

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Judoo Lall Mullick v. Gopaul Chunder Mookerjee and another, from the High Court of Judicature at Fort William in Bengal; delivered 30th March 1886.*

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Present :

LORD BLACKBURN.

LORD HOBHOUSE.

SIR RICHARD COUCH.

The Plaintiffs below who are the Respondents here, and the Defendant who is the Appellant, occupy contiguous houses and premises in Calcutta, with a southern frontage in Puthoreah Ghat Street. The Plaintiffs' house lies to the eastward of the Defendant's. Adjoining the north side of the Defendant's premises lies a piece of ground also belonging to him, and fronting northwards to a street called apparently by various names, of which Jorabagan is one. At a point between the two streets the Defendant's property juts out a few feet to the eastward, and to that extent overlaps the property of the Plaintiffs, and lies to the north of it.

The following facts are common to the case of both parties : that an open drain used to run along the eastward boundary of the Defendant's property from the point where it juts eastward into Jorabagan ; that at the same point there communicated with this drain one of the drains of the Plaintiffs' house leading directly from one of their privies ; that at the

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point of communication there was a doorway in the Plaintiffs' wall; and that in the year 1876 the drain was filled up, and has never again been opened.

The Plaintiffs brought evidence to show further that their house was constructed with a double wall so as to form a narrow passage from the privy to the doorway; that periodically, some three or four times a year, scavengers hired by the Plaintiffs or their predecessors entered the drain at Jorabagan and made their way up it to the doorway; that the doorway was furnished with a door which was kept locked, but was opened by the Plaintiffs' durwan on these occasions; that the scavengers came through the doorway, passed along the Plaintiffs' drain between the double walls, and so reached the privy, from which they carried the refuse away through the doorway and down the Defendant's drain into Jorabagan. Certainly one of the witnesses, and probably another, deposes to the continuance of this practice from dates more than 20 years prior to the Defendant's interruption of it, which was in December 1880. The suit was instituted in June 1881.

Against this evidence the Defendant has produced nothing at all except that he never saw the Plaintiffs' scavengers at work, and that he and Mr. Edwards, a surveyor, say that it was impossible for the scavengers to go where several witnesses saw them go. And, in cross-examination, the Defendant admitted that the doorway could only lead to the drain.

Indeed in this part of the case the Defendant appears to have relied mainly upon imperfections in the Plaintiffs' evidence. Mr. Justice Wilson who presided in the Original Court, thought that the Plaintiffs had failed to show user for 20 years. But it is observable that he says there is only one witness, viz., Tarrabullub

Chatterjee, who professes to carry his memory back to 20 years at all. He does not notice Dwarka Nath Bonnerjee, who had known the privy and drain for upwards of 25 years, and who speaks of the action of the Plaintiffs' scavengers, apparently, for the note of the evidence is not perfectly clear, for that space of time. Neither does he notice the probability afforded to the Plaintiffs' story by the construction of their walls and of their doorway, both of which date more than 20 years before the interruption.

Mr. Justice Wilson dismissed the suit. On appeal the High Court took a different view, and gave the Plaintiffs a decree establishing their right to use the passage in dispute for the purpose of carrying away their night-soil at all proper and convenient times in the year. Their Lordships concur in the view which the Appellate Court has taken of the evidence, and think that the user on which the Plaintiffs rely is sufficient unless it has been interrupted or altered in character by the events which took place in and after the year 1876.

In that year the Legislature of Bengal passed an Act for the more efficient Municipal Government of Calcutta. Under the powers conferred by that Act the Town Commissioners made byelaws to regulate the removal of refuse. It is not to be discharged in any other way than as the Commissioners direct. The servants of the municipality are to cleanse daily the privies of every house on account of which a night-soil fee is levied, and for that purpose every occupier of a house is to give free access to his privy. An occupier of land on which a privy is situated, and to which such free access is denied, is not to allow night-soil or filth of any kind to accumulate for more than 24 hours. Under these regulations the open drain bordering the Defen-

dant's land was, as before stated, filled up, and the surface has been used by the scavengers of the Municipality ever since, to gain access to the privy of the Plaintiffs for the purpose of removing the refuse. This they do daily.

Mr. Doyne has argued for the Defendants that the change of system thus brought about operates as a breach of the user by the Plaintiffs, and so destroys their title by prescription. But their Lordships cannot see that the change of system works any discontinuance of the prior user. In point of frequency the user is much more active than before. The purpose is still the purpose of cleansing the privy. The mode of access from Jorabagan to the privy is not altered, except that the scavengers, instead of walking in the drain, walk on the surface of the earth that fills it. And it cannot make any difference that the Plaintiffs no longer use the passage to admit their own scavengers, but use it to admit those of the Municipality, to whom they are bound to afford free access.

It is then argued that the change from the practice of cleansing at long intervals to the practice of cleansing daily is so great that the servitude gained by user is materially aggravated, indeed that it is applied to a new purpose, which the Plaintiffs have no legal right to do.

But it is difficult to see how the servitude is aggravated, even in the sense of causing more annoyance to the Defendant. In order to afford the requisite access only three or four times a year, the passage must be kept open and unobstructed. That being so, it cannot be much more onerous to the Defendant that a small quantity of refuse should be removed daily than that a large quantity should accumulate and be removed at long intervals of time.

The real question, which is not free from difficulty, is whether the user proved prior to

1876 is one which sustains the right affirmed by the decree under appeal. A servitude gained for one purpose cannot lawfully be used for another. What then is the servitude which the Plaintiffs have acquired over the the Defendant's land? There is no agreement specifying times or occasions of access. The Defendant has never till now interfered with the access, or claimed to exercise any control over it. The servants of the Plaintiffs came and went at their own discretion, or at the discretion of their employers. What is the inference to be drawn? It is difficult to suppose that if they thought fit to use the passage twice as often, or four times as often, as they actually did use it, they were not at liberty to do so. There is nothing in the proved facts to indicate a limit to the user of the passage, except the limit that it must be a reasonable user for the purpose of cleansing. It seems to their Lordships that if, without any action on the part of the Municipality, the Plaintiffs had chosen to cleanse out their privy every morning, they might have used the passage at a convenient hour for that purpose. If so, they may now use it for giving access to the servants of the Municipality at reasonable and convenient times. And in a legal sense they are not aggravating the servitude at all, for this is the servitude to be inferred from the proved facts.

The result is that in their Lordships' opinion the decree appealed from is right, and this appeal should be dismissed. They will humbly advise Her Majesty to that effect. The Appellant must pay the costs.

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