that the execution debtor could make an assignment to the official assignee of another County than that in which he resided and carried on business.

As the question had been, by consent, left to be summarily disposed of by the Chief Justice, he granted an order barring the claimant.

Order accordingly.

CHANCERY.

(Reported by Alexander Grant, Esq., *Barister at-Law, and Reporter to the Court.)*

Cartwright v. Gray.

Nuisance—Injunction.

Every one has a right to the air on his premises uncontaminated by the occupants of other property, though those who live in a city cannot insist on the complete immunity from all interference which they might have in the country. But the occupant of city property cannot justify throwing into the air in and around his neighbour's house any impurity which there are known means of guarding against.

The defendant erected in the city of Kingston a planing machine and circular saw, driven by steam, and was in the habit of burning the pine shavings and other refuse. He took no means to consume or prevent the smoke; and it being carried to the plaintiff's premises in sufficient quantities to be a nuisance, the defendant was decreed to desist from using his steam engine in such a manner as to occasion damage or annoyance to the plaintiff from the smoke.

Hearing before Vice Chancellor Mowat, at Kingston, in June, 1866.

Machar, for the plaintiffs, cited *Rex* v. *Neal*, 2 Car. & P. 485; *Rex* v. *Ward*, 4 Ad. & E. 384; *Rex* v. *White*, 1 Bur 333; *Bradley* v. *Gill*, Lutw. 69; *Hole* v. *Barlow*, 4 C. B N. S 334; *Simpson* v. *Savage*, 1 C. B. N. S. 347; *Rich* v *Basterfield*, 4 C. B. 805; *Bamford* v. *Turnley*, 9 Jur. N S. 377; *Elliotson* v. *Feetham*, 2 Bing, N. S. 134; *Regina* v. *Train*, 31 L. J. M. C. 160, Q B. 179; *Flight* v. *Thomas*, 10 A. & E. 590; *Sampson* v. *Smith*, 8 Sim. 272; *Crowder* v *Tinkler*, 19 Ves. 617; *Walter* v: *Selfe*, 4 DeG & Sm. 315; *Bankart* v. *Houghton*, 27 Beav. 425; *Tipping* v. *St. Helen's Smelting Co.*, 1 L. R. App. 66; *Spokes* v. *Banbury*, 1 L. R. Eq. 42; *Goldsmid* v. *Tunbridge*, 1 L. R. Eq. 163; *Mitchell* v. *Steward*, 1 L. R. Esq., 547; *Soltau* v. *DeHeld*, 2 Sim. N. S. 133.

R. Walkem, for defendant, cited *Attorney General* v *Cleaver*, 18 Ves. 111; *Walter* v. *Selfe*, 15 Jur. 416; *Cavey* v. *Lidbetter*, 9 Jur. N. S. 798; *Beardmore* v. *Treadwell*, 9 Jur. N. S 272; *Radenhurst* v. *Coate*, 6 Gr. 139; *Mumford* v. *The Oxford, Worcester and Wolverhampton Railway Co.*, 1 H. & N. 34; *Clarke* v. *Clark*. 1 Law Rep. Eq. 16; Drewry on Injunction, 238; Mitford on Pleading, 168; Addison on Torts, 16, 168.

Mowat, V. C.—The facts appear to be these: In December, 1864, the plaintiffs sold and conveyed to the defendant a lot of ground in the city of Kingston, near the residence of plaintiff, Richard Cartwright, and near the two other houses of which the two plaintiffs are joint owners. In the following year the defendant erected on this lot a carpenter's shop, with a planing machine and circula saw driven by steam. The plaintiffs complain of the smoke, noise and sparks produced in working the engine as nuisances.

The defendant burns all the pine shavings and other refuse of his business, and only a small quantity of hardwood, and the smoke arising therefrom is described by several witnesses as pungent and disagreeable, and also as soiling linen hung out to dry. I think it proved that, from the prevalent wind being in the direction in which the plaintiff Richard Cartwright's residence lies from the defendant's shop, the smoke goes generally in that direction; that from this cause, as well as the height of the house and other local circumstances, the occupants are liable to suffer more from the smoke than the occupants of the neighboring houses; and, comparing the testimony on both sides, I have no doubt that the character of the nuisance, as affecting the plaintiff's residence, is not overstated by one of the witnesses, who says: "The smoke is a heavy black smoke. It has been heavy at times in the yard of Mr. Cartwright's house, such that I could not see or breathe as freely as when there is no smoke. The smoke was so thick that if the windows had not been down it would have injured fine curtains or wall paper or the like. I have sometimes heard Mrs. Cartwright order the windows to be shut in consequence of the smoke. I saw the smoke two or three times a week, and sometimes every day of the week. It did not annoy me. It did not hurt the yard. It was like a heavy fog." This witness, a servant of Mr. Cartwright's, says the smoke did not annoy him, though he also says that it interfered with his seeing and breathing: but I think I must hold that such a degree of smoke as he and others describe is quite sufficient to justify the testimony of another witness, who, speaking from his own observation, pronounced it "certainly prejudicial to comfortable enjoyment, so far as respects the plaintiffs' house."

It is not alleged that the defendant has adopted any of the well known contrivances for consuming or preventing smoke. Now, according to the settled doctrine of the courts, as stated by Vice Chancellor, now Lord Justice, Knight Bruce, in *Walter* v. *Selfe*, 4 DeG. & Sm. 321, the plaintiff is clearly entitled to "an untainted and unpolluted stream of air for the necessary supply and reasonable use of himself and his family there; or, in other words, to have there, for the ordinary purposes of breath and life, an unpolluted and untainted atmosphere * * * *: meaning by 'untainted' and 'unpolluted,' not necessarily as fresh, free and pure as, at the time of building the plaintiff's house, the atmosphere there was, but air not rendered to an important degree less compatible, or at least not rendered incompatible, with the physical comfort of human existence: a phrase to be understood, of course, with reference to the climate and habits of England." I think that the inconvenience made out by the plaintiffs in the present case is, in the language of the same learned judge, "more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people." *Vide* also *Clarke* v. *Clark*, 1 Law Rep. App. 16; *Dent* v. *Auction Mart Co.*, 1 Law Rep Eq Ca.