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IMPERATRIX v. VITHAL BHAICHAND.

The accused was convicted of having gambled with coins at a fair within two miles of the Mehmadabad railway station. The game played was not one of mere skill; but no cards, dice, counters or other instruments of gaming were used in playing the game. The Subordinate as well as the District Magistrate considered that, as the game played was not one of mere skill, the act of the accused was criminal under section 11 of Bombay Act III of 1866, and sentenced the accused to a fine of ten rupees. The accused consequently applied to the High Court.

*Gokaldas Kahandas Parekh* for the applicant.

*Nanabhai Haridas*, Government Pleader, for the Crown.

*Per Curiam.*—The Court is of opinion that a coin is not an instrument of gaming within the meaning of section 11 of Bombay Act III of 1866. An instrument of gaming means an implement devised or intended for that purpose: *Watson* v. *Martin*[1]; see also the case of *Rama Zilu*, Criminal Rulings dated 19th June, 1873. The Court, therefore, reverses the conviction and sentence, and directs that the fine be restored.

*Conviction reversed.*

(1) 34 L. J. M. C. 50; 11 Jur. N. S. 321.

## APPELLATE CIVIL.

*Before Mr. Justice Melvill and Mr. Justice Kemball.*

PUNJA KUVARJI (ORIGINAL PLAINTIFF), APPELLANT, *v.* BAI KUVAR AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

*Limitation—Prescription—Act XV of 1877, Sections 23 and 26—Continuing nuisance—Easement.*

From time immemorial, and certainly for more than twenty years prior to the date of the obstruction by the defendants, the plaintiff enjoyed the right of having an egress for his rain water through a drain in the defendants' land. The plaintiff, more than two years after the date of the obstruction, sued the defendants for the removal of the obstruction.

*Held* that though, under the circumstances, the plaintiff had failed to prove a title acquired under section 26 of Act XV of 1877, yet the plaintiff, having a title, evidenced by immemorial user, did not require the aid of that Act; and inasmuch as the obstruction complained of, constituted a continuing nuisance, as to

* Second Appeal, No. 236 of 1881.

which the cause of action was renewed *de die in diem*, the plaintiff's claim was not barred by any provision of the Act, but, on the contrary, was saved by the express provision of section 23.

THIS was a second appeal against the decision of S. H. Phillpotts, Judge of Ahmedabad, reversing the decree of the Subordinate Judge of Kaira.

The plaintiffs and the defendants were owners of two contiguous buildings. The plaintiff on the 31st of June, 1879, sued the defendants to cause them to remove obstructions placed by them on the 23rd of June, 1876, in the way of the plaintiff's rain-water flowing through the defendants' drain. The plaintiff alleged that the water had had egress through the defendants' drain from time immemorial. The defendants *(inter alia)* contended that the plaintiff not having enjoyed his easement within two years of the date of suit, his claim was barred by section 26 of the Limitation Act XV of 1877. The Subordinate Judge of Kaira held that the plaintiff had by long user acquired a prescriptive right the enforcement of which was not barred by the section quoted or any other of the Limitation Act. The District Judge differed from this view. He said: "It is admitted by the defendants, both in their pleadings and in one of their depositions, that the plaintiff's rain water has always flowed over the land he seeks to get a servitude over now: it is quite sufficient to prove any length of prescription when the opposite party himself admits that the user has always existed.

"There, therefore, is the first fact that from time immemorial up to a date which was either 1870 or 1876 the plaintiff's rain water had an egress through the drain in question on to the defendants' land. How the water was drained off from there, was the defendants' business.

"The next fact to be determined is, when did this user cease? I hold that the date specified by the plaintiff is the true one. This is the 23rd of June, 1876, or the commencement of the rains of that year * * * * * *. Hence it is clear, first, that the plaintiff had by long usage acquired a title to the easement he now claims; and, secondly, that he was not interfered with till 23rd June, 1876. This suit, however, was not brought till the 31st January, 1879,—*i. e.*, more than two years after the plaintiff admits he was obstructed in the use of his right.

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PUNJA KUVARJI v. BAI KUVAR.

"Section 26 of Act XV of 1877 applies to this case, and the illustrations thereon show that the delay is fatal to the plaintiff's case. The Subordinate Judge holds this is not a suit in the way of easement, because the plaintiff had not brought his suit in that way, but on a right which has always existed and which the defendants admit; but the Subordinate Judge has misunderstood the meaning of the word easement, and confounded it with that of prescription. Easement is a right to enjoy certain privileges over another's property; it matters not how this easement is derived,—it may be from contract,—it may be, as appears in this case, from long user * * *. Therefore, the suit is for an easement,—*i.e.*, for the right of the rain water of his house to pass through another property,—and, as such, he must bring his suit within the period prescribed by law.

"It appears that the plaintiff has enjoyed it for a period of more than twenty years, but he admits he has not exercised his right since 1876. This suit must, therefore, be dismissed."

The District Judge accordingly reversed the decree of the Subordinate Judge, and rejected the plaintiff's claim. The plaintiff thereupon appealed to the High Court.

*Gokaldas Kahandas Parekh* for the appellant.—The plaintiff's prescriptive right is not denied by the defendants, and has been found proved by the Judge, who has erred in applying to this case the law of limitation as to easements. The obstruction complained of, is a continuing nuisance; and the existence of the dominant right being established, its enforcement can be applied for at any time. *Rajrup Koer* v. *Abdul Hossein*[1] is a case on all fours with this. More than twenty years before the suit in that case the plaintiff's ancestors had constructed and used a water-course on the defendant's land, and obstructions were made by the defendant within two years of the suit. The Privy Council held that Act IX of 1871 was a remedial Act, and neither prohibitory nor exhaustive, and its provisions did not exclude or interfere with the acquirements of rights otherwise than under them. And with regard to section 27 of that Act, which corresponds with section 26 of Act XV of 1877, their Lordships held that that section by

(1) I. L. R., 6 Calc. 391.

allowing a user of twenty years, if exercised within two years of suit, under the conditions prescribed, to give, without more, a title, did not prevent proof of an easement founded on another title independently of the Act. In *Achul Mahta* v. *Rajun Mahta*[1] the above decision was followed by the High Court at Calcutta in a case to which, like the present, Act XV of 1877 was applicable.

*Najindas Tulsidas, contra.*

The judgment of the Court was delivered by

MELVILL, J.—Having regard to the decision of the Judicial Committee in *Rajrup Koer* v. *Abdul Hossein*[2], we think that the plaintiff is entitled to succeed. He has failed to prove a title acquired under section 26 of Act XV of 1877; but the District Judge has found that "from time immemorial up to a date which was either 1926 (1870) or 1932 (1876) the plaintiff's rain water had an egress through the drain in question on to the defendants' land." Immemorial user must be referred to a legal origin,—that is, either to a lost grant, or to an agreement between the predecessors in title of the parties. Under this view the plaintiff, having a title evidenced by immemorial user, does not require the aid of Act XV of 1877; and inasmuch as the obstruction complained of, as observed by the Judicial Committee in the case referred to, constituted a continuing nuisance, as to which the cause of action was renewed *de die in diem*, the plaintiff's claim was not barred by any provision of the Limitation Act, but, on the contrary, was saved by the express provisions of section 23 of the Act. The decree of the District Judge must, therefore, be reversed, and that of the Subordinate Judge restored. Costs on the defendants throughout.

*Decree reversed.*

(1) 1. L. R. 6 Calc. 812. (2) I. L. R., 6 Calc., 394.