existence and/or

[37] MA Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' (1998) 111 *Harvard Law Review* 621.
[38] RH Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law & Economics* 1.
[39] G Calabresi and AD Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089.
[40] I Ayres and E Talley, 'Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade' (1985) 104 *Yale Law Journal* 1027.
[41] R Cooter, 'The Cost of Coase' (1982) 11 *Journal of Legal Studies* 1.

scope of entitlements that may result in the parties having different views as to their rights.

In the face of substantial obstacles to bargaining, owners of servient tenements are likely to struggle to secure a release from owners of dominant tenements, even if such an arrangement providing for a relaxation of an easement of light would be mutually advantageous.

# III. REMEDIES FOR BREACHES OF A RIGHT TO LIGHT

## A. The Significance of Remedies for Interfering with an Easement of Light

The likelihood that holdouts will complicate efforts to buy out easements of light is largely dependent upon the extent to which the owner of the dominant tenement can veto any attempt to develop the servient tenement in breach of the easement. Such bargaining power is determined in large part by the willingness of the courts to enjoin the actions of the defendant. If, instead of being entitled to an injunction, claimants were limited to recovering damages for loss of amenity, the leverage conferred by easements of light would be greatly reduced.

## B. The Rise of the Right to Light

### (i) Remedies in Right to Light Actions before the Chancery Amendment Act 1858**Error! Bookmark not defined.**

Before the latter part of the nineteenth century, rights of light litigation was largely conducted in the courts of common law. While litigants might seek an interim injunction as a prelude to the matter being determined at law, the courts of equity would not entertain awarding a permanent injunction in response to an alleged breach of a common law right if the merits of the matter had not been tried in a court of law.[42]

Even though the courts of common law did not at this point have the remedy of an injunction in their armoury, plaintiffs were not expected to be satisfied with the remedy of damages. Plaintiffs could recover only for loss resulting from past breaches

[42] *Fishmongers v East India Co* (1752) Dick 163, 21 ER 232.

and not for anticipated damage on the assumption that a breach would continue.[43] The standard order upon a finding that a structure erected by the defendant interfered with the plaintiff's easement of light was a verdict for the plaintiff with an award of nominal damages.[44] As, Lord Tindal CJ remarked in his directions to the jury in *Parker v Smith*, the effect of such a verdict would be 'that of a notice to the defendants, that they must pull down the building of which the plaintiff complains.'[45]

Odd as it might seem now, one possibility was that the plaintiff might take the matter into his own hands and abate the nuisance by pulling down the offending structure.[46] Another option for resolving a continuing breach in these circumstances was to go to the Court of Chancery to seek an injunction. However, an alternative was to bring a further action in the court of common law that had already found in favour of the plaintiff. As Jervis CJ suggested in *Battishill v Reed*, 'if the defendant persists in continuing the nuisance, then they may give such damages as may compel him to abate it.'[47] He also quoted Blackstone's *Commentaries* for the proposition that, 'very exemplary damages will probably be given if, after one verdict against him, the defendant has the hardiness to continue the nuisance.'[48]

The effectiveness of this approach can be seen in the one reported right to light case where the plaintiff sued the defendant a second time for the same nuisance. In *Shadwell v Hutchinson*,[49] the court delivered a verdict for the plaintiff and awarded nominal damages. Two years later, the plaintiff brought a further action in response to the defendant's failure to abate the nuisance. The court awarded damages of £100.[50] A ruling was subsequently granted reducing the damages after the defendant acted to abate the nuisance.[51]

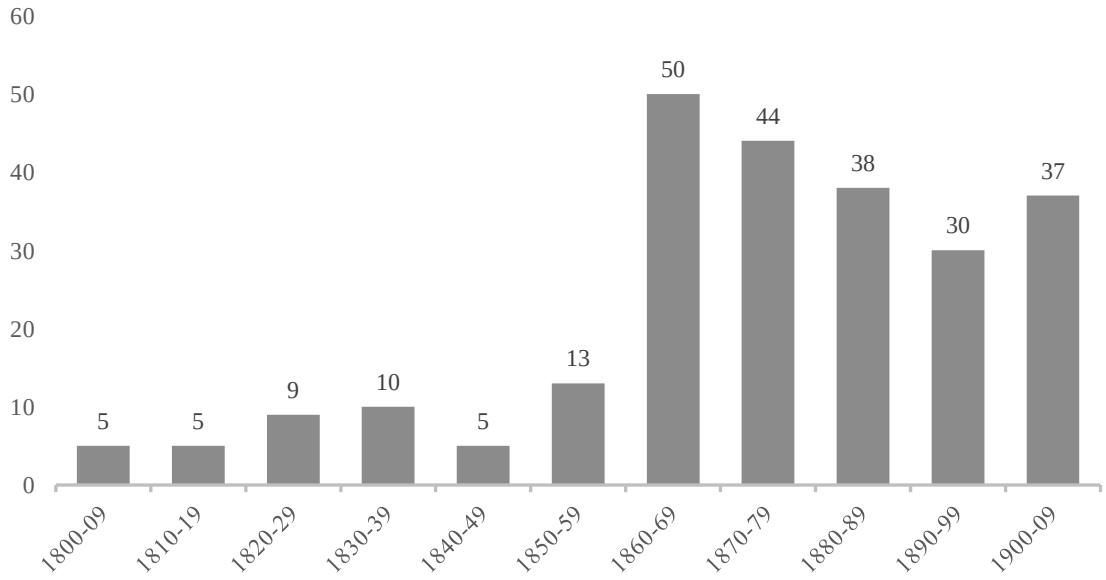
### (ii) The Jurisdiction to Grant Damages in Lieu of an Injunction

The mid-to-late Victorian period saw a boom in rights to light litigation. In giving his judgment in *Dent v Auction Mart Co* in 1866, Sir William Page Wood VC observed

