plaintiff in respect of her alleged right to light and air.

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HAKIM MAL-TANI MAL v. MRS. V. E. EARLE.

In this view of the case I would accept the appeal, set aside the judgment and decree of the Court below and dismiss the plaintiff's suit with costs throughout.

TEK CHAND J.—I agree in the order proposed by my learned brother.

TEK CHAND J.

N. F. E.

Appeal accepted.

APPELLATE CIVIL.

Before Tek Chand and Agha Haidar JJ.

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Jan. 23.

RAM SARUP (PLAINTIFF) Appellant

versus

ABDUL HAQ (DEFENDANT) Respondent.

Civil Appeal No. 2618 of 1926.

Indian Limitation Act, IX of 1908, section 26—Easement —requirements of section—English law—prescription—distinction—"peaceable"—"as of right"—meaning of—Interruption—whether unsuccessful suit for injunction constitutes —Second Appeal—Legal inference from facts found—question of law.

A suit for injunction to remove an obstruction to certain doors, *parnalas* and drains, infringing plaintiff's alleged right of easement was dismissed on first appeal on the finding that the plaintiff's enjoyment of the easement was not "as of right," "open and peaceable," but was "contentious and precarious." The plaintiff had for the whole of the required period of 20 years been using the doors, etc. openly in the exercise of an asserted right, his enjoyment being visible and manifest, and not furtive or secret; but the present defendant had during that period instituted a suit against the plaintiff's predecessor-in-title for an injunction, which relief was refused. On second appeal, plaintiff did not seek to challenge the findings of fact arrived at by the lower Appellate Court but argued that, on these findings the legal inference drawn was wrong.

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Held, that as the previous litigation shewed that plaintiff had been exercising his alleged right in defiance of the defendant's wishes, this was a case in which the enjoyment has been *nec vi, nec clam, nec precario;* and the mere denial by the defendant, therefore, of the plaintiff's alleged right and his unsuccessful attempt to have this right negatived in a Court of law did not affect the plaintiff's acquisition of the easements in question.

For, all that the word " peaceable," as used in section 26 of the Limitation Act, means is that the plaintiff, who claims to be the dominant owner, has neither been obliged to resort to physical force himself at any time to exercise his right within twenty years expiring within two years of the suit nor had he been prevented by the use of physical force by the defendant in his enjoyment of such right. And the acquisition of the right is not interrupted by mere verbal quarrels or contentions.

Muthu Goundan v. *Anantha Goundan*, per Sadasiva Aiyar J. (1), and *Bai Kurvarbai* v. *Jamsedji Rustamji Daruvala* (2), followed.

Held further, that the term " as of right " is not synonymous with "' rightfully," but signifies " enjoyment by a person in the assertion of a right " or " enjoyment had, not secretly or by stealth, or by tacit sufferance, or by leave or favour, or by permission asked from time to time on each occasion, or even on many occasions, of using it, but an enjoyment had openly, notoriously, without danger of being treated as a trespasser, as a matter of right."

Modhoosoodun Dey v. *Bissonauth Roy* (3), followed.

Held also, that in India the right of easement depends upon positive enactments and it is not necessary that any presumption of a supposed grant and its subsequent loss need be made.

Arzan v. *Rakhal Chunder Roy Chowdhry*, per Garth C. J. (4), and *Muthu Goundan* v. *Anantha Goundan*, per Sadasiva Aiyar J. (1), followed.

(1) (1915) 31 I. C. 528, 531.
(2) (1919) 49 I. C. 963.
(3) (1875) 15 Beng. L. R. 361.
(4) (1884) I. L. R. 10 Cal. 214, 218.

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The *Explanation* to section 26 of the Act, moreover, shews that in India an "interruption" to be effective must result in actual discontinuance of the enjoyment of the right of the claimant.

Eaton v. *Swansea Waterworks Company* (1), distinguished.

