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of the contract the right of suing for the balance of purchase-money, and that right is expressly reserved to the vendors; and, independently of the terms of the contract, we think that that is the only right which the plaintiffs would retain. They have a lien on the house for the unpaid purchase-money; but they cannot be allowed to rescind the contract, and recover possession of the house. The decrees of the Courts below are, accordingly, reversed and the claim disallowed; but, under the circumstances, we order that the parties bear their own costs throughout.

Decree reversed.

APPELLATE CIVIL.

(40)

Before Mr. Justice West and Mr. Justice Pinhey.

November 25.

MOHANLAL JECHAND (ORIGINAL PLAINTIFF), APPELLANT, *v.* AMRATLAL BECHARDAS (ORIGINAL DEFENDANT), RESPONDENT.*

Limitation—Prescription—Easement—Custom.

The plaintiff and the defendant were owner, respectively, of two adjoining houses, having a space between them belonging to the plaintiff. The roof of the defendant's house built more than thirty years previously, projected over a part of this space. The plaintiff built a new story to his house, with a roof overhanging the roof of the defendant's house, and under and alleged custom of the country (Ahmedabad) claimed a right to remove the part of the defendant's roof which projected over his (plaintiff's) land. He also sued to establish his right to an easement as against the defendant of compelling the defendant to receive upon the roof of his house the rain water which flowed from the newly-erected roof of the plaintiff.

Held, with regard to the former claim, that if the enjoyment by the defendant were considered as possession by him, of the space occupied by his projecting roof, the Limitation Act extinguished the plaintiff's right to sue; and if such enjoyment were to be regarded as a mere easement then the uninterrupted user of more than thirty years vested in the defendant a proprietary right to the same.

Held further, with regard to the plaintiff's claim to an easement, that the plaintiff could only have acquired such easement either by contract or prescription, on neither of which did he rely.

No custom can be admitted to override the provisions of the Limitation Act.

THIS was a second appeal from the decision of Satyendranath Tagore, Judge of Ahmedadad, reversing the decree of the Second

* Second Appeal, No. 292 of 1874.

Class Subordinate Judge of Ahmedabad. The facts fully appear in the judgment.

Nanabhai Haridas, Government Pleader, for the appellant.

Pandurang Balibhadra for the respondent.

WEST, J.—The roof of the defendant's house overhangs the space between that house and the plaintiff's to the extent of three feet in width. The total width of the intervening space is three feet ten inches. The plaintiff having raised his own house by one story, placed on it a roof which, projecting two feet five and a half inches, overhung that of the defendant to the extent of one foot seven and half inches. The rain water thus projected on to the defendant's roof caused damage, for which he sought compensation as to the injury arising in the course of one year in the Small Cause Court.

Thereupon the plaintiff brought two suit, one to establish his right to build up close to the defendant's will, and as his building rose to cut off the *pankh* or projecting eaves of defendant's roof; the other to establish his right to maintain his roof as it stood. The latter was in reality, though not in form, a suit to establish his right to an easement as against his neighbour of compelling the latter to receive the rain water from his roof as it now stood.

The District Judge has found that the defendant's roof has stood as it now stands for half a century. This might be regarded as an occupation for its purposes of the ground standing perpendicularly below it; but it is admitted that that ground is the plaintiff's. The occupation held by the defendant, therefore,—for an occupation of space it is rather than an enjoyment of a mere easement,—is to be assimilated to the case which sometimes arises of possession giving rise to a prescriptive right to an upper chamber of a house, while the ownership of the ground-floor remains along with its possession in the hands of the original proprietor. For the plaintiff several witnesses deposed to a local custom whereby the owner of land might cut off the *panth* of his neighbour for the convenience of his own building. On the other side, several witnesses, admitting the existence of the custom in a general way, denied that it extended to a case

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wherein a *chidi*, or interval, severed neighbouring houses. The Subordinate Judge held that the plaintiff had a right to cut off his neighbour's *pankh* and *a fortiori* that the latter must submit to the fall of the plaintiff's rain water from eaves not extended so far as they might legally be extended. The District Judge was not satisfied, on the evidence, that the custom was established whereby a neighbour's *pankh* might after any time be cut off, and he found, moreover, that the proposed structure close to defendant's wall would block up his ancient lights. He, accordingly, threw out the claim to build in that way. As to the easement claimed by the plaintiff, he refused to pronounce in favour of it. The change in elevation of the plaintiff's house, he found, had caused a sensible alteration in the fall of the rain water, so that now it caused damage not caused formerly, and which out to be prevented by using a catchment eaves-pipe.