[43] *Battishill v Reed* (1856) 18 CB 696, 139 ER 1544.
[44] ibid, 714 (Jervis CJ).
[45] *Parker v Smith* (1832) 5 Car & P 438, 440, 172 ER 1043.
[46] *Perry v Fitzhowe* (1846) 8 QB 757, 775, 115 ER 1057 (Lord Denham CJ).
[47] *Battishill v Reed* (n 43 above) 714.
[48] ibid, 712.
[49] *Shadwell v Hutchinson* (1829) 3 Car & P 615, 619, 172 ER 569.
[50] *Shadwell v Hutchinson* (1830) 4 Car & P 333, 334, 172 ER 728.
[51] *Shadwell v Hutchinson* (1831) 2 B & AD 97, 99, 109 ER 1079.

that, 'the cases have become more frequent of late, in consequence of the increased desire to erect, in the metropolis and elsewhere, buildings of considerable magnitude, which must, of course, more or less affect houses in their immediate neighbourhood.'[52] One indication of this rise in litigation is provided by reported cases on such disputes. Of course, only a fraction of disputes are litigated, only a subset of contested cases will reach the higher courts and only some of these will be reported. Nonetheless, the number of cases reported is likely to reflect relative levels of litigation in the higher courts. Reflecting Wood VC's perception, there was an explosion in reported cases in the 1860s. Levels of reported litigation remained relatively elevated for the following four decades as shown in Table 1.[53]

Table 1: Reported Rights to Light Cases




Certainly, as Wood VC suggested, some of this rise in litigation can be attributed to demographic pressures: the period of 1860–1900 saw the population of inner London (which provided the backdrop to most reported right to light cases) increase from 3 million to 5 million. Yet, the population of that area had already tripled

[52] *Dent v Auction Mart Co* (1866) LR 2 Eq 238, 245 (Ch).
[53] The data in this and the following tables is drawn from cases involving rights of light, whether arising by prescription or by implied or express grant, on the basis that the issues of enforcement are largely the same regardless how the easement arises. The data includes different stages of the litigation of the same dispute where these are reported.

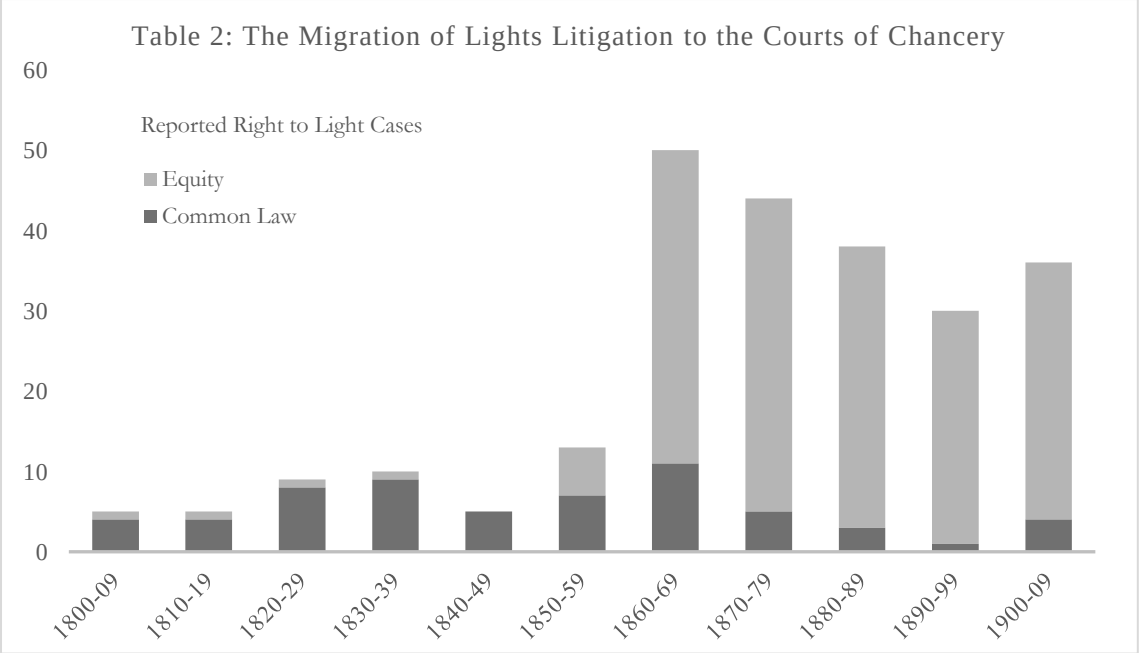
from 1800 to 1860, without a significant rise in reported cases.[54] It is likely that changes in the legal environment in the mid-nineteenth century encouraged those whose rights were being infringed to resort to litigation. One of the most obvious changes in the juridical landscape came in the form of the Prescription Act 1832, which is sometimes regarded as having encouraged plaintiffs to assert prescriptive rights.[55] However, with the exception of its elimination of the 'ancient foundations' custom that had hitherto prevailed in the City of London, the reforms of the Act were largely relatively minor matters of procedure and there was no significant increase in reported lights cases in the 30 years that followed its enactment.

The 1850s saw a series of institutional reforms that presaged the integration of the common law and equity realised by the Judicature Act 1873. One such reform was the passing of the Common Law Procedure Act 1854, section 79 of which granted the courts of law powers to award injunctions for repetitive or ongoing breaches. Had this power been exploited in right to light cases, such litigation might have remained largely the province of common law courts. The power was, however, little used in this context before being superseded by the more fundamental reforms of the 1870s.[56] Instead, the reported cases suggest that the rise in rights of light litigation coincided with these disputes being heard in the Chancery Courts, as Table 2 demonstrates.

[54] Great Britain Historical Geographical Information Systems Project, A Vision of Britain through Time (2017). Data on Inner London population available at: http://www.visionofbritain.org.uk/unit/10076845/cube/TOT_POP.

[55] See M Lobban, in W Cornish et al, *The Oxford History of the Laws of England, vol 12: 1829–1914 Private Law* (Oxford, Oxford University Press, 2010) 1071.

[56] The jurisdiction was used after considerable discussion in a right to light case in *Jessel v Chaplin* (1856) 2 *Jurist (NS)* 931. It also appears to have been used in another dispute of this type in *Crofts v Haldane* (1867) LR 2 QB 194 (QB), where the plaintiff's pleading appears to be phrased in the wording of s 79, and an injunction was apparently awarded.




