APPELLATE CIVIL.

Before Mr. Justice Baker.

MARGHABHAI ALIAS VALLAVBHAI JIVABHAI (ORIGINAL PLAINTIFF), APPELLANT *v.* MOTIBHAI MITHABHAI (ORIGINAL DEFENDANT), RESPONDENT.* 1932 *March* 1.

Easement—Light and air—Joint tenants, rights of—Windows receiving light and air from and projection of eaves for dropping water over joint property—Trespass—Claim to ownership inconsistent with exercise of right of easement—Acquisition of easement, essentials of.

Between the houses of the plaintiff and defendant there was an open space of land which was claimed by the defendant as his own. For 50 years continuously the eaves of defendant's house projected over this piece of land and certain windows of his house received light and air therefrom. Plaintiff obtained a decree against defendant to the effect that he was entitled to 1/3rd share in this open space of land; and in execution of his decree was given as his 1/3rd share that portion of the land which abutted on defendant's house. When plaintiff started to build over this portion he was obstructed by defendant who claimed an easement of light and air over it which would be interfered with by the proposed building of the plaintiff:

Held, (1) that the defendant having consistently claimed exclusive ownership in the land he could not acquire a right of easement over the same land either by prescription or under the Easements Act;

(2) that an easement by prescription is capable of being acquired only if the user during the statutory period has been with the *animus* of enjoying the easement as such in the land of another and not if the user has been in consciousness of one's own ownership over the same.

Chunilal Fulchand v. *Mangaldas Govardhandas*,[1] *Subba Rao* v. *Lakshmana Rao*,[2] *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited*,[3] *Lyell* v. *Hothfield (Lord)*[4] and *Harbidge* v. *Warwick*,[5] followed.

Earl De la Warr v. *Miles*[6] and *Rambhai Dabhai* v. *Vallabhbhai Jhaverbhai*,[7] distinguished.

Held, further, (3) that the projection of eaves for dropping water on the joint land and the opening of windows to receive light and air therefrom was no trespass and gave no cause of action so long as the land remained joint and consequently no right of easement could be acquired with respect thereto during that period.

Chhaganlal v. *Hemchand*,[8] *Rajubhai* v. *Lalbhai*[9] and *Sturges* v. *Bridgman*,[10] followed.

Tinkowri Pathak v. *Ram Gopal Pathak*,[11] explained.

* Second Appeal No. 493 of 1929.

[1] (1891) 16 Bom. 592.
[2] (1925) 49 Mad. 820, F.B.
[3] (1915) A. C. 599.
[4] (1914) 3 K. B. 911 at p. 916.
[5] (1849) 3 Exch. 552.
[6] (1881) 17 Ch. D. 535.
[7] (1920) 45 Bom. 1027.
[8] (1931) 34 Bom. L. R. 395.
[9] (1925) 28 Bom. L. R. 1000.
[10] (1879) 11 Ch. D. 852.
[11] (1922) 50 Cal. 356.

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SECOND APPEAL against the decision of M. G. Mehta, First Class Subordinate Judge, A. P., at Nadiad in Appeal No. 141 of 1928.

The material facts are sufficiently set out in the judgment.

U. L. Shah, for the appellant.

B. G. Rao, for *Diwan Bahadur G. S. Rao*, for the respondent.

BAKER J. This appeal raises a question of law on which the lower appellate Court has gone wrong. The plaintiff sued to obtain a declaration that he is entitled to build over the land in dispute which has fallen to his share, and to obtain an injunction restraining the defendant from obstructing him in building the same, and to remove the eaves of the defendant's roof abutting on the suit space. There was an open piece of land between the houses of the plaintiff and the defendant over which the defendant claimed ownership. The eaves of his house projected over this piece of ground, and certain windows of his house received light and air. But ultimately the plaintiff obtained a decree, which was confirmed in appeal, to the effect that he was entitled to a one-third share in this ground along with the defendant and one Kashibhai, and in execution of the decree he got possession of his one-third share, which abuts on the defendant's house, but when he desired to build on it, he was obstructed by the defendant, who claimed an easement of light and air over it which would be interfered with by the proposed building of the plaintiff. The first Court, the Joint Subordinate Judge of Nadiad, gave the plaintiff a decree, but on appeal the First Class Subordinate Judge with appellate powers reversed the decision on the ground that the defendant had acquired an easement over the property even though it is joint property. The view of the learned Judge of the lower