Held lastly, that it is settled law that the question whether a particular fact has been proved when evidence for or against has been properly admitted, is necessarily a pure question of fact, but the proper legal effect of a proved fact is essentially a question of law, which can be raised in second appeal.

Wali Muhammad v. *Muhammad Bakhsh* (2), *Nafar Chandra Pal* v. *Shukur Sheikh* (3), *King* v. *Port of London Authority*, per Lord Parmoor (4), and *Shotts Iron Co., Ltd.* v. *Fordyce*, per Sankey L. C. (5), followed.

Siti Kanta Pal v. *Radha Gobinda Sen* (6), and *Eshan Chandra Samanta* v. *Nil Moni Singh* (7), distinguished.

Second appeal from the decree of Mr. S. L. Sale, District Judge, Delhi, dated the 5th August 1926, reversing that of Lala *Radha Kishen, Subordinate Judge, 2nd Class, Delhi, dated the 2nd October 1925, and dismissing the plaintiff's suit.*

KISHEN DIAL and BHAGWAT DIAL, for Appellant.

MUHAMMAD RAFI, for Respondent.

TEK CHAND J.—The plaintiff-appellant instituted a suit against the defendants-respondents praying for a permanent injunction for removal of a wall constructed by the defendants which, *inter alia*, caused obstruction to seven doors, three *parnalas* and certain drains of the house of plaintiff and in respect of which he claimed to have acquired a right of easement. TEK CHAND J.

(1) (1851) 17 Q. B. 267: 85 R. R. 455.
(2) (1930) I. L. R. 11 Lah. 189, 207 (P.C.)
(3) (1919) I. L. R. 46 Cal. 189 (P.C.).
(4) 1920 A. C. 1, 31.
(5) 1930 A. C. 503, 508.
(6) (1929) I. L. R. 56 Cal. 927.
(7) (1908) I. L. R. 35 Cal. 851, 856.

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DEK CHAND J.

The defendants denied the plaintiff's claim and also pleaded that the suit was barred by the rule of *res judicata*. The trial Court found in favour of the plaintiff on both these points and granted him a permanent injunction directing the defendants to remove the obstruction to the doors, *parnalas* and the drains.

On appeal the learned District Judge agreed with the trial Court that the suit was not barred by *res judicata* and also upheld the finding of fact that the doors, *parnalas* and drains in question had been in existence for more than twenty years and had been enjoyed continuously for that period until the construction of the wall by the defendant which was within two years of the institution of the suit. He, however, dismissed the suit on the ground that the plaintiff's enjoyment thereof was not "as of right," "open and peaceable" but was "contentious and precarious."

The plaintiff has come up in second appeal and it has been contended on his behalf that on the findings of fact recorded by the trial Court and affirmed by the learned District Judge, it should have been held that the plaintiff had acquired the easements claimed and the suit should have been decreed. At the commencement of the hearing Mr. Muhammad Rafi for the respondents raised a preliminary objection that the finding that enjoyment of an easement which the plaintiff claimed was not as of right, peaceful and without interruption, is one of fact and could not be challenged in second appeal. In my opinion the objection is devoid of force and cannot be sustained. It is settled law that the question whether a particular

fact has been proved, when evidence for or against has been properly admitted, is necessarily a pure question of fact, but the proper legal effect of a proved fact is essentially a question of law. See *Wali Muhammad* v. *Muhammad Bakhsh* (1), and *Nafar Chandra Pal* v. *Shukur Sheikh* (2), *cf.* the judgment of Lord Parmour in *King* v. *Port of London Authority* (3), recently approved by the House of Lords in *Shotts Iron Co., Ltd.* v. *Fordyce* (4) (*per* Lord Chancellor Sankey). The respondent's counsel has cited *Siti Kanta Pal* v. *Radha Gobinda Sen* (5) and *Eshan Chandra Samanta* v. *Nil Moni Singh* (6), but they are not in point, as it is not clear from the Reports whether the questions that were sought to be raised in those cases related to the existence of certain facts or to legal inferences to be drawn therefrom. In the case before us the learned counsel for the appellant does not challenge the findings of fact arrived at by the District Judge but seeks to argue that on these findings the learned Judge was wrong in drawing the legal inference that the enjoyment was not "open, peaceable and as of right." This is clearly a question of law, which he is entitled to raise in second appeal. I would, therefore, overrule the preliminary objection.