A number of institutional reforms enabled parties to litigate disputes over common law rights in the courts of equity. The Court of Chancery Procedure Act 1852 gave the courts of equity the jurisdiction to decide points of law, allowing courts of equity to go beyond providing interlocutory relief and to hear rights of light disputes on their merits. The powers given by the Act were initially little used,[57] and, a decade later, Parliament passed the Chancery Regulation Act 1862, better known as Rolt's Act, to force the Chancery Courts to assume a greater role.[58] While by the time the latter Act came into force the rise of lights litigation was already underway, it may have contributed to a spike in cases in the Courts of Chancery in the mid-1860s.

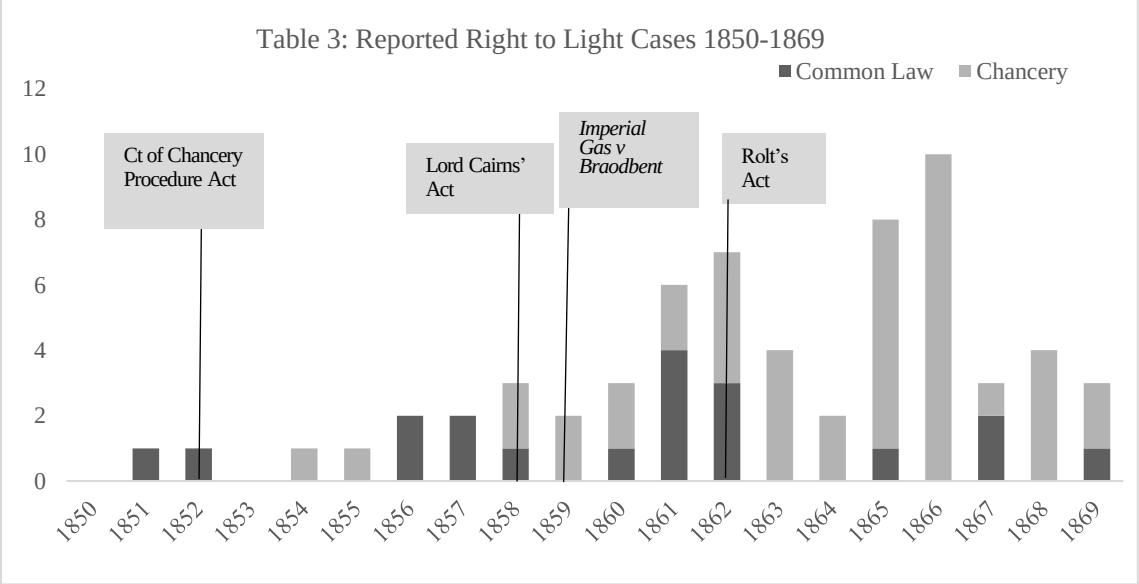
It would be tempting to attribute the increase in reported cases to the Chancery Amendment Act 1858. Lord Cairns' Act, as it was more commonly known, was designed to allow the Courts of Chancery to award claimants damages in lieu of equitable remedies so that they did not have to initiate a separate suit at law in order to recover monetary relief. Although it was not foreseen by the drafters of the legislation, the courts of equity asserted a power unavailable at common law to award damages for the future loss that would result from a Court's denial of a permanent injunction.[59] The

[57] Although the Act was used in *Potts v Levy* (1854) 2 Drewry 272, 61 ER 723.
[58] The role of Rolt's Act and Lord Cairns' Act is discussed by counsel for the plaintiff in *Durell v Pritchard* (1865) LR 1 Ch 244, 247 (Ch App).
[59] *Isenberg v East India House Estate Company* (1863) 3 De GJ & Sm 263, 46 ER 637.

increase in rights of light litigation and its shift to the Courts of Chancery were contemporaneous with that Act coming into force. However, a close examination of cases of this type heard in equity in the late 1850s and early 1860s suggests that litigants were slow to rely on the new powers and judges tended to ignore them or interpret them restrictively.

Instead, a more proximate cause of the growth of right to light litigation in the Courts of Chancery would appear to be the courts' adoption of a strict approach to awarding injunctions to protect private rights, most authoritatively signalled by the House of Lords in *Imperial Gas Co v Broadbent*.[60] The plaintiff, a market gardener, brought an action in the Court of Common Pleas claiming that the defendant's gas manufacturing operation was causing an actionable nuisance. The parties agreed to refer the case to a referee, who found in favour of the plaintiff and made an award of damages for past harm. When the defendant thereafter sought to expand the operation in dispute, the plaintiff brought the matter to the Court of Chancery, where Sir William Page Wood VC granted an injunction. On appeal, Lord Cranworth resisted the suggestion that the court might have regard to considerations of public convenience in deciding whether an injunction should be available.[61] The House of Lords rejected the defendant's subsequent appeal, with Lord Campbell concluding that, where a plaintiff 'has established his right at law he is entitled as of course to an injunction to prevent the recurrence of that violation.'[62]

[60] *Imperial Gas Co v Broadbent* (1859) 7 HLC 600, 11 ER 239.
[61] *Broadbent v Imperial Gas Co* (1857) 7 De G M & G 436, 462, 44 ER 170.
[62] *Imperial Gas Co v Broadbent* (n 60 above) 609.




In the 1860s, it became increasingly commonplace for plaintiffs in right to light cases to initiate an action in the Courts of Chancery seeking injunctive relief. For a time, it appeared that the possibility of awarding damages in lieu of an injunction provided by Lord Cairns' Act might lead to the courts' being more reluctant to enjoin such nuisances. Thus, Lord Westbury, whose period as Lord Chancellor began shortly after the passage of that Act, showed himself to be particularly cautious about the use of injunctions. In *Isenberg v East India House Estate Company*,[63] despite the fact that he was faced with a defendant who had accelerated the construction of a development after the plaintiff complained that the completed building would interfere with his light, Westbury LC refused to grant an injunction. His Lordship remarked that, 'The exercise of that power is one that must be attended with the greatest possible caution.'[64] In his view, the Court should not, 'deliver over the Defendants to the Plaintiff bound hand and foot, in order to be made subject to any extortionate demand that he may by possibility make'.[65]

Sir John Romilly MR adopted a more cautious attitude towards the use of the jurisdiction conferred by Lord Cairns' Act in right to light cases. Thus, in *Dunball v Walters*,[66] he remarked:

> An Act of Parliament alone can give any person the right of taking the property of another without his consent on payment of an adequate pecuniary compensation, and

[63] n 59 above.
[64] ibid 272.
[65] ibid 273.
[66] *Dunball v Walters* (1865) 35 Beav 565 (Ch), 55 ER 1106.

