Oct. 13, 1905

Present : Layard C.J. and Wendt J.

PILLAY *v.* FERNANDO *et al.*

296—*D. C. Colombo*, 19,170.

Servitude of light and air—May be acquired by user for the prescriptive period—Window overlooking roof of adjoining house—Demolishing wall does not terminate right of servitude.

Plaintiff, who had for over thirty years a window in his wall overlooking the roof of defendants' house, demolished the wall and rebuilt it.

Held, that the taking down and rebuilding of the wall did not destroy plaintiff's right of servitude.

A right of servitude of light and air may be acquired by prescription by mere enjoyment, just as much as any other servitude.

Neate v. Abrew [1] followed.

THE facts appear from the judgment.

Dornhorst, K.C. (with him *Elliott*), for the defendants, appellants.

Walter Pereira, K.C. (with him *Seneviratne*), for the plaintiff, respondent.

Cur. adv. vult.

October 13, 1905. WENDT J.—

The plaintiff and the defendants own adjoining houses in the Pettah of Colombo, and the object of the present action is to restrain the defendants from building on their land so as to interfere with the access of light and air to plaintiff's house through a window in the plaintiff's wall. The space enclosed by this window includes that which was formerly enclosed by a smaller window in plaintiff's old

[1] *(1883) 5 S. C. C. 126 ; Wendt 188.*

wall. That wall was partly taken down and rebuilt some five or six years before action. The old window was in the angle of a gable wall and looked out on the roof of defendants' house, which was at a lower level. Defendants having pulled down their house are now building afresh on the site, and it would seem that their nearest wall, of which plaintiff complained, is so close to plaintiff's that it will, if carried above the level of plaintiff's window, undoubtedly diminish the amount of light entering plaintiff's premises through it. The learned District Judge has limited plaintiff's right (which he declares) to the dimensions of the old window, and has enjoined defendants from building so as to interfere with that right. The defendants have appealed.

The District Judge had found that the old window existed uninterruptedly for over thirty years prior to the demolition and rebuilding of the wall. In fact, the erection of plaintiff's house with the window in it appears to have occurred at a date beyond living memory. It was not opened or used with the permission, express or implied, of the owners of defendants' premises, and no acknowledgment of defendants' right to interfere with it is suggested ever to have been made. Under these circumstances, the District Judge held that plaintiff had made out his claim to have acquired by prescription the right to the full access of light through the window—the servitude *ne luminibus officiatur*.

In appeal it was contended for appellants that the destruction of the original wall put an end to the servitude, if it had existed up to that time, and that, as a matter of fact, the new window had not been proved to occupy the same position as the old. On the matter of law no authority was cited to us, and it seems only reasonable to hold, as we have done in cases of prescriptive title to land, that such a title once acquired continues until divested in one of the usual modes of transferring *dominium*. Further, no wall can stand for ever, it must needs eventually be rebuilt, and it is difficult to see why the taking down and rebuilding of it should be considered to evince an intention of abandoning the servitude. On the question of fact, the weight of the evidence supports the District Judge's opinion that the present window, although larger in size, stands in substantially the same position as the old.

The main question contested in appeal, however, was the question of prescription. Appellant's counsel contended that, the servitude being a negative servitude, plaintiff could not under the Roman Dutch Law acquire it by prescription in virtue of any period of mere enjoyment, however long; that plaintiff's use of the light which came to him over defendants' premises involved no invasion of defendants' rights, so long as defendants did not seek to build higher on their land; and that therefore, in order to start prescriptive user, plaintiff must have resisted some attempt on defendants' part to exercise their right of building on the score that it would

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obscure his light. This certainly appears to be the Roman Dutch-Law (*Voet ad Pand* 8, 4, 5). But in Ceylon the law of prescription has been dealt with by Statute, and the Statute applicable to the present case is Ordinance No. 22 of 1871. In 1883 a case on all fours with this came before the Supreme Court, consisting of De Wet A.C.J., Clarence and Dias JJ. (*Neate v. Abrew.*[1]) They agreed in holding that the plaintiff was entitled to restrain the defendant from building so as to obscure his windows. The learned District Judge, though inclined to question the soundness of that decision, properly ruled that he was bound by it. And as a decision of the Full Court it is equally binding upon us. Doubts as to its correctness in law have from time been expressed, but it has never been over-ruled, nor, so far as I am aware have any Judges of this Court ever declined to follow it. It has, in fact, been acted upon as law for over twenty years. We cannot therefore now properly review it ; that must be left to a higher Court. That case is indistinguishable from the present and following it we must hold that defendants' appeal fails. It is a cordingly dismissed with costs.

LAYARD C.J.—Agreed.

Appeal dismissed.