1869.
July 21.

Special Appeal No. 175 of 1868.

DADÁBHAI NARSIDAS..*Appellant.*
THE SUB-COLLECTOR OF BROACH...................*Respondent.*

Possession—Onus Probandi—*Reg XVII. of* 1827—*Bombay Act I of* 1865—*Bombay* Act *IV. of* 1838—*Act XIV of* 1859, *Sec.* 15.

Semble that Reg. XVII. of 1827 and Bombay Act 1 of 1865 were not applicable to building sites in towns and cities until Bombay Act I. of 1865 was expressly made applicable to such sites by Bombay Act IV. of 1868.

The law obtaining in India requires that in actions of ejectment the courts should always enforce the rule that a plaintiff must recover by the strength of his own title; and a party who might have shifted the burden of proof, if he had proceeded under Sec. 15 of Act XIV. of 1859 cannot, if he let slip that opportunity, obtain the same advantage in an action of ejectment.

Semble—Mere possession as a trespasser is not sufficient to entitle a plaintiff to recover in a suit brought under Sec. 15 of Act XIV. of 1859. There must be in the plaintiff juridical, as opposed to mere physical, possession.

THIS was a special appeal from the decision of C. G. Kemball, Judge of the District of Surat, in Appeal Suit No. 152 of 1868, affirming the decree of S. H. Phillpotts Acting Senior Assistant Judge at Broach.

The special appeal was heard before LLOYD and MELVILL, JJ., on the 6th of August 1869, the 22nd of November 1869, and the 17th of June 1870;

Shantaram Narayan for the appellant.

Dhirajlal Mathuradas, Government Pleader, for the respondent.

The facts sufficiently appear from the following judgments which were delivered on the 21st of July 1870.

MELVILL, J.:—The plaintiff in this case sues for possession of a piece of ground in the town of Broach, alleging that he purchased it on the 29th of May 1865 and took possession of it, but that he was served with a notice, and was finally ejected, by the defendant, the Sub-Collector of Broach, on the ground that the land belonged to Government.

The Sub-Collector's defence was that, under the provisions of Reg XVII. of 1827 and Bombay Act I. of 1865, the land in dispute was liable to the payment of assessment, and that he had taken measures accordingly; that the land belonged to Government, and had not been given to the plaintiff with the sanction of the Collector, as required by Sec. 7 of Reg. XVII. of 1827; that it had been lying waste for many years, and that the suit was barred by lapse of time; and that there was nothing to show that the plaintiff's vendors had any title. Such appears to be the substance of the defence, though it is not very clearly or logically expressed.

So much of the defence as relates to the application of Reg. XVII. of 1827, and Act I. of 1865, to land in towns, and to the right of Government to levy assessment on such land, seems hardly relevant, for the papers in the case show that the plaintiff was not ejected because he refused to pay assessment. He was first served with a notice that, as the land was Government land, and he had occupied it without permission, he was to pay ten times the ordinary assessment. The demand was afterwards reduced to five times the ordinary assessment; and the final order of the Collector was that the plaintiff might purchase the ground for two rupees a square yard, but that, if he refused to consent to these terms, any building which he might commence upon the land would be removed.

If it be necessary to express any opinion as to the applicability of statutes which do not seem to have been applied, I would say that a consideration of the general scope and particular terms of Reg. XVII. of 1827, and Act I. of 1865 leads me to the conclusion that these statutes were not applicable to building-sites in towns and cities until Act I. of 1865 was expressly made applicable by Bombay Act IV. of 1868.

The real question, and one which appears to me to be raised with sufficient distinctness by the pleadings, is the question of title. The courts below have found that the plaintiff has failed to prove his title. But it has been objected before us

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that the *onus probandi* has been improperly laid on the plaintiff; that he was in possession until ousted by the defendant; and that, inasmuch as possession is good against all the world except the rightful owner, he is entitled to succeed on the ground of possession only, unless the defendant is able to prove a good title.