> the right to light and air is as much property as the land which enjoys this easement on the land of another.[67]

Further decisions of the Courts of Chancery in this period suggested that Lord Westbury's approach to injunctions in right to light cases might prevail. In *Curriers' Company v Corbett*,[68] Sir RT Kindersley VC refused to grant a mandatory injunction for the reason that, 'The Defendant's new buildings are of considerable magnitude and importance, while the two houses of the Plaintiffs are comparatively of small value and importance…'.[69] Similarly, later that year, in the Court of Appeal in Chancery in *Durell v Pritchard*,[70] Sir George Turner LJ remarked that, 'this Court will not interfere by way of mandatory injunction, except in cases in which extreme, or at all events very serious, damage will ensue from its interference being withheld.'[71] Subsequently, Romilly MR himself awarded damages in lieu of an injunction in *Calcraft v Thompson*,[72] modifying his approach to the jurisdiction in response to Sir George Turner LJ's judgment in *Durell*.

A change of attitude was soon apparent. After Lord Westbury's resignation, later Lord Chancellors took a less active judicial role and the law was shaped primarily by successive Masters of the Rolls and Vice Chancellors.

While Wood VC expressed some dissatisfaction with the constraints imposed by easements of light, he nonetheless viewed this as a matter for the legislature.[73] He concluded that the courts should respond to breaches of these rights in the manner proposed in *Broadbent***Error! Bookmark not defined.**, whereby injunctions should be available as of right, and that this approach should not be affected by the recognition of the jurisdiction to grant damages in lieu of an injunction. Thus, in refusing to award damages in the place of a mandatory injunction in *Dent v Auction Mart Co*,[74] Wood VC remarked,

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[67] ibid 567.
[68] *Curriers' Company v Corbett* (1865) 2 Dr & Sm 355, 62 ER 656.
[69] ibid 361.
[70] n 58 above.
[71] ibid, 250.
[72] *Calcraft v Thompson* (1866) 35 Beav 559 (Ch), 55 ER 1013; affirmed by Chelmsford LC: *Calcraft v Thompson* (1867) 15 WR 387.
[73] *Stoke v City Office Co* (1865) 12 LT (NS) 602 (Ch), 603.
[74] n 52 above.

> it cannot be contended that those who are minded to erect a building that will inflict an injury upon their neighbour have a right to purchase him out without any Act of Parliament for that purpose having been obtained.[75]

While Wood VC awarded damages in lieu of an injunction on more than one occasion in this context, he stressed that mandatory injunctions could be denied only in exceptional circumstances. Thus, in two cases in which he exercised the jurisdiction in the defendant's favour, he concluded that the fact that the plaintiffs had expressed a willingness to consent to the proposed development for the right price provided a good indication that the harm in question could fairly be compensated by money.[76]

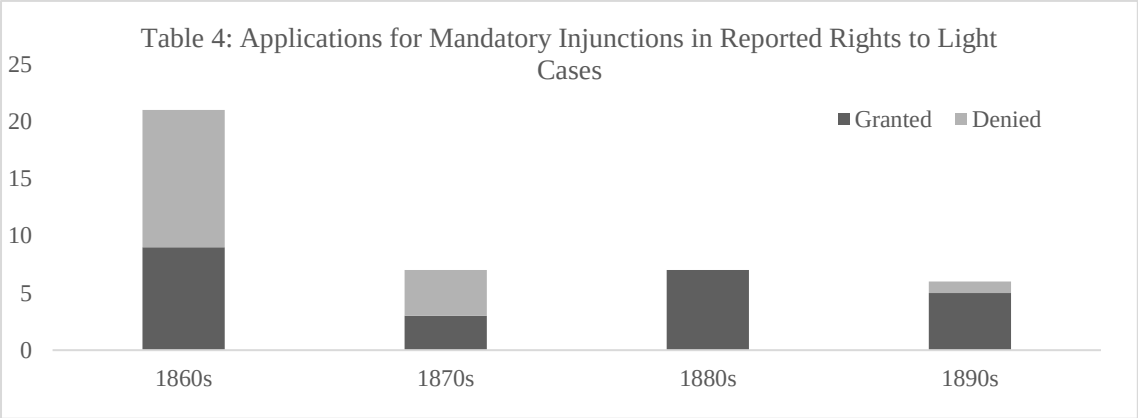
The Judicature Act 1873 came into effect shortly after Romilly's successor as Master of the Rolls, Sir George Jessel, began his tenure. The Act permitted courts of law to award equitable remedies. Nonetheless, most rights to light litigation continued to be initiated in the Courts of Chancery, perhaps because claimants preferred the greater certainty that was afforded by avoiding the jury that remained a feature of common law trials.

In *Aynsley v Glover*,[77] in considering an application for an interlocutory injunction, Jessel MR showed himself to be well aware of the potential that awarding damages instead of an injunction had for reducing the 'holdout problem. His Lordship suggested that the discretion had been conferred in order to prevent plaintiffs using their position to 'obtain a very large sum of money from defendants'.[78] Nonetheless, he concluded that it would be appropriate to award damages only where the plaintiff's injury was 'very slight' and the hardship that would be visited upon the defendant as a result of imposing the injunction, considerable. Jessel MR suggested that an upper limit of £40 would be appropriate. Such a sum would be the equivalent of around £4,500 in 2018.