appellate Court was that for easements there is nothing to prevent a person A who has full ownership over property B and a joint ownership over and user of a property C from acquiring easements in respect of B over C as a servient tenement by enjoyment and acquisition in any legal mode. He distinguished the facts of *Chunilal Fulchand* v. *Mangaldas Govardhandas*[1] and relied on *Rambhai Dabhai* v. *Vallabhbhai Jhaverbhai*.[2] He also refers to *Earl De la Warr* v. *Miles*.[3] He, therefore, held that the defendant had acquired an easement by long user for fifty years and prescription, and that the plaintiff had not the right to build on the whole land and have the eaves cut off. The plaintiff makes this second appeal, and it is contended on his behalf, first that the defendant having always believed himself to be owner, he could not have enjoyed the light and air and the right of dropping water from his eaves as an easement, and that an easement cannot be acquired over property of which the owner of the dominant tenement conceives himself to be the owner. Secondly, the property having been found to be joint, no easement can be acquired over it. Thirdly, at the partition, the defendant having by his statement, Exhibit 39, and darkhast No. 84 of 1923, given up all his rights in the property, he is estopped from contesting the plaintiff's right to build, and lastly, no actionable wrong has been caused. The view of the law which the learned Judge of the lower appellate Court has taken is undoubtedly wrong, and is opposed to the decisions of both the Privy Council and the English Courts and of the High Courts. The defendant claims the right to light and air by immemorial user, but he has throughout claimed it as an owner until in the suit of 1918 it was found that the land in dispute was joint. And the law is that if a person enjoys a right under the supposition that he is an owner, he does not acquire an easement. This has been laid down

[1] (1891) 16 Bom. 592. [2] (1920) 45 Bom. 1027.

[3] (1881) 17 Ch. D. 535.

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frequently by all the Courts, by this Court in *Chunilal Fulchand* v. *Mangaldas Govardhandas*[1], which says :—

"In order to acquire an easement under section 26 of the Limitation Act (XV of 1877), the enjoyment must have been by a person claiming title thereto as an easement as of right for twenty years. Evidence of immemorial user adduced in support of a right founded on ownership, does not, when that right is negatived, tend to establish an easement."

The learned Judge of the lower appellate Court has distinguished this case as being on its own facts. But I do not think that there is any such distinction. It is plainly laid down that (p. 595) "it would be equally necessary for the plaintiff to prove a user of the *nul*, gutter and *kothi* as of right as an easement, as distinguished from a right of ownership." Another leading case on the point is *Subba Rao* v. *Lakshmana Rao*,[2] where it was held :—

"An easement by prescription is capable of being acquired only if the user during the statutory period had been with the *animus* of enjoying the easement as such in the land of another and not if the user had been in the consciousness of one's own ownership over the same.

But a mere assertion of ownership in prior legal proceedings while the enjoyment was really as an easement, is not conclusive against a right of easement. The question of *animus* is one of fact."

In this present case, until the decision of the suit in 1918 the defendant has throughout claimed to be owner, and therefore as the user has not been with the *animus* of enjoying the easement as such in the land of another, there can be no acquisition of easement. There are a number of English cases on the point, which are collected in *Subba Rao* v. *Lakshmana Rao*,[2] and which have been quoted by the learned advocate for the appellant. The first of them is a judgment of the Privy Council, *Attorney-General of Southern Nigeria* v. *John Holt and Company (Liverpool), Limited*.[3] At p. 618 their Lordships say :—

"An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout

(1) (1891) 16 Bom. 592.