The Limitation Act prescribes twelve years as the time within which a suit must be brought for the possession of immoveable property. After the lapse of that time the right to the possession of land perishes alyng with the capacity to enforce it by suit. Taking "land" to include immoveable property of a tengible kind, the plaintiff could not after twelve years recover possession of the space occupied by the defendant's projecting roof, which is to be regarded as part of that column resting on the area belonging to the plaintiff and extending indefinitely upwards. If the enjoyment held by the defendant is to be regarded as a mere easement. Still it would, according to the decision in *Anaji Dattushet* v. *Morushet Bapushet*,(1) ripen into a right by uninterrupted user for upwards of thirty years. Such user the District Judge has found to be established. Thus from either point of view, and the former of the two is the one which commends itself to us, the defendant's right is made out to a continued possession or injoyment inconsistent with the right which the plaintiff asks to have declared as vested in himself. He is not now entitled to cut off the defendant's eaves even for the purpose of building.

As to the easement the case is still simpler. The plaintiff's water is projected beyond the place where it formerly fell. It now

(1) 2 Bom. H. C. Rep. 334.

falls on the defendant's roof. The plaintiff claims a declaration that he is entitled to this convenience, but he can have acquired such an easement against his neighbour's property only by contract or prescription, on neither of which does the plaintiff here rely. He may, apart from prescriptive rights acquired by his neighbour, build to any height he pleases; but he is not at liberty, without a grant proved or presumed, encroach by the fall of his rain water on his neighbour's property.

It has been contended that the defendant built on a facit understanding that he should be subject to have his *pankh* removed and his lights closed, which understanding is to be inferred from the custom proved. The custom, as applying to the particular case, has not been established; but even if it had been, it could not, we think, be allowed to override the positive prescriptions of the Limitation Act. That Act would be made inoperative in a great number of cases if customs in operation prior to its enactment were allowed to prevent the usual effect of possession by causing it to be referred to an understanding not expressed, by which the enjoyment or possession was rendered not adverse.

Had such a principle been recognized in England, the law of prescription could not have grown up there in the particular course which it has taken (see Evans' Pothier, Vol. II, p. 132; *Gray* v. *Bond*(1) *Hilton* v. *Granville*;(2) *Chasemore* v. *Richards*. (3) Custom, in truth, for the purposes of a case like the present constitutes a law imposing a particular period of limitation within which a right must be asserted or else no period at all. In the latter case there is no direct conflict with a statute of limitation except one between a law and no law; in the former, the customary law must give way to the command of the legislature. Possession and enjoyment are, *primâ, facie*, adverse and exclusive, and a law which converts the fact into a rigt, is not to be set aside by the circumstance that the party affected by this law may have line by inactive in reliance on some other customary law which would have postponed or prevented the acquisition of the

(1) 2 Br. & Bing. 67. (2) 5 Q. B. 701. (3) 7 H. L. C. 349.

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right. The understanding on one side and the other, that a particular law subsists, is not to be identified with an understanding in the sense of a contractual engagement by the parties interested in a legal act that they are to abide by that law in spite of its repeal or supersession.(1)

We must, therefore, confirm the decree of the District Court in both cases with costs.

Decree confirmed.

(1) See the observations of M. Demolombe on a similar question. Traite de la Publication, des effets et des applications des lois, p. 75.

APPELLATE CRIMINAL.

(41)

Before Mr. Justice West and Mr. Justice Pinhey.

December 12.

EMPRESS *v.* UMSA DBAKSH.*

Kidnapping—Indian Penal Code (Act XLV of 1860), Section 361—Guardianship—Minor.

A child under ten years of age is, *primâ facie*, subject to guardianship, and any one removing such child without permission properly obtained, takes the risk of such act upon himself; the fact of having omitted to inquire whether the child had a guardian or not, is no defence to a charge of kidnapping a minor from lawful guardianship under section 361 of the Indian Penal Code.

THIS was an appliation for revision of an order passed by G. Drutt, Acting Sessions Judge of Ahmedabad, confirming the order of A. L. P. Larken, Assistant Sessionss Judge, sentencing the accused to three years' rigorous imprisonment on conviction of kidnapping a minor from lawful guardianship.

The evidence for the prosecution showed that the minor, a girl of ten years of age, was living with her husband and mother-in-law, and was sent out to collect and sell cowdung cakes, that as she was returning home the accused detained her at her house and took her away, intending to go to a different place with her.

P. M. Mehta with *Gokaldas Kahandas* for the accused.—The facts found do not constitute kidnapping: *Reg.* v. *Green*,(1) *Queen* v. *Gudner Singh*, (2) and *Queen* v. *Mussamat Oozeerun*. (3)

* Application (Criminal) for revision, No. 233 of 1878.

(1) 2 Russell on Crimes, 958. (2) 4 Calc. W. R. 6 Cr. Rul.

(3) 7 *ibid.* 98 Cr. Rul.