The judiciary had initially proved willing to deny injunctions even in cases where the building at issue was in the early stages of construction when the matter was heard or where the defendant had completed construction after the plaintiff had

[75] ibid 246. For similar remarks by the same judge, see *Senior v Pawson* (1866–67) LR 3 Eq 330 (Ch), 333. Such comments should not be taken to suggest that the defendant missed the opportunity to obtain a Private Act of Parliament to enable him to proceed without fear of an injunction. There is no trace of a practice of the legislature authorising private developments in this way.
[76] *Senior v Pawson* (ibid); *Viscount Gort v Clark* (1868) 18 LT Rep NS 343 (Ch).
[77] *Aynsley v Glover* (1874) LR 18 Eq 544 (Ch).
[78] ibid 555. Jessel MR remarked, 'I do not like to use the word extort', thereby conveying the impression that he had something of the kind in mind.

commenced the action.[79] Subsequently, however, the courts tended to limit relief to damages only in cases where the building in question was complete;[80] and even then, it was not certain that the court would exercise its discretion in the defendant's favour.[81] As a result, the denial of mandatory injunctions became increasingly uncommon. The only reported case in which damages were granted in lieu of a mandatory injunction in a right to light dispute in the last two decades of the nineteenth century was *Martin v Price***Error! Bookmark not defined.**, where Kekewich J's use of the discretion was overturned on appeal.[82]




The judicial attitude to the award of damages in lieu of an injunction was most definitively expressed in the Court of Appeal's decision in *Shelfer v City of London Electric Lighting Co*,[83] where the Court unanimously upheld the plaintiffs' appeal against Kekewich J's refusal of an injunction for a nuisance caused by the defendant's electricity-generating operation. AL Smith LJ formulated his 'good working rule', which was to represent the orthodoxy on this issue for much of the next 120 years. In his view, damages should be awarded as a substitute for an injunction only:

> (1) If the injury to the plaintiff's legal rights is small, (2) And is one which is capable of being estimated in money, (3) And is one which can be adequately compensated by

[79] See eg *Jackson v The Duke of Newcastle* (1864) 3 De GJ & S 275, 46 ER 642 (construction in progress at the time the matter was heard); *Isenberg v East India House Estate Company* (n 59 above) (building completed after action initiated).
[80] This was a feature of most of the handful of cases in the 1870s where an injunction was denied. See *City of London Brewery Co v Tennant* (n 33 above); *Lady Stanley of Alderley v Earl of Shrewsbury* (1875) LR 19 Eq 616 (Ch); and *National Provincial Plate Glass v Prudential Assurance* (1877) 6 Ch D 757 (Ch).
[81] See eg *Lazarus v Artistic Photograph Co* [1897] 2 Ch 214 (Ch).
[82] *Martin v Price* [1894] 1 Ch 276 (CA).
[83] *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 (CA).

> a small money payment, (4) And the case is one in which it would be oppressive to the defendant to grant an injunction…[84]

Once again, the court was uncomfortable with the implication that it might undermine property rights by limiting plaintiffs to damages in lieu of an injunction. This concern was expressed most succinctly by Lindley LJ when he remarked, 'Expropriation, even for a money consideration, is only justifiable when Parliament has sanctioned it.'[85] It is apparent, however, that *Shelfer* was far from revolutionary. That decision was foreshadowed by the approach of Wood VC in the 1860s and Jessel MR in the 1870s.[86]

## C. The Balance Restored in *Colls*

As noted, the latter half of the nineteenth century saw a sharp and sustained rise in rights of light litigation. In addition to the judicial tendency to award injunctions as a matter of course in response to breaches of rights to light, plaintiffs were encouraged by decisions that strengthened the scope of protection conferred by an easement of light. The courts rejected the notion that the level of lighting that one might legitimately expect depended in part on the location in which the dispute arose.[87] In addition, various authorities, culminating in the Court of Appeal decision in *Warren v Brown*,[88] concluded that the owners of dominant tenements were permitted to retain an exceptional level of natural light if that was necessary for the profession practised on the premises in question.[89] Moreover, *dicta* in some cases[90] appeared to suggest that owners of dominant tenements were essentially entitled to the same level of light enjoyed at the moment the easement arose.

The high degree of protection provided to rights of light compromised urban development. The facts of *Colls v Home and Colonial Stores*[91] usefully illustrate the constraints that the prevailing state of the law imposed. The plaintiff, whose three-storey premises benefited from electric lighting, complained of the defendant adding a

[84] ibid 322–23.
[85] ibid 315–16.
[86] Indeed, subsequently in *Slack v Leeds Industrial Co-operative Society* [1924] 2 Ch 475 (CA), 487, Pollock MR remarked that, 'The rules that are laid down in *Shelfer* … are also to be found in *Aynsley v Glover*, if not in the same terms, at any rate in words to much the same effect…'.
[87] *Yates v Jack* (1866) LR 1 Ch App 295 (Ch App).
[88] *Warren v Brown* [1900] 2 QB 722 (CA).
[89] See eg *Lazarus v Artistic Photograph Co* (n 81 above).
[90] Eg: *Calcraft v Thompson* (1867) 15 WR 387; *Scott v Pape* (1886) 31 Ch D 554 (CA).
[91] n 31 above.

third storey to its premises on the opposite side of a street with a width of 40 feet in the City of London. It seems scarcely credible that such a modest expansion in the centre of the metropolis could have resulted in the highest court in the land hearing an appeal by the defendant against an order that it pull down the storey it had added. However, the state of the authorities was such that, with considerable reluctance, the Court of Appeal had reached the view that it was obliged to order a mandatory injunction.[92] In upholding the defendant's appeal, the House of Lords sought to restate numerous aspects of right to light law.

