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towns, sub-section (4) of section 364 provides that the provisions of that section will not apply to such examination. It is also significant that the Presidency Magistrates have been given very wide discretion in the matter of recording evidence in cases in which the sentences would not be appealable; and it would be consistent with the policy indicated by these provisions in the Code of Criminal Procedure to relax the provisions of section 364 of the Criminal Procedure Code in the direction suggested so far as the Presidency Magistrates are concerned.

Conviction and sentence set aside.

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APPELLATE CIVIL.

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

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September 27.

RATANLAL BHOLARAM AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* GULAM HUSEN ABDULALLI (ORIGINAL PLAINTIFF), RESPONDENT*.

Indian Easements Act (V of 1882), section 15—Easement—Acquisition by prescription—Burning down of the house during the period of acquisition—Re-building of the house—Enjoyment of easement treated as continuous.

Where the owner of a building, who, in the course of acquiring a right of easement by prescription, has his house burnt down, begins immediately to rebuild it and places the windows exactly in the same position as before, he can be regarded as enjoying the access and use of light and air continuously and will be entitled to protection after twenty years from the first building. If, however, there is any delay in re-building, then it might be evidence of an intention not to resume the user.

SECOND appeal from the decision of P. E. Percival, District Judge of Khandesh, confirming the decree passed by K. K. Sunavalla, Subordinate Judge at Bhusawal.

Suit for injunction.

* Second Appeal No. 286 of 1921.

The plaintiff owned a house which he had built in 1897. In the western wall of his house he had opened windows on the ground floor and the two upper floors through which he enjoyed unobstructed light and air. The house was burnt down in 1905 and was immediately re-built by the plaintiff. The windows in the western wall were retained in their old position.

In 1918, the defendants who owned property to the west of the plaintiff's house began to build on their own land so as to obstruct light and air coming to the plaintiff's windows on the west. They built up the ground floor and threatened to raise their building higher.

On the 30th August 1918, the plaintiff sued to require the defendant to pull down the obstruction to the windows on the ground-floor and to restrain them by permanent injunction from obstructing the free access of light and air through the higher windows.

The trial Court held that the plaintiff had not acquired right of easement to the windows in the ground-floor, though he had acquired the right to the windows on the upper floors in spite of the burning down of the house in 1905. The Court granted injunction restraining defendants from obstructing plaintiff's windows on the upper floors.

On appeal, this decree was affirmed.

The defendants appealed to the High Court.

P. V. Kane, for the appellants:—The lower Courts have found that the house was built in January 1898. The plaint was filed in August 1918. The Courts have found that the house was completely burnt down in May 1905 and it took about nine months to rebuild. Our contention is that the period during which the house was in procees of being built must be excluded. If that is done the plaintiff has not acquired a right of

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easement. We rely upon the words "where the access and use of light and air...have been peacefully *enjoyed therewith*...for twenty years" in section 15 of the Indian Easements Act. Here no light and air were *enjoyed with* any house for a period of twenty years. Where one person begins to enjoy property adversely and, before twelve years have elapsed, is deprived of possession and then again secures possession, it has been held that he cannot tack on his subsequent possession to his previous possession. In the present case, when the house was burnt down in 1905, no easement had been acquired; it was in process of acquisition. The interval of several months caused a break and when the house was rebuilt it must be held that a fresh start was made for the acquisition of an easement. The decided cases, English as well as Indian, deal with ancient lights. In all such cases easements of light and air had already been acquired by prescription and the question was whether, when the house was repaired or altered, the easement of light was preserved and whether non-user for some period would extinguish an easement that had already been acquired by long enjoyment. Sections 45 and 51 of the Indian Easements Act apply to easements acquired by more than twenty years' enjoyment. There is no rule as to easements that are inchoate and are in process of being acquired. Hence, on the analogy of adverse possession, the plaintiff must be held to have begun again after the house was rebuilt and he has no right of easement.

M. V. Bhat, for the respondent:—No difference should be made between inchoate easements and those actually acquired by over twenty years' enjoyment. I rely upon *Andrews* v. *Waite*[1]. The important question is whether the person acquiring an easement has

[1] [1907] 2 Ch. 500 at p. 509.

given up his intention to acquire in case of an accident to the dominant tenement. Here the plaintiff, immediately after the building was burnt down, began to build it and built the windows in exactly the same position as before. Thereby he showed his intention of continuing to enjoy the easement. Actual user during all the period of twenty years is not necessary. Only by an interruption as defined in section 15 can the acquisition of an easement be broken in upon. There is no such interruption in this case.

Kane, in reply :— The case cited by the respondent has no application as there was no obstruction of a house there, but only alteration.

MACLEOD, C. J. :—The plaintiff sued to restrain the defendants from blocking up certain windows of his house.

The defendants replied that the plaintiff had not acquired a complete prescriptive right to the light and air of the windows mentioned in the plaint, so that they were entitled to block up those windows.

