## PRIVY COUNCIL.

P.C.
1914

April 20;
May 11.

# PAUL
*v.*
# ROBSON.

**[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]**

*Easement—Light and Air—Ancient light, infringement of—Nuisance—Measure of right—Requirement of light for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind—Concurrent findings of fact—Grounds of appeal relating not to fact, but to pure question of law.*

In this case which was an appeal in an action for damages for the infringement of the appellants' alleged rights of light and air, the Judicial Committee held that though there were concurrent findings of fact in the Courts below, yet the grounds of appeal did not relate to those findings but to the question whether the Courts below had taken the proper view of the legal rights of the appellants, and whether, accordingly, the test which they had applied on the question of the infringement of the appellants' rights was the correct one. That was a pure question of law which admittedly turned upon the interpretation to be given to the decision of the House of Lords in *Colls* v. *The Home and Colonial Stores* (1), when considered in connection with the late decision of the House of Lords in *Jolly* v. *Kine* (2).

*Held*, further, that in *Colls' Case* (1) the legal test in such an action was formulated by Lord Davey as being that "the owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind. . . . The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance." And the House of Lords in that case adopted that formulation of the law.

* *Present*: Lord Dunedin, Lord Moulton, Sir John Edge, and Mr. Ameer Ali.

(1) [1904] A. C. 179. (2) [1907] A. C. 1.

In the judgment of the House of the Lords in *Wolly* v. *Kine* (1) there was an authoritative exposition of the decision in *Colls' Case* (2), and it was established that the law as stated by Lord Davey is the law as laid down by that decision, and that it accurately formulated the law on the subject. In the High Court, in the present case the Court of first instance adopted Lord Davey's opinion, and applied it consistently to the findings of fact to which he came; and the Appellate Court had substantially taken the same test. Their Lordships, therefore, affirmed the judgments of the Courts below, and dismissed the appeal.

APPEAL 17 of 1913 from a judgment and decree (1st August 1911) of the High Court at Calcutta in its Appellate Civil Jurisdiction, which affirmed a judgment and decree (29th March 1911) of Stephen J. a Judge of the same Court in its ordinary original jurisdiction.

The plaintiffs were appellants to His Majesty in Council.

The main question for determination in this appeal was to the whether the appellants were entitled to relief by injunction or damages for an alleged interference with their rights to access of light and air to their house and premises 7, Esplanade East, in Calcutta.

The facts are fully stated, and the judgments of the Courts are set out in the report of the hearing of the case on appeal to the High Court (Sir LAWRENCE JENKINS C. J. and WOODROFFE J.) which will be found in I. L. R. 39 Calc. 59.

On this appeal,

*De Gruyther K. C.* and *A. M. Dunne*, for the respondents, took a preliminary objection to the hearing of the appeal on the ground that the Appellate Court had affirmed the decision of the first Court, and there were concurrent findings of fact by both Courts that no actionable nuisance had been proved, and that no damage had been sustained by the appellants by

(1) [1907] A. C. 1 (2) [1904] A. C. 179.

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reason of the depreciation in value of their house and premises; and there was no substantial question of law; it was submitted, therefore, that no appeal lay. Reference was made to the Civil Procedure Code (Act V of 1908) section 110; *Sajjad Husain* v. *Wazir Ali Khan* (1); and *Karuppanan Servai* v. *Srinivasan Chetti* (2). Reference was made on the merits of the case to *Colls* v. *Home and Colonial Stores* (3); *Higgins* v. *Betts* (4) and *Jolly* v. *Kine* (5); it being contended that the principles of law applicable to the present case, which were laid down in those cases, had been rightly applied by the High Court: and that the appellants had failed to establish any ground for the relief sought by them.

*Upjohn K.C.*, *Hudson K.C.* and *W. E. Vernon*, for the appellants, contended that the evidence in the case clearly proved that the respondents' new building caused a nuisance or illegal obstruction to the appellants' ancient windows; that by reason of the erection of the building the appellants' premises had been, to a substantial degree, rendered less fit for the purpose of busines or occupation; that such erection had sensibly interfered, according to the ordinary notions of mankind, with the comfort and convenience of the appellants' building as a residence, and its usefulness as a place of business; and that the question whether sufficient light was left for the purposes of a dwelling house and place of business was not the test to be applied in order to ascertain whether the respondents' buildings constituted an actionable nuisance; but the test was whether there had been a diminution of light caused sufficient to amount to a nuisance. The

(1) (1912) I. L. R. 34 All. 455: L. R. 39 I. A. 157.
(2) (1901) I. L. R. 25 Mad. 215: L. R. 29 I. A. 38.
(3) [1904] A. C. 179.
(4) [1905] 2 Ch. 210.
(5) [1907] A. C. 1.

arguments were based on *Colls* v. *Home and Colonial Stores* (1) and *Kine* v. *Jolly* (2) and, on appeal, *Jolly* v. *Kine* (3); and it was contended that as to what was the proper test the Judges in those cases had differed in opinion, and that the decision on the question in the former case had not been altogether supported by the Court of Appeal or in the latter case on appeal. The proper test had not been applied to the present case by the High Court, which had therefore not taken a proper view of the appellants' rights. *Griffiths* v. *Richard Clay and Sons, Limited*(4) was also referred to. The appellants, it was submitted, had a cause of action against the respondents, and were entitled to damages for the injury caused to their rights.