A key feature of *Colls* was the choice of a single objective standard for the degree of light to which plaintiffs were entitled, without regard to the fact that the plaintiff might have enjoyed an exceptional amount of light, or to any need for an extraordinary level of illumination that the plaintiff might claim. This was most succinctly captured by Lord Lindley's conclusion that claimants were entitled to 'sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of [the premises]'.[93]

Their Lordships concluded that the obstruction in question did not amount to a nuisance. While this was sufficient to dispose of the case, both Lords Macnaghten and Lindley addressed the issue as to whether it would have been appropriate to award an injunction had they found the defendant liable. Lord Macnaghten doubted that 'the amount of damages which may be supposed to be recoverable at law offers a satisfactory test' for determining whether the courts should limit the plaintiff to monetary relief. Instead, his Lordship suggested that the issue should turn primarily on the quality of the defendant's behaviour. He concluded,

> if there really is a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction.[94]

For his part, Lord Lindley struck a much less strident tone than he had in *Shelfer***Error! Bookmark not defined.**. In an analysis that featured none of the absolutist property rights rhetoric that marked the judgments of that earlier decision, his Lordship was content to conclude that this would have been an appropriate case in

[92] *Home and Colonial Stores v Colls* [1902] 1 Ch 302.
[93] *Colls* (n 31 above) 208.
[94] ibid 193.

which to grant damages in lieu of an injunction. He concluded by counselling moderation in right to light disputes, observing that:

> There are elements of uncertainty which render it impossible to lay down any definite rule applicable to all cases. First, there is the uncertainty as to what amount of obstruction constitutes an actionable nuisance; and, secondly, there is the uncertainty as to whether the proper remedy is an injunction or damages. But, notwithstanding these elements of uncertainty, the good sense of judges and juries may be relied upon for adequately protecting rights to light on the one hand and freedom from unnecessary burdens on the other. There must be consideration for both sides in all these controversies.[95]

The apparent relaxation in the approach toward exercising the discretion conferred by Lord Cairns' Act signalled in *Colls* had an immediate effect on the Court of Appeal in *Kine v Jolly*.[96] The defendant had built a house which interfered with the plaintiff's right to light, substantially diminishing the value of the plaintiff's property. While denying the appeal on the question of liability, the Court of Appeal reversed Kekewich J's decision at first instance on the choice of remedy and so denied the plantiff a mandatory injunction. Cozens-Hardy LJ observed that:

> I think it is impossible to doubt that the tendency of the speeches in the House of Lords in *Colls* … is to go a little further than was done in *Shelfer* …, and to indicate that as a general rule the Court ought to be less free in granting mandatory injunctions than it was in years gone by.[97]

Given rights to light are qualified in that an actionable nuisance arises only when the interference is so significant that it renders the premises 'substantially less comfortable and convenient',[98] it is unclear that any such breach could be said to have satisfied the first of AL Smith LJ's tests in *Shelfer*, whereby it must be demonstrated that 'the injury to the plaintiff's legal rights is small'.[99] Moreover, given that a majority of the Court of Appeal accepted Kekewich J's finding that the value of the premises had been 'substantially diminished', it is difficult to understand how the breach could have satisfied AL Smith LJ's third test that the injury 'is one which can be adequately compensated by a small money payment'.[100]

Within a few years of *Colls*, there was a marked decrease in rights of light litigation. In the next 20 years, the courts seldom ordered a mandatory injunction in

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[95] ibid 208.
[96] *Kine v Jolly* [1905] 1 Ch 480 (CA); affirmed *Jolly v Kine* [1907] AC 1 (HL).
[97] *Kine v Jolly* (ibid) 504.
[98] *Colls v Home and Colonial Store* (n 31 above) 187 (Lord Macnaghten).
[99] *Shelfer* (n 83 above) 322.
[100] ibid.

response to a breach of a right to light,[101] and in at least four instances damages were ordered as an alternative to that remedy.[102] Almost two decades after *Colls*, Younger LJ summarised the consequences of that decision:

> It has become a commonplace amongst us that the restatement of the law and proper practice in such cases made by the House of Lords in *Colls' Case* reduced the hitherto abundant flow of actions for injunctions in light and air cases to a mere trickle. Injunctions became no longer a matter of course; the real damage did not translate itself into a sum sufficiently substantial to be attractive. Cases of trivial interference no longer troubled the Courts.[103]

Twenty years after *Colls*, in *Leeds Industrial Cooperative v Slack*,[104] the House of Lords concluded by a narrow majority that the courts had the jurisdiction to grant damages for prospective harm in substitution for a *quia timet* injunction. The plaintiff had halted the defendant's building development by obtaining an interim injunction and thereby prevented the threatened breach of his easement of light occurring. The case was sent back to the Court of Appeal, which did indeed exercise its discretion to grant damages.[105] The willingness of the House of Lords to sanction the use of the jurisdiction not only to permit continuing nuisances but to authorise future transgressions of the plaintiff's rights was starkly at odds with the restrictive attitude apparent in the line of cases culminating in *Shelfer*.[106]

The retreat from the late Victorian approach to the award of remedies in right to light cases continued in *Fishenden v Higgs & Hill*,[107] when the Court of Appeal once again overturned a refusal of the first instance court to award damages in lieu of an injunction. Lord Hanworth MR was critical of AL Smith LJ's rule[108] and suggested that 'we ought to incline against an injunction if possible'.[109] Romer LJ concluded that, while he was sure that an injunction would be refused if *all* of the criteria in *Shelfer* were fulfilled, AL Smith LJ could not be taken to have asserted that an injunction would

[101] The one exception is *Higgins v Betts* [1905] 2 Ch 210 (Ch).
[102] *Kine v Jolly* (n 96 above); *Ankerson v Connelly* [1907] 1 Ch 678 (CA); *Bailey v Holborn & Frascati* [1914] 1 Ch 598 (Ch); *Wills v May* [1923] 1 Ch 317 (Ch).
[103] *Slack v Leeds Industrial Co-operative Society Ltd* (n 86 above), 461. His Lordship was dissenting on the question of the jurisdiction to grant damages in lieu of a *quia timet* injunction, expressing a view that was subsequently adopted by the majority of the House of Lords on appeal.
[104] *Leeds Industrial Cooperative Society Ltd v Slack* [1924] AC 851.
[105] *Slack v Leeds Industrial Co-operative Society Ltd* (n 86 above).
[106] Damages were ordered in lieu of a *quia timet* injunction in a right to light case by Pearson J *Holland v Worley* (1884) LR 26 Ch D 578 (Ch). However, it was quickly treated as bad law by Bacon VC in *Greenwood v Hornsey* (1886) 33 Ch D 471 (Ch).
[107] *Fishenden v Higgs & Hill* (1935) 153 LT 128 (CA).
[108] ibid 139.
[109] ibid.