(2) (1925) 49 Mad. 820, F.B.

(3) [1915] A. C. 599.

admits that the property is in another, and that the right being built up or asserted is the right over the property of that other. In the present case this was not so. For these reasons their Lordships are of opinion that the grounds upon which the judgment appealed from are put cannot be maintained."

In *Lyell* v. *Hothfield (Lord)*,[1] a similar principle was enunciated, and it is stated that the claimant had never made during the sixty years any claim to a profit, but only a claim to a title in the soil. In *Harbidge* v. *Warwick*[2] it was held that an easement of access of light and air over contiguous land can only be acquired when it has been had for twenty years in the character of an easement, distinct from the enjoyment of the land itself, and that the enjoyment contemplated by the legislature must be such as can be interrupted by the adjoining occupier at least during some part of the time. These cases are all considered in *Subba Rao* v. *Lakshmana Rao*,[3] and the case of *Earl De la Warr* v. *Miles*[4] distinguished, because in that case the right was exercised as a right of a dominant over a servient tenement, even though the owner of the dominant tenement was in error as to the exact origin of the right he possessed and exercised, and it was held that though the English cases were of course decisions either under English Prescription Act or the common law, their Lordships were satisfied that their principles apply to section 15 of the Indian Easements Act, and *Konda* v. *Ramasami*,[5] which took the contrary view, was overruled. The case in *Rambhai Dabhai* v. *Vallabhbhai Jhaverbhai*,[6] on which the learned Judge has relied, does not seem to me to deal with this point at all, inasmuch as the plaintiff admitted the ownership of the defendant over the land over which the easement, which was one of carrying water, was claimed. It seems, therefore, to be established law, which has been recognised by the English Courts in a series of cases, by the Privy Council, by the Court in

[1] [1914] 3 K. B. 911 at p. 916.
[2] (1849) 3 Exch. 552.
[3] (1925) 49 Mad. 820, F.B.
[4] (1881) 17 Ch. D. 535.
[5] (1912) 38 Mad. 1.
[6] (1920) 45 Bom. 1027.

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Chunilal Fulchand v. *Mangaldas Govardhandas*,[1] and by the Madras High Court in *Subba Rao* v. *Lakshmana Rao*,[2] that a person cannot acquire an easement unless he acts with the knowledge that it is a case of a dominant and a servient tenement and that he is exercising a right over property which does not belong to him, and in the present case, where the defendant has consistently claimed ownership in the land over which the so-called easement is now claimed, he cannot, in the face of these cases, claim to have acquired an easement. The question of immemorial user has nothing to do with it.

Secondly, it has now been found that this land was joint land, and it continued to be such until it was partitioned in 1923. It was held in *Chhaganlal* v. *Hemchand*[3] that the projection of eaves for dropping water is not a trespass in law, and therefore it is contended that the present plaintiff could not have prevented the defendant from making this use of the joint land. The learned advocate for the appellant has referred to Halsbury's Laws of England, Vol. XXVII, p. 855, in which it is stated that a joint tenant or tenant in common of land can maintain trespass against his co-tenant if the co-tenant expels him from the land or destroys the subject of the co-tenancy without the co-tenant's consent, but not otherwise, and it is not trespass for one co-tenant to use the common property in the natural and necessary course of use or enjoyment, as, for instance, by working a coal-mine or cutting the grass of a field and making it into hay. Hence the opening of the windows was no trespass and gave no cause of action as long as the land remained joint, and therefore no easement could be acquired against him. Reference is made to the English case of *Sturges* v. *Bridgman*,[4] where it is held that user which is neither physically capable of prevention by the owner of the servient tenement, nor actionable, cannot support an easement, and this is

(1) (1891) 16 Bom. 592.
(2) (1925) 49 Mad. 820, F.B.
(3) (1931) 34 Bom. L. R. 395.
(4) (1879) 11 Ch. D. 852.

applicable both to affirmative and negative easements. There is, however, a case of this Court directly in point, and that is *Rajubhai* v. *Lalbhai*,[1] in which it was held that an easement of light and air through windows opened in a joint wall cannot be acquired by prescription. Reference is also made to *Lachmeswar Singh* v. *Manowar Hossein*,[2] as to the rights of joint tenants.