The appellant's pleader wishes us to affirm the proposition that it is sufficient for a plaintiff in ejectment to show prior possession, however it may have been obtained, and for however short a time it may have been enjoyed. He maintains, if I have understood him correctly, that occupation, obtained even by force or fraud, and held for no more than an hour, is sufficient to support the plaintiff's claim, and to throw upon the defendant the task of proving his title. From this view of the law I have often expressed my dissent, and I now do so again It is opposed to reason and justice, and I can find no authority in support of it.

In *Doe* v. *Dyeball* (*a*) a party had received the key of a room from the lessor of the plaintiff, and held the premises for about a year, when the defendant broke in at night and took forcible possession. Lord Tenterden, C. J., held that the plaintiff's possession was sufficient to maintain ejectment without any further proof of title. This decision was referred, to, and followed, in *Asher* v *Whitlock* (*b*), in which case Cockburn, C.J., said that the same principle was applicable although the possession of the defendant had not been obtained by actual force, for that "a person being peaceably in possession of a house, a person going in and taking possession without his leave commits a trespass, and all trespass implies force in the eye of the law." But I apprehend that I am rightly interpreting these decisions when I say that they apply only to cases in which the person who is ousted has been for some time previously in peaceable and undisturbed possession---such possession as, being acquiesced in, creates a presumption of title---what the Roman jurists designate judicial possession, as distinguished from mere

(*a*) Mood.M&. 346. (*b*) L. R. I. Q. B. I.

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detention (Von Savigny on Possession, S. 1; Domat's Civil Law, Sec. 2134). A mere trespasser, unless his occupation be acquiesced in, acquires no such possession, and may be expelled by main force. In *Browne* v. *Dawson* (c) the plaintiff was a schoolmaster, who had been dismissed by the trustees, and had given up his room, which was taken possession of by them and locked up. He returned on the next day and broke open the room. He was required by notice to depart, and, persisting in remaining, was ejected, for which he brought an action of trespass. Lord Denman, C.J., in giving judgment, said: "We agree that the question of title is not to be raised on a plea of possession. We agree also that this action is possessory, and that possession is sufficient for the plaintiff in trespass against a wrongdoer. But these elementary principles must be understood reasonably. A mere trespasser cannot, by the very act of trespass, immediately and without acquiescence give himself what the law understands by possession against the person whom he ejects, and drive him to produce his title, if he can without delay reinstate himself in his former possession. Here, by the acquiescence of the plaintiff, the defendant had become peaceably and lawfully possessed as against him; he had e-entered by a trespass; if they had immediately sued him for that trespass, he certainly could not have made out a plea denying their possession. What he could not have done on the 1st of July he could as little have done on the 11th; for his tortiously being on the spot was never acquiesced in for a moment, and there was no delay in disputing it."

The conclusion to which I am brought by the above decisions is that the courts of law in England will lay the burden of proving title on the defendant in ejectment, if the plaintiff can show undisturbed and peaceable possession, acquiesced in or not disputed, for even so short a time as one year.

In the present case the Assistant Judge found on the evidence of a single witness that the plaintiff had possession

(c) 12 Ad. & E. 624.

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of the land. The evidence of that witness is to the effect that the plaintiff was warned off the land the instant he entered upon it; and, therefore, as he was treated as a trespasser from the first, it may well be doubted whether he ever had what the law understands by possession. I think that in a court of law in England he would not be allowed to succeed without proving his title.

But we are not here to administer the law of England; but the law of India; and I am of opinion that the latter law requires that in actions of ejectment we should always enforce the ordinary rule, that a plaintiff must recover by the strength of his own legal title. My reason is that the law of this country gives to a person who is dispossessed of property a remedy which the law of England does not provide and that if he does not choose to avail himself of this remedy, he has no claim to the advantages which it would have secured to him.