It has been concurrently found by the Courts below that the doors, *parnalas* and drains in question had been in existence since 1900 and that there had been no physical obstruction by the defendants or anyone else in the continuous enjoyment thereof by the plaintiff from 1900 till December 1921, when the wall

(1) (1930) I. L. R. 11 Lah. 189, 207 (P.C.).
(2) (1919) I. L. R. 46 Cal. 189 (P.C.).
(3) 1920 A. C. 1, 31.
(4) 1930 A. C. 503, 508.
(5) 1929) I. L. R. 56 Cal. 927.
(6) (1908) I. L. R. 35 Cal. 851, 856.

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was constructed. The enjoyment has, however, been held to have been "contentious and precarious" because of certain previous litigation between the parties. It appears that in 1916 Abdul Haq, the present defendant-respondent instituted a suit against Prabhu Dial, father of the present appellant, for an injunction praying that these seven doors and two *parnalas* be ordered to be closed. Prabhu Dial raised various defences pleading *inter alia* that the doors and *parnalas* were ancient, and that even if they were not proved to be so Abdul Haq, having acquiesced in their existence for a long time, was not entitled to the injunction prayed for. The suit was eventually decided by Col. Knollys, District Judge (see Ex. D. 10) who held that the doors and *parnalas* had been erected in 1900 and continuously used since their erection, but that at the date of the institution of the suit the period of 20 years had not expired and, therefore, Prabhu Dial could not be said to have acquired an indefeasible right of easement. He, however, held that as Abdul Haq had acquiesced in the existence of the doors and the *parnalas* for many years, relief in the form of a mandatory injunction could not be granted. He accordingly dismissed Abdul Haq's suit. During the pendency of that suit as well as in the interval that elapsed between its dismissal and the construction of the wall by the defendant in December 1921 Prabhu Dial, father of the plaintiff, continued in uninterrupted enjoyment of the doors and the *parnalas* and, as already stated, at the time when the defendant physically obstructed these openings in the plaintiff's wall the enjoyment had been continuously for a period of more than 20 years. It is conceded for the respondents, that but for the litigation of 1916, the plaintiff's right to the unobstructed user of the

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doors and *parnalas* would have matured into an easement at the time of the institution of the present suit. But it is contended that the mere fact that there was litigation in 1916 is sufficient in law to render the plaintiff's enjoyment thereof as one which was neither "as of right" nor "open and peaceful," even though the defendant had been unsuccessful in that litigation.

Now I fail to see how, on the facts as found, this contention can possibly prevail. The term "as of right" is a well-known legal expression which is not synonymous with 'rightfully,' but which in the words of Markby J. in *Modhoosoodun Dey* v. *Bissonauth Roy* (1), signifies "enjoyment by a person *in the assertion* of a right." As observed by an eminent author it means "enjoyment had, not secretly or by stealth, or by tacit sufferance, or by leave or favour, or by permission asked from time to time on each occasion, or even on many occasions of using it, but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it, without danger of being treated as a trespasser, as a matter of right." It will be readily admitted that in the case before us the plaintiff has all along been using the doors and *parnalas* in the exercise of an asserted right. He has done so openly and not stealthily; his enjoyment has from the very beginning been visible and manifest, not furtive or secret; he has never sought or obtained permission from the defendant for the exercise of his alleged right. Indeed, the litigation of 1916 shows unmistakably that he has been doing so in defiance of the latter's wishes. There seems to be no doubt that this is a case in which the enjoyment has been *nec vi, nec clam, nec precario.*

(1) (1875) 15 Beng. L. R. 361.