Thirdly, there was a partition by the decree of the Court in 1923, in which the defendant made a statement, Exhibit 39 in this appeal, in which he states, "I do not keep my right over the said portion, and the plaintiff may put the said portion to any use he likes (i.e., the share of this land which has been handed over to the plaintiff)". It is contended that an easement being a right, the defendant has expressly given up his right to the easement over this portion. I have already referred to the cases quoted by the learned Judge of the lower appellate Court, i.e., *Rambhai Dabhai* v. *Vallabhbhai Jhaverbhai*[3] and *Earl De la Warr* v. *Miles*,[4] neither of which has any application to the facts in dispute, and *Subba Rao* v. *Lakshmana Rao*,[5] as I have already said, supports the plaintiff. The case of *Konda* v. *Ramasami*[6] has been overruled by *Subba Rao* v. *Lakshmana Rao*.[5] Reference was made by the learned advocate for the respondent to *Tinkowri Pathak* v. *Ram Gopal Pathak*.[7] That lays down that although a tenant cannot acquire a prescriptive right of easement in land belonging to his lessor, he may claim a right of easement based on immemorial user, but there was no doubt there of the distinction between the dominant and servient tenement. The case goes on to say (p. 361), "when enjoyment of a right of [easement] has continued uninterrupted for a long series of years, such enjoyment should be attributed to a legal origin, and the Court should presume a grant or an agreement." But

(1) (1925) 28 Bom. L. R. 1000.
(2) (1891) 19 Cal. 253 at pp. 263, 264.
(3) (1920) 45 Bom. 1027.
(4) (1881) 17 Ch. D. 535.
(5) (1925) 49 Mad. 820, F.B.
(6) (1912) 38 Mad. 1.
(7) (1922) 50 Cal. 356.

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these general propositions do not affect the special conditions of the present case, which have already been sufficiently indicated.

In these circumstances, the decree of the lower appellate Court cannot be sustained. The appeal is allowed, the decree of the lower appellate Court set aside, and the decree of the first Court restored with costs throughout.

Appeal allowed.

B. G. R.

APPELLATE CRIMINAL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Broomfield.

1932
January 6.

EMPEROR *v.* VASUDEO BALWANT GOGTE (ORIGINAL ACCUSED).*

Indian Penal Code (Act XLV of 1860), section 307—Attempt to murder—Essentials of the offence—Duty of prosecution regarding witnesses favouring defence.

The accused fired two shots from a revolver which was a powerful weapon at another at point blank range. The shots hit the person attacked but did not cause his death owing to some defect in the ammunition or to some obstacle obstructing the passage of the bullet :

Held, that accused was rightly convicted of an offence punishable under section 307 of the Indian Penal Code.

Queen-Empress v. *Niddha,*[1] approved.

Reg. v. *Cassidy,*[2] doubted and distinguished.

To attract the operation of section 307 of the Indian Penal Code the accused must do an act with such a guilty intention and knowledge and in such circumstances that but for some intervening fact the act would have amounted to murder in the normal course of events.

The words "under such circumstances" in section 307 have not such a wide meaning as was given to them in *Reg.* v. *Cassidy,*[2] but they refer to facts which introduce a defence to a charge of murder, such as for instance, the accused was acting in self defence or in the course of military duty.

There is no rule that in murder cases including cases of attempt to murder every eye-witness must be examined by the prosecution. The duty of the prosecution

*Criminal Appeal No. 714 of 1931.

[1] (1891) 14 All. 38.

[2] (1867) 4 Bom. H. C. (Cr. C.) 17.