Sec. 15 of Act XIV of 1859 provides that "if any person shall, without his consent, have been dispossessed of any immoveable property otherwise than by due course of law, such person, or any person claiming through him, shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof, notwithstanding any other title that may be set up in such suit; provided that the suit be commenced, within six months from the time of such dispossession. But nothing in this section shall bar the person from whom such possession shall have been so recovered, or any other person, instituting a suit to establish his title to such property, and to recover possession thereof, within the period limited by this Act."

We have here an exact reproduction of the provisions of the Roman Civil Law, the only difference being that under that law the period of limitation was not six months, but one year. A person who had been dispossessed of property had a right to an *interdictum de vi*, under which he might recover the property on the ground of possession only; but if he allowed a year to elapse without claiming this remedy, he was con-

sidered to have lost his possession ; and, though he retained his action for the property, he was bound in such action to make out his title (Domat's Civil Law, ss. 2144, 2175). Under a similar law we should, I think apply the same principle. The law has fixed a period of limitation within which a party may recover possession without proof of title. If he allow that period to elapse, he must prove his title.

I may make a remark, in passing, which has reference to what I have said regarding trespassers. A person could not obtain the *interdictum de vi* unless he had had juridical possession : "*Ne id quidem satis est, nisi docet ita se possedisse ut nec vi, nec clam, nec precario possederit*" (Cicero pro Cæciná, c. 32). Thus a mere trespasser could not have succeeded ; nor could he, in my opinion, succeed under Sec. 15 of Act XIV. of 1859. He has never acquired what the law understands by possession, and cannot, therefore, have been dispossessed.

If the view which I have adopted be correct (and in support of it I may refer to a decision of the Calcutta High Court in *Kalee Chunder Sein and others* v. *Adoo Shaikh and others*) (*d*), a party who might have shifted the burden of proof, if he had proceeded under Sec. 15 of Act XIV. of 1859, cannot, if he let slip that opportunity, obtain the same advantage in an action of ejectment. The issue in such an action must always be, Has the plaintiff proved his title ? I do not say that mere possession without further proof may not be sufficient to decide that issue in a plaintiff's favour. Possession in evidence of title, more or less strong according to its duration ; and a court may well be justified in allowing a plaintiff to recover on such evidence only. But if he be allowed so to recover, it is on the ground that he has produced sufficient proof of title, and not on the ground that he has a right to recover without proof of title, because possession is good against all the world except the real owner. Whatever the decision may be, it is a decision on evidence, and involves no error of law cognisable in special appeal.

(*d*) 9 Calc. W. Rep., Civ. R. 602.

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In the present case the Judge required the plaintiff to prove his title, and, considering that such possession as the plaintiff had had, coupled with the other evidence produced by him, was insufficient to establish his title, he disallowed his claim. This is a decision on evidence, and, no error in law being shown, we cannot interfere with it.

I would confirm the decision with costs.

LLOYD, J:—As regards the nature of the possession necessary to sustain an action under Sec. 15 of the Limitation Act, I do not think it expedient to go as far as my learned colleague. The question does not arise in the present suit, and it seems to me undesirable to express an opinion thereon till it comes directly before the court. With this reservation I fully coincide with the views expressed by Mr. Justice Melvill, and agree in confirming the decree of the lower court.

MELVILL, J. :—I feel the force of what Mr. Justice Lloyd has said, and admit that, as a rule, it is not desirable that we should express any opinion on a question not judicially before us. But as decisions in possessory suits under Sec. 15 of Act XIV. of 1859 are not open to appeal we have no opportunity of expressing a judicial opinion as to, the law relating to such suits. I believe that my colleagues, generally concur with me in thinking that the Mámlatdárs by whom such suits are ordinarily tried, have very vague and confused ideas of the law bearing on the subject; and I venture to think that it is not undersirable to make such remarks as, though not authoritative, may induce those officers to understand more clearly what it is which they are called upon to decide.

Decree confirmed.