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original transactions. It may be, as Mr. Ghanasham contends, that certain inconveniences will arise from the construction of the enactments we are considering according to their literal sense, but that is not a reason for our amending the work of the Legislature according to our notions of fitness. "The intention of the Legislature is to be ascertained from the grammatical sense as applied to the object in view"—see *Eastern Counties Railway Companies* v. *Marriage*, *per* Blackburn, J. (1)—and "considerations of policy are to be excluded where the words are clear," (*per* Lord Coleridge, C.J., in *Ditcham* v. *Worran*(2). Here the words are perfectly clear; and as the plaintiff, though an assignee, is an agriculturist, he is entitled to the benefit of sections 12, 13 and 14 of the Act.

We answer the reference accordingly.

(1) 9 H. L. at p. 36. (2) L. R., 5 C. P. D. at p. 419.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Nanabhai Haridas.

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MATHURADAS NANDVALABH AND ANOTHER (ORIGINAL PLAINTIFFS) APPELLANTS, v. BAI AMTHI (ORIGINAL DEFENDANT), RESPONDENT.*

Easement—Light and air—Apertures—Enjoyment as of right—Section 26 *of Act XV of* 1877.

The enjoyment by the plaintiff of light and air through apertures in the wall of his house, when it is open and manifest, not furtive or invisible, and when it is not had in such wise as to involve the admission of any obstructive right in the owner of the servient tenement, is an enjoyment "as of right" within the meaning of section 26 of Act XV of 1877.

The phrase does not imply a right obtained by grant from the owner of the servient tenement.

THIS was a second appeal from the decision of S. Hammick, Assistant Judge of Surat, reversing the decree of Khan Saheb E. M. Modi, Subordinate Judge of Jambusar.

The plaintiffs and the defendant are next-door neighbours living in the town of Jambusar. The plaintiffs' house consists

* Second Appeal, No. 546 of 1882.

of front and back rooms, both on the ground floor and the upper story, the back rooms receiving light and air through apertures, 10 inches square, made in the back wall of the house. Contiguous to this wall is the ground belonging to the defendant, upon which she built a shed, the roof of which was completed in April, 1878. This roof excluded light and air from two of the apertures in the plaintiffs' house, and they, therefore, within a few days of the completion of the new roof sued the defendant for its removal, alleging that they had been in enjoyment of the light and air, of which they were now deprived, for upwards of thirty years. The defendant answered that a slighter roof, shutting out the plaintiffs' light and air, had stood in the place of the new roof for some years, and that the claim was thus barred by limitation; that the apertures in question were constructed by the predecessor of the plaintiffs in title by permission of the defendant, and that the plaintiffs had not enjoyed the light and air through those apertures as of right.

The Subordinate Judge allowed the plaintiffs' claim. The Assistant Judge reversed his decree. He said: "The answer to the question, whether the plaintiffs are entitled to have the whole, or any part, of the roof removed, depends upon whether they have proved that they have peaceably enjoyed the light and air through the apertures as an easement, and as of right, without interruption for more than twenty years. The plaintiffs' evidence proves to my satisfaction hat the apertures were in existence for upwards of twenty years prior to the institution of the suit. There is no evidence that any obstruction was put in their way until the defendant made the roof now complained of, and therefore, I consider that the enjoyment of the light and air was continuous and peaceful. The defendant also entirely fails to prove that the enjoyment was the result of her favour or expressed permission. But there is still an important point which the plaintiffs must prove before their right to the easement can be held to be established. It is that their enjoyment of the air and light has been taken by them as of right. It has been argued by the defendant that the apertures are so small that the light and air coming through them must have been practically

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of no value, and, therefore, there could not be any legal enjoyment. I think the smallness of the apertures is a reason for thinking that they were from the first overlooked by the defendant, and that they were allowed to remain, rather because the defendant did not think it worth while to object to them, than because the plaintiffs had a right to maintain them. I find no evidence at all, or reason, for assuming that the plaintiffs had used the apertures as of right. The defendant's tacit acquiescence in the apertures, so long as they did not interfere with her, cannot, in my opinion, by itself constitute a right for the plaintiffs to maintain them when the circumstances are charged, and their maintenance interferes with the defendant's ordinary rights of property."

The Assistant Judge accordingly rejected the plaintiffs' claim. They, therefore, appealed to the High Court.

Shivram Bhandarkar for the plaintiffs.—The defendant's own case, as made in her written statement, is that the apertures were made by her permission. The Courts below have found adversely upon it, and the defendant should not have been allowed to set up a new case, *viz*, that of her ignorance or tacit acquiescence. The defendant's tacit permission of the apertures for over twenty years was sufficient to create a right to their continuance in the plaintiffs' favour, and adversely to the defendant. The enjoyment of the plaintiffs was for more than thirty years, and they have acquired a prescriptive right under Regulation II of 1827, sec. 5.

Gokaldas Kahandas Parekh for the defendant.—Whether the plaintiffs enjoyed the right they claim for upwards of twenty years as of right, is a question of fact which has been found against them, and the High Court cannot interfere.

The judgment of the Court was delivered by

WEST, J.—The enjoyment of apertures admitting light and air is an enjoyment "as of right" when it is open and manifest, not furtive or invisible, and when it is not had in such wise as to involve the admission of an obstructive right in the owner of the alleged servient tenement. The phrase does not mean a

right acquired through grant from the owner of the servient tenement, though the presumption of a grant from an enjoyment for twenty years was the basis of the English law on the subject. It may seem hard that the owner of a plot of land should be divested of one of the ordinary incidents of ownership by his neighbour's building a house on his land more than twenty years before the former wants to build, and that would be so if exclusive ownership were an ultimate fact; but the truth is, that both owners occupy under the sanction of the State, because such occupation is found conducive to the general welfare. The same principle warrants the use of land for purposes beneficial to community, and the protection of an enjoyment of apparent rights which has continued for a certain time, because men's arrangements naturally become fitted to a state of things which has thus continued, and in the great majority of cases such a period as twenty years affords ample opportunity for the assertion of a contradictory right by the servient owner. The Legislature, at any rate, has taken this view; and as there has, in this case, been an enjoyment of the lights openly, and without admission of any subsisting contradictory right, for twenty years, we must reverse the decree of the District Court, and restore that of the Subordinate Judge in this sense, that the defendant be enjoined against keeping up her roof in so far as it interferes with the accustomed access of light and air to the apertures in question with costs throughout on respondent.

Decree reversed.