The respondents were not further heard.

The judgment of their Lordships was delivered by

*May* 11.

LORD MOULTON. The action in which the present appeal is brought is an action in which the appellants sued the respondents for infringement of certain rights of light possessed by them in connection with premises known as 7, Esplanade East, Calcutta, of which they owned the freehold. The respondents had erected a building known as 8, Esplanade East, Calcutta, lying to the east of the appellant's premises and so situated that the western walls of the respondents' buildings were parallel to and at a distance of 17 feet from the eastern wall of the appellants' building. The ground on which the respondents' building was erected had for more than 20 years previously been occupied by much lower buildings, and it is conceded that the appellants had acquired rights of light thereby for the windows on ths east side of their

(1) [1904] A. C. 179.
(2) [1905] 1 Ch. 480, 481, 493.
(3) [1907] A. C. 1.
(4) [1912] 2 Ch. 291 298.

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premises. The new buildings of the respondents greatly exceed in height the former buildings upon the site and decreased the amount of light coming to the eastern windows of the appellants, and it is in respect of this interference with the access of light to their windows that the appellants brought the action.

The action came on for trial with witnesses before the Hon. Mr. Justice Stephen, sitting as a Judge of the High Court of Judicature at Fort William in Bengal, in its ordinary civil jurisdiction, and on the 29th day of March 1911 he gave judgment dismissing the action. An appeal was brought from that judgment to the High Court of Judicature at Fort William in Bengal in its appellate jurisdiction, and on the 1st day of August 1911 judgment was delivered by that Court dismissing the appeal. It is from this judgment that the present appeal is brought.

Both in the Court of first instance and in the Court of Appeal the facts of the case are dealt with in detail, and clear findings are given on all relevant points of fact. Their Lordships can find no material difference between the views taken by the two Courts on these points of fact, though the expressions used may not be in all cases identical. Their Lordships therefore would feel justified in holding, if it were necessary, that this is a case of concurrent findings of fact. But in truth the grounds of appeal do not relate to these findings of fact, but to the question whether the Courts below have taken the proper view of the legal rights of the appellants, and whether accordingly, the test which they applied as to whether those rights had been infringed was the correct one. This is a pure question of law, and it was admitted by counsel for the appellants that it practically turns upon the interpretation to be given to the well-known decision of the House of Lords in the case of *Colls* v.

*The Home and Colonial Stores* (1), when considered in connection with the later decision of the House of Lords in *Jolly* v. *Kine* (2).

Their Lordships do not consider that it is either necessary or profitable to go into the history of the divergent views in respect of the nature and extent of rights of light acquired by prescription that prevailed in the Courts prior to the decision in *Colls's Case* (1). It suffices to say that one stream of authorities gave countenance to the view that by the enjoyment of light for a period of 20 years, there could be acquired an indefeasible right to the enjoyment of a like amount of light in the future. The conflicting stream of authorities countenanced the view that nothing constituted an infringement of rights of light which did not amount to an actionable nuisance, so that the amplitude of previous enjoyment was no measure of the rights acquired thereby. This conflict of views was fully recognised by the noble Lords who took part in the decision of *Colls's Case* (1), and there can be no doubt that it was their intention to decide between them, and to lay down the law in such a manner as to prevent uncertainty in the future.

Mr. Justice Stephen takes, as expressing the law laid down by this decision, the following quotation from the opinion of Lord Davey in that case :—

"The owner . . . . of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind . . . . The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance?"

And the Court of Appeal, although they do not so directly base their judgment on the above passage in Lord Davey's opinion, appear to their Lordships to

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have substantially taken the same test. But in their Lordships' opinion it is not necessary to examine minutely the verbal differences between the expressions used in the Court of Appeal and by the Judge of first instance. They accept in full the findings on fact of the Judge of first instance, and they are of opinion that he has consistently applied to them the legal test above formulated. The only question therefore is whether it accurately formulates the law on the subject.

It is evident on reading the opinion of Lord Davey that he intended the passage to be a precise formulation of the rights of a dominant tenement in respect of ancient lights, and his opinion was formally accepted by Lord Robertson who also took part in the decision. The opinion of the Lord Chancellor in that case is equally clear on the essential points that the easement acquired by ancient lights is not measured by the amount of light enjoyed during the period of prescription, and that there is no infringement unless that which is done amounts to a nuisance. It has been suggested that a different view is to be found in the opinions of Lord Macnaghten and Lord Lindley, but although there are passages in those opinions which might if they stood alone indicate that those noble Lords considered that to some extent the amount of light enjoyed in the past might influence the rights acquired for the future, there is no reason to think there was any intention on the part of those noble Lords to differ from the conclusions of their colleagues. It must be taken therefore that the House of Lords adopted the formulation of the law given by Lord Davey as above mentioned.