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It was strenuously urged that the fact that there was litigation at one time before the requisite period of twenty years had passed shows, at any rate, that the enjoyment was not 'peaceable' within the meaning of section 26 of the Limitation Act. But as held by Sadasiva Aiyar, J. in *Muthu Goundan* v. *Anantha Goundan* (1), all that the word "peaceable" means is "that the plaintiff, who claims to be the dominant owner, has neither been obliged to resort to physical force himself at any time to exercise his right within twenty years expiring within two years of the suit nor had he been prevented by the use of physical force by the defendant in his enjoyment of such right." The same view was expressed by the other learned Judge, Bakewell J. who observed that "the adverbs *peaceably* and *openly* qualify the verb '*enjoyed*' and may be paraphrased as follows:—The person who claims a right over the property of another must not have deprived him of that right by the use of force or secretly; in other words the user must be *nec vi, nec clam*." In that case it was held that the acquisition of the right of easement would not be interrupted by mere verbal quarrels or contentions.

Similarly in *Bai Kurvarbai* v. *Jamsedji Rustamji Daruvala* (2), the Bombay High Court held that in order to destroy the peaceful nature of the plaintiff's exercise of the alleged right the "obstruction or opposition to the enjoyment of a right of easement must find expression in something done on the servient tenement itself." "Mere protest on the part of the servient owner does not amount to interruption." In that case legal notices had been given by the owner of the alleged servient tenement objecting to the main-

(1) (1915) 31 I. C. 528, 531. (2) (1919) 49 I. C. 963.

tenance of the windows, etc., and this was not considered sufficient to justify a finding that the enjoyment had not been peaceful. Following this interpretation of the law, there can be no doubt that mere denial by the defendant of the plaintiff's alleged right in 1916, or his unsuccessful attempt to have this right negatived in Courts of law does not affect the plaintiff's acquisition of the easements in question.

In the course of the argument, reference was made to certain remarks in text-books on the Law of Easements, based on observations made in English decisions. In applying these remarks to cases in India, it must, however, be borne in mind that most of them are founded on the legal fiction, favoured by English jurists for a long time, that in cases of easements acquired by prescription, the law presumed a grant and its accidental loss due to lapse of time. This led to various difficulties which logically followed from this assumption, *e.g.*, knowledge, acquiescence, consent, etc. on the part of the owner of the servient tenement. In India, however, the right depends upon positive enactments and it is not necessary that any presumption of a supposed grant and its subsequent loss need be made. As observed by Chief Justice Garth in *Arzan* v. *Rakhal Chunder Roy Chowdhry* (1) "the Indian Limitation Act under which easements are now generally acquired in some parts of India has nothing to do with prescription. It is an Act for the limitation of suits and other purposes, and section 26 enables any person to acquire certain right by a twenty-years' user without reference to any grant express or implied, from the servient owner." See also to the same effect the elaborate judgment of Sadasiva Aiyar, J. in *Muthu Goundan* v. *Anantha Goundan* (2).

(1) (1884) I. L. R. 10 Cal. 214, 218. (2) (1915) 31 I. C. 528.

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In this connection reference may usefully be made to the Explanation to section 26 of the Limitation Act, which is identical in terms with Explanation II to Section 15 of the Indian Easements Act, and which specifically provides that " nothing is an interruption within the meaning of this section, unless there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorising the same to be made." It will thus be seen that in India an " interruption " to be effective must result in actual discontinuance of the enjoyment of the right of the claimant. In some of the cases decided in England, a much more extended meaning has been put on the word ' interruption,' but in view of the Explanation it does not seem necessary to discuss them here. Reference may, however, be made to *Eaton* v. *Swansea Waterworks Company* (1), which is the basis of one of the passages which was much relied upon by counsel. In that case the facts found were that water had flowed in its existing course for more than twenty years past the plaintiff's close, and during this period the plaintiff, and those under whom he claimed, had been constantly in the habit of drawing off the water to irrigate his close, but the owners of the watercourse had frequently resisted it. On one occasion when the plaintiff's servant drew off the water, the defendant instituted criminal proceedings against him. The servant was summoned before a justice for so doing, and the plaintiff's son by his direction attended and defended the servant who was, however,

