APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

KASHIBHAI KALIDAS PATEL (ORIGINAL PLAINTIFF), APPELLANT *v.* VALLAVBHAI WAGJIBHAI PATEL (ORIGINAL DEFENDANT), RESPONDENT*.

1922. *January* 11

Easement—Injunction to remove projection over plaintiff's land—Title to land cannot be acquired by reason of projection existing for a statutory period—Right in the nature of easement.

In a suit brought by the plaintiff for an injunction to the defendant to remove a projection over the Khadki wall and the suit land, the lower appellate Court refused to grant the injunction and held that the plaintiff had lost his title up to the line of defendant's projections which had existed over 12 years. On appeal to the High Court,

Held, reversing the decision, that even if the defendant had acquired the right to project his roof over the plaintiff's land and to discharge rain water over the plaintiff's land, he could not acquire a title to plaintiff's land. His rights would be in the nature of easement which he could only acquire either by grant or by prescription.

SECOND appeal against the decision of T. R. Kotwal, Assistant Judge at Ahmedabad, varying the decree passed by M. G. Mehta, Subordinate Judge at Nadiad.

The facts material for the purposes of this report are sufficiently stated in the judgment.

G. N. Thakor, for the appellant.

G. S. Rao, for the respondent.

MACLEOD, C. J.:—The plaintiff sued to obtain various perpetual injunctions against the defendant. The first was to restrain the defendant from discharging rain-water on to plaintiff's land at a particular place. The second was an injunction to the defendant to remove the projection over the *khadki* wall and the suit land. The third was to restrain the defendant from making the intended *dattan* (cess-pool).

* Second Appeal No. 331 of 1921.

1922.

KASHIBHAI KALIDAS v. VALLAVBHAI WAGJIBHAI.

The plaintiff succeeded in both the Courts in getting an injunction restraining the defendant from making the intended *dattan*, the remaining portions of the claim being rejected. The lower Court had come to the conclusion that because the plaintiff had allowed the defendant's eaves to project and rain water to be discharged over his land for nearly 20 years, he was thereby barred from coming to a Court of Equity for relief. The learned appellate Judge went further than this and held that the plaintiff had lost his title to the land up to the line of the defendant's projections, which had existed over 12 years. That would be a very startling decision and it was obviously wrong.

All that the defendant could acquire by prescription would be an easement imposing the burden on the servient tenement of having that projection over it. Even if he acquired the right to project his roof over the plaintiff's land and to discharge rain-water over the plaintiff's land, he could not acquire a title to the plaintiff's land. His rights would be in the nature of easement, which he could only acquire either by grant or by prescription, and it is admitted by the defendant that he had not acquired any easement.

It has been argued before us that owing to the long acquiescence by the plaintiff of this trespass against his rights, although it had not continued for 20 years, the Court will not grant an injunction. Reliance is placed on a decision of this Court in *Vithoba Raghunath Sonar* v. *D. Anna Rozario Mendosa* [1]. In that case the Court said: "However, it appears that the plaintiff has acquiesced in the falling of the water on his land for many years; and under these circumstances, we think that, having regard to section 56, clause (4) (sic) of the Specific Relief Act, an injunction restraining the

[1] (1888) P. J. 212.

defendant from allowing it to fall ought not now to be granted." Clause (*h*), if that was referred to, relates to the prevention of a continuing breach in which the applicant has acquiesced ; clause (*i*) is applicable when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court. We do not think that any general rule can be laid down in such cases. The Statute of Limitation entitles the plaintiff to seek relief by means of an injunction against a party seeking to establish an easement against him within 20 years. Admittedly there may be cases where it would be inequitable on account of the plaintiff's acquiescence over a period of less than 20 years to grant the relief. If on account of the acquiescence the cost of obeying the injunction would be very much greater than it otherwise would have been, or even prohibitive, then I agree that the Court ought to penalize the plaintiff for his neglect to assert his right earlier. But there is no such equity in this case. It does not appear that there will be any more expense to the defendant in obeying the injunction than there would have been if the application had been made shortly after the defendant erected his building. The defendant must have erected his building in defiance of the plaintiff's rights and he did so at his own risk.

We think, therefore, that the appeal must be allowed and there must be, in addition to the injunction already granted by the trial Court, an injunction restraining the defendant from projecting his roof over the plaintiff's land and from discharging rain-water from it on to the plaintiff's land.

The appellant to get his costs.

Decree reversed.

J. G. R.