The trial Court granted an injunction with regard to the windows of the western wall in the second storey of the plaintiff's house. An appeal from this decision was dismissed.

In the lower appellate Court the only question argued was whether the windows on the second storey of the plaintiff's house were built more than twenty years before August 1918 when the plaint was filed. Apparently the question whether the enjoyment of light and air had been continuous since the building of the second storey was not argued.

In second appeal the appellants contend that the plaintiff had not peaceable enjoyment of the light and air which he claimed as an easement for twenty years, on the ground that the building was burnt down in

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1905 and rebuilt, so that during the period of rebuilding there were no windows with regard to which the use of light and air could be enjoyed. There does not appear to be any authority, strange to say, on this question. Admittedly, if the plaintiff had already acquired an easement of light and air for certain windows in the building before it was burnt down in 1905, and had rebuilt his house with windows corresponding with the old windows, he would be entitled to the same access of light and air as that enjoyed by the old windows. But in 1905 the plaintiff was in the process of acquiring an easement of light and air for these windows, and since peaceable enjoyment for twenty years is necessary, it is contended that during the period of re-building he could not have enjoyed the access or use of light and air to these windows. Section 15 of the Indian Easements Act says that the user must be peaceably enjoyed *without interruption*. But interruption is defined in Explanation 2 and it is conceded by the appellants that the interruption in the user, owing to the building having been burnt down and having to be re-built, was not an interruption within the meaning of the explanation, because the interruption to the user was not owing to the act of some person other than the claimant. The appellants' argument seems to be that the period of rebuilding ought to have been deducted from the period of user. But I do not think that this is correct. Either the period of re-building must be included in the twenty years, or the interruption in the user would stop time running in favour of the owner of the building, so that he would have to start afresh acquiring a right by prescription to an easement of light and air for the windows of the new house. Therefore this is a case, where, owing to an accident, the person who was endeavouring to acquire a right by prescription to an easement of light and air,

for the windows of his house was prevented during a short period from enjoying any light and air as there were no windows through which he could enjoy them.

The case of *Andrews* v. *Waite*[1] may help us to decide this question, although the question there was whether the right to the access of light to a building which had been enjoyed through one window was preserved upon an alteration of the building. It was decided that the answer to that question depended on the identity of light, not on the identity of aperture. The Judge after setting out the facts said at page 508 :

"It has been argued that there has been such an alteration of his [the plaintiff's] premises, both in 1888 and again still more conspicuously in 1895, as to prevent his acquisition of any right to light over the defendant's premises at all. That, I think, must depend upon the proper construction to be put upon section 3 of the Prescription Act, which refers to acquisition of rights of light, taken in connection with the decisions of the Courts in respect of the matter. It is said that, except with regard to the term necessary for the acquisition of the right, the Prescription Act did not alter the law as it existed at the time the Act was passed. I think that is probably true, but if so the Act shows what the law at that time was, so far as the Act purports to state anything in connection with it."

Then this is the important passage :—

"I do not think that any distinction can be drawn between what, in the way of alteration, involves the loss of the right to light when once indefeasibly acquired, and what is sufficient to prevent the acquisition of the right during the twenty years."

Therefore paraphrasing these words, non-user during the twenty years must be such non-user as would involve the loss of the right to light if it had been indefeasibly acquired. I may now refer to Goddard's Law of Easements (7th Edn.) at page 269 :—

"Mere non-user will not, in every case, prevent acquisition of an easement; but, to have that effect, it must be coupled with some act indicative of an

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intention to abandon the claim, or it must be of such long continuance, and so constant, as to indicate an intention not to resume the user. Non-user, however, which would not prevent acquisition of an easement at common law, may often be sufficient to do so under the Prescription Act, which requires *actual* enjoyment for the full period."

I do not think that the last sentence in any way weakens the effect of the last passage of the judgment in *Andrews* v. *Waite*[1], to which I have referred, because it is not necessary that there should be actual enjoyment of the right every moment of each twenty-four hours during the twenty years. I do not suppose that if the owner of a building who was seeking to acquire a right by prescription to an easement of light and air for his windows, went away for six months, and during that time the shutters of the windows of his house were closed, such non-user would stop time from running in his favour. It seems to me, therefore, that the question must depend very much on the facts of each case, and that if the owner of a building, who, in the course of acquiring a right of easement by prescription, is so unfortunate as to have his house burnt down, begins immediately to rebuild his house and places the windows exactly in the same position as the old ones, it may be said that he has been enjoying the access and use of light and air continuously, and he will be entitled to protection after twenty years from the first building. If, however, there is any delay in rebuilding, then that might be evidence of an intention not to resume the user.

The appeal, therefore, must be dismissed with costs.

SHAH, J. :—I agree.

Appeal dismissed.

R. R.

(1) [1907] 2 Ch. 500.