(1) (1851) 17 Q. B. 267: 85 R. R. 455.

convicted and fined. It was proved that the fine was paid by the plaintiff's son. In a subsequent suit by the plaintiff for an injunction against the defendant for disturbing the watercourse, which of right ought to flow into the plaintiff's close, the conviction of the servant was sought to be tendered in evidence but was rejected by the trial Judge. The matter, was, however, taken to the Court of the Queen's Bench and there it was held that the evidence was improperly rejected. " as the conviction, unappealed against, was under the circumstances, evidence of an acknowledgment by the plaintiff, that the usage, to draw off the water for irrigation, was not as of right." It will thus be seen that *Eaton's* case is entirely distinguishable from the one before us, as there the defendant had successfully asserted his denial of the plaintiff's right by getting the plaintiff's servant convicted, and this was held to be evidence of an acknowledgment by the plaintiff that the user was not " as of right." It is clear from the judgment that if the prosecution had failed, or the conviction had been quashed on appeal, no such presumption could have been raised, and if the enjoyment of the right had continued for 20 years the right claimed would have matured into an easement.

After careful consideration, I have no doubt that so far as the doors and the *parnalas* are concerned the plaintiff's enjoyment had been ' without interruption,' ' as of right,' ' open and peaceful,' and that the litigation of 1916 did not destroy its character as such. No objection to the existence of drains was taken in 1916 and, therefore, the question does not arise so far as they are concerned. I am accordingly of opinion that the finding of the learned District Judge is erroneous and cannot be sustained.

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I would, therefore, accept the appeal, reverse the decree of the learned District Judge and restore that of the trial Court, with costs throughout.

AGHA HAIDAR J. AGHA HAIDAR J.—I agree.

N. F. E.

Appeal accepted.

APPELLATE CIVIL.

Before Addison J.

1931

Jan. 30.

BHAJNA (DEFENDANT) Appellant

versus

MST. BHEOLI (PLAINTIFF) Respondent.

Civil Appeal No. 464 of 1930.

Custom—Widow's estate—unchastity or re-marriage—whether causes forfeiture —Ahirs— Tahsil *Rewari—District Gurgaon*—Riwaj-i-am.

Held, that as according to the *Riwaj-i-am* of tha Gurgaon district, the unchasity or re-marriage of a widow among *Ahirs* of *Tahsil* Rewari, District Gurgaon, causes a forfeiture of her life estate, the *onus* of rebutting the correctness of this statement was upon the widow and that she had failed to do so.

Beg v. *Allah Ditta* (1), and Rattigan's Digest of Customary Law, 11th Edition, paragraph 31, referred to.

Labh Singh v. *Mst. Mango* (2), *Kahan Singh* v. *Gopal Singh* (3), and *Labha Ram* v. *Raman* (4), relied upon.

Mussammat Bhurian v. *Mst. Puran* (5), distinguished.

Second appeal from the decree of Rai Sahib Lala *Ghanshyam Das, District Judge, Gurgaon at Hissar, dated the 17th December 1929, reversing that of* Pandit *Rajindar Kishen Kaul, Subordinate Judge, 4th Class, Gurgaon, dated the 12th August 1929, and decreeing the plaintiff's suit.*

(1) 45 P. R. 1917 (P.C.).
(2) (1927) I. L. R. 8 Lah. 281.
(3) (1927) I. L. R. 8 Lah. 527.
(4) (1928) I. L. R. 9 Lah. 1.
(5) 105 P. R. 1885.