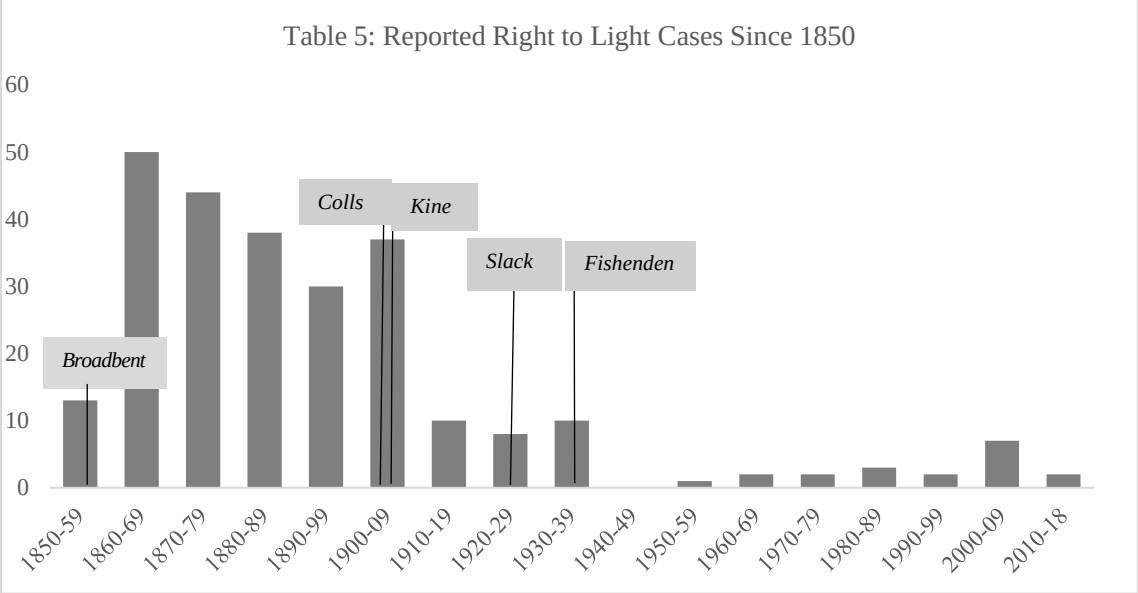
invariably be denied if *any* of them were not satisfied.[110] Consistently with Lord Macnaghten's analysis in *Colls*, Lord Hanworth MR and Romer LJ justified overturning the decision of the court below in large part because the defendants had acted in good faith.[111]

Echoing Lord Lindley's coda in *Colls*, members of the Court of Appeal in Fishenden suggested that rights of light cases should be treated differently from other nuisances. Both Maugham LJ and Lord Hanworth MR sought to restrict *Shelfer* to its facts by emphasising that it was a case in which the nuisance physically damaged the plaintiff's property.[112] Maugham LJ concluded that AL Smith LJ's approach did not offer 'a universal or even a sound rule in all cases of injury to light'.[113]

The choice of the majority of their Lordships in *Colls* to favour an absolute, objective standard for nuisance by interference with an easement for light rather than one that was dependent upon the level of light previously enjoyed by the defendant no doubt did a great deal to stem the flow of litigation. Not only did this approach impose a higher threshold for claimants; it offered the possibility that the standard might be reduced to a measurable benchmark that would bring greater certainty to light disputes. This opportunity was, to a degree, realised with the development and widespread use of Percy Waldram's method.[114]

There appear to be no reported right to light cases in the *Law Reports*, the *Weekly Law Reports* or the *All England Reports* between 1937 and 1967.[115] While no doubt attributable in part to the distractions of the Second World War, the consequences of the temporary extension of the period of prescription provided for in the Rights to Light Act 1959 and the establishment of a comprehensive planning regime, this pause in litigation is nonetheless remarkable.

[110] ibid 141.
[111] ibid 139 (Lord Hanworth MR) and 141 (Romer LJ).
[112] ibid 138 (Lord Hanworth MR) and 144 (Maugham LJ).
[113] ibid 144.
[114] See above n 34.
[115] The only reported case in this period I have found is *Blake & Lyons Ltd v Lewis Berger and Sons* [1951] TLR 605 (Ch).




## D. A Brief Return to *Shelfer*

The danger of such a lengthy hiatus is that the hazards of treating easements of light in the same way as any other proprietary interest may fade from the collective memory of the legal community. In 2006, in *Regan v Paul Properties DPF (No 1)*,[116] the Court of Appeal ordered a mandatory injunction in a case in which a defendant had proceeded with a development after having been advised by an expert that any interference with the claimant's right to light that was likely to result would be minor. In overruling the decision of the judge at first instance to award damages as a substitute for a mandatory injunction, Mummery LJ suggested that Lord Macnaghten's remarks in *Colls* had been treated as carrying an authority that he had never intended them to have.[117] While the diminution in value to the claimant from the development was not more than £5,500 and the cost of complying with the injunction for the defendant would have been £200,000, the Court concluded that the *Shelfer* test was not satisfied. A similar result was seen four years later in the High Court decision of *HKRUKII (CHC) Ltd v Heaney*.[118]

The availability of injunctive relief was also affected by the emergence of awards of release fees in lieu of an injunction following *Wrotham Park Estate Co Ltd*

[116] *Regan v Paul Properties DPF (No 1)* [2006] EWCA Civ 1391, [2007] Ch 135.
[117] ibid [39].
[118] *HKRUKII (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

*v Parkside Homes Ltd.*[119] The practice has developed of granting claimants awards of around a third of any profit attributable to the breach of the right in question. Awards made on this basis are said to reflect what the claimant might reasonably have charged the defendant in return for relaxing the rights in question.[120] It was suggested both in Regan and Heaney that such awards should be taken into account for the purposes of AL Smith's test in determining whether 'the injury to the plaintiff's legal rights is small' and/or 'is one which can be adequately compensated by a small money payment'.[121] This approach would have the rather perverse result of meaning that claimants who are in the privileged position of being entitled (if no injunction were granted) to awards far exceeding the diminution in value suffered as a consequence of a breach of a right to light would as a result always be entitled to an injunction. It might be argued that such awards should not be treated as relevant to the *Shelfer***Error! Bookmark not defined.** test because they are based on the defendant's gain rather than the claimant's loss. Such an objection would, however, be at odds with the recent Supreme Court decision in *Morris-Garner v One Step (Support) Ltd*,[122] where their Lordships concluded that a release fee awarded in lieu of an injunction is properly regarded as compensation for loss on the basis that, 'the refusal of an injunction effectively deprive[s] the plaintiffs of the benefit of their right, and therefore of its value'.[123]