But if any doubt remained on the point it is in their Lordships' opinion set at rest by a consideration of the subsequent decision of the House of Lords in

the case of *Jolly* v. *Kine* (1). In that case Mr. Justice Kekewich had found as a fact that the obstruction amounted to a nuisance, but in the course of his judgment said that the room affected was "still a well-lighted room." He gave judgment for the plaintiff. On appeal to the Court of Appeal there was a division of opinion among the judges. Romer, L.J., held that under the decision in *Colls's Case* (2) the finding that it was still a well-lighted room was fatal to the plaintiffs' claim. Vaughan Williams and Cozens Hardy, L.JJ., held to the contrary. On appeal to the House of Lords their Lordships were equally divided and accordingly the appeal was dismissed. But this division of opinion was not due to any doubt as to the law to be applied. The Lord Chancellor gives his opinion on the law as laid down in *Colls's Case* (2) in the following words:—

"The right of the owner or occupier of a dominant tenement to light is based upon the principle stated by Lord Hardwicke in 1752, in *Fishmongers' Company* v. *East India Company* (3), that he is not to be molested by what would be equivalent to a nuisance. He does not obtain by his easement a right to all the light he has enjoyed. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surroundings. That is the basis on which the decision of this House proceeded."

Lord James of Hereford concurred in the judgment delivered by the Lord Chancellor.

These were the judgments of the two noble Lords who were in favour of dismissing the appeal. On the other hand, Lord Robertson was of opinion that the appeal should be allowed and in his opinion says:—

"I adhere, as I did in *Colls's Case* (2) to the definition given by Lord Davey in entire accordance with the judgments of the other noble and learned Lords. According to that definition the quantity of light to which

(1) [1907] A. C. 1. (2) [1904] A. C. 179.
(3) (1752) 1 Dick. 163.

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right is acquired in 20 years is 'what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind'"

Lord Atkinson, who was the other member of the Court, was also in favour of allowing the appeal, and referring to the decision in *Colls's Case* (1) he says:—

"It would appear to me that that case established the principle that there must be an invasion of the legal right of the owner of the dominant tenement sufficient to amount to a nuisance in order to give him a right of action, and that as long as he receives through the windows of his dwelling-house, or in the case of a particular room in his dwelling-house, through the windows of that room, an amount of light which, to use the words of James, L.J., in *Kelk* v. *Pearson* (2) is 'sufficien' according to the ordinary notions of mankind for the comfortable use and enjoyment' of his dwelling-house, or of the room in it, as the case may be, no nuisance has as regards him been created, and no legal wrong has been inflicted upon him."

And although he does not expressly repeat the well-known passage from Lord Davey's opinion in *Colls's Case* (1) he shows by the language which he uses that he thoroughly agrees with it, and says that to him it appears to be of general application.

In the judgment of the House of Lords in *Jolly* v. *Kine* (3) there is therefore an authoritative exposition of the decision in *Colls's Case* (1), and it is established that the law as formulated by Lord Davey is the law laid down by that decision. It is somewhat remarkable therefore that counsel for the appellants should have sought to treat the decision in *Jolly* v. *Kine* (3) as throwing some doubt upon the interpretation of the decision in *Colls's Case* (1), operating, if such an expression could be used, to weaken it in the direction of directing that regard should be had to the extent of previous enjoyment of light. The only explanation of such a view is that the appeal was in the end dismissed, inasmuch as the House was equally divided. But this

(1) [1904] A. C. 179. (2) (1871) L. R. 6 Ch. App. 809.
(3) [1907] A. C. 1.

was in no way due to any difference of opinion as to the law, but to the fact that the Lord Chancellor felt himself entitled to disregard the finding that the room was "still a well-lighted room" in the sense which those words would naturally convey and to hold them as meaning that it would have been considered to be well-lighted according to the standard of a crowded city." His Lordship was led to this conclusion by passages in the evidence and the context of Mr. Justice Kekewich's judgment. It was on this ground alone that he was in favour of dismissing the appeal, and therefore the actual result in that case has no bearing on its effect as an authoritative explanation of the law laid down in *Colls's Case* (1).

Their Lordships are therefore of opinion that the learned Judge at the trial took the proper test as to whether or not there had been an infringement of the rights of the appellants and that he applied it correctly to the facts of the case. They are therefore of opinion that his judgment was right and that the Court of Appeal was right in affirming it, and they will humbly advise His Majesty that the present appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors for the appellants: *Westbury, Preston, & Stavridi.*

Solicitors for the respondents, the Members of Mackintosh Burn & Co.: *Watkins & Hunter.*

(1) [1904] A. C. 179.

J. V. W.