## E. Reimagining Remedies for Nuisance: *Lawrence v Fen Tigers Ltd*

The status of *Shelfer* was reconsidered by the Supreme Court in *Lawrence v Fen Tigers*,[124] a dispute involving two claimants who had moved to an isolated bungalow near a stadium used for motor sports. While upholding the claimants' appeal on the question of liability, the Court sent the matter back to the court of first instance to consider whether damages should be awarded instead of an injunction.

There was agreement amongst their Lordships that the exercise of the jurisdiction to grant damages in lieu of an injunction should no longer be constrained

[119] *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (Ch)**Error! Bookmark not defined.**.
[120] For an example of this in the context of a right to light dispute, see *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd (No 2)* [2007] EWHC 212 (Ch), [2007] 1 WLR 2167.
[121] *Regan v Paul Properties DPF No 1 Ltd* (n 116 above) [72] (Mummery LJ); *HKRUK II v Heaney* (n 118 above) [80]–[81] HHJ Langan QC.
[122] *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20, [2018] 2 WLR 1353.
[123] ibid [54] Lord Reed (with Lady Hale, Lord Wilson and Lord Carnwarth concurring).
[124] *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] AC 822.

by a strict application of AL Smith LJ's rule from *Shelfer*. Importantly for the purpose of this analysis, Lords Neuberger and Sumption treated *Regan* as wrongly decided.[125] Lord Neuberger, giving the lengthiest judgment, suggested that, prima facie, a claimant should be entitled to an injunction on proof of a nuisance and that the burden lay on the defendant to persuade the court that damages should be granted instead.[126] However, the effect of his Lordship's approach was to greatly reduce the obstacles to discharging that burden. Echoing Romer LJ's analysis in *Fishenden***Error! Bookmark not defined.**,[127] Lord Neuberger stated that if the tests listed by AL Smith LJ are all met, a court should deny an injunction and grant damages; if they are not all fulfilled, however, the court might still exercise its discretion in the defendant's favour.[128] Their Lordships agreed that the judiciary might do well to take more account of the public interest in choosing between remedies than courts had previously done. They agreed that the court might have regard to the fact that planning permission had been granted for a particular development, although they varied on how much weight should be attached to the matter.[129]

The decision in *Lawrence* may have particular significance for right to light disputes. Lord Neuberger remarked, 'I do not see such cases as involving special rules when it comes to this issue.'[130] Perhaps he thought it important to make this claim because, in proposing a departure from *Shelfer*, he relied on the 'more open-minded approach' that he argued was apparent in *Colls*, *Kine* and *Fishenden*,[131] all cases involving rights of light. Lord Mance, in contrast, observed that he was not sure that the same considerations arose in right to light cases compared with a nuisance of the kind found in *Lawrence*.[132] Given that Lord Mance was the most cautious of the judges in favouring a departure from *Shelfer*, he may have intended to indicate that the fact that the courts are often prepared to deny injunctions in right to light cases does not mean that they should be ready to do so for other types of nuisance.

One reading of *Lawrence* is that cases of 'coming to the nuisance' and right to light disputes can be viewed as two special categories where the courts might readily

[125] ibid [119]–[120] (Lord Neuberger), [159] (Lord Sumption).
[126] ibid [121].
[127] See above text to nn 107–113.
[128] *Lawrence v Fen Tigers Ltd* (n 124 above) [123].
[129] ibid [167] (Lord Mance), [246] (Lord Carnwath).
[130] ibid [122].
[131] ibid [117].
[132] ibid [167].

decline to grant an injunction.[133] In contrast, in other cases of nuisance, the case for awarding damages in lieu of an injunction might be more difficult to justify.

### F. Takings for Quasi-Public Purposes

One reason that large building schemes can still be completed is the sleight of hand formerly enabled by section 237 of the Town and Country Planning Act 1990 and now provided for by section 203 of the Housing and Planning Act 2016. The latter provision indicates that, where a local authority has appropriated land for planning purposes, 'easements and other rights' may be overridden. This applies whether the development is carried out by the local authority or by someone deriving title from it, thus allowing public bodies to acquire title to land temporarily and pass it on to a developer who may then build without the danger of being enjoined.[134] The owner will have to pay compensation pursuant to the usual principles applying to land that is compulsorily purchased. However, these principles stipulate that compensation is paid according to the market value of the right and not on the basis of a release fee that the owner of a dominant tenement benefiting from a right to light might have hoped to extract from the developer.[135]

## IV. CONCLUSION

Rights of light are anomalous. There is much to be said for the view that England and Wales would do well to follow the lead of so many other common law jurisdictions and eliminate these easements. As long as they do exist, however, there are good reasons to treat them differently from other rights. What is more, there is a judicial tradition recognising this: briefly established in the 1860s in the decisions of Lord Westbury and Sir George Turner LJ, and later sustained for decades in a line of appellate authority from *Colls* to *Fishenden*. Rights of light pose special problems because they are burdensome, difficult to identify and vague in scope, and because the obstacles to bargaining around these entitlements are potentially acute. The Supreme Court's

[133] Treating coming to the nuisance cases as special in this way would equally explain the Court of Appeal's decision to refuse an injunction in *Miller v Jackson* [1977] QB 966 (CA).
[134] *Midtown Ltd v City of London Real Property Col Ltd* [2005] EWHC 33 (Ch), [2005] 14 EG 130.
[135] ibid [34].

decision in *Lawrence* appears to acknowledge this understanding and will hopefully serve to encourage the courts to be more willing to grant damages instead of injunctions in this context.