Privy Council Appeal No. 17 of 1913.

Peter Charles Ernest Paul and another - *Appellants,*

v.

William Robson and others - - *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 11TH MAY 1914.

Present at the Hearing:

LORD DUNEDIN. SIR JOHN EDGE.
LORD MOULTON. MR. AMEER ALI.

[*Delivered by* LORD MOULTON.]

The action in which the present appeal is brought is an action in which the appellants sued the respondents for infringement of certain rights of light possessed by them in connection with premises known as 7, Esplanade, East, Calcutta, of which they owned the freehold. The respondents had erected a building known as 8, Esplanade, East, Calcutta, lying to the east of the appellants' premises, and so situated that the western walls of the respondents' buildings were parallel to and at a distance of 17 feet from the eastern wall of the appellants' building. The ground on which the respondents' building was erected had for more than 20 years previously been occupied by much lower buildings, and it is conceded that the appellants

[40] J. 328. 125.—5/1914. E. & S.

had acquired rights of light thereby for the windows on the east side of their premises. The new buildings of the respondents greatly exceed in height the former buildings upon the site and decreased the amount of light coming to the eastern windows of the appellants, and it is in respect of this interference with the access of light to their windows that the appellants brought the action.

The action came on for trial with witnesses before the Hon. Mr. Justice Stephen, sitting as a Judge of the High Court of Judicature at Fort William in Bengal, in its ordinary civil jurisdiction, and on the 29th day of March 1911 he gave judgment dismissing the action. An appeal was brought from that judgment to the High Court of Judicature at Fort William in Bengal in its appellate jurisdiction, and on the 1st day of August 1911 judgment was delivered by that Court dismissing the appeal. It is from this judgment that the present appeal is brought.

Both in the Court of First Instance and in the Court of Appeal the facts of the case are dealt with in detail, and clear findings are given on all relevant points of fact. Their Lordships can find no material difference between the views taken by the two Courts on these points of fact, though the expressions used may not be in all cases identical. Their Lordships therefore would feel justified in holding, if it were necessary, that this is a case of concurrent findings of fact. But in truth the grounds of appeal do not relate to these findings of fact, but to the question whether the Courts below have taken the proper view of the legal rights of the appellants, and whether, accordingly, the test which they applied as to whether those rights had been infringed was the correct one. This is a pure question of law, and it was admitted by

counsel for the appellants that it practically turns upon the interpretation to be given to the well-known decision of the House of Lords in the case of *Colls* v. *The Home and Colonial Stores, Limited*, (1904, A.C. 179), when considered in connection with the later decision of the House of Lords in *Jolly* v. *Kine*, (1907, A.C. 1).

Their Lordships do not consider that it is either necessary or profitable to go into the history of the divergent views in respect of the nature and extent of rights of light acquired by prescription that prevailed in the Courts prior to the decision in *Colls's case*. It suffices to say that one stream of authorities gave countenance to the view that by the enjoyment of light for a period of 20 years, there could be acquired an indefeasible right to the enjoyment of a like amount of light in the future. The conflicting stream of authorities countenanced the view that nothing constituted an infringement of rights of light which did not amount to an actionable nuisance, so that the amplitude of previous enjoyment was no measure of the rights acquired thereby. This conflict of views was fully recognised by the noble Lords who took part in the decision of *Colls's case*, and there can be no doubt that it was their intention to decide between them, and to lay down the law in such a manner as to prevent uncertainty in the future.

Mr. Justice Stephen takes as expressing the law laid down by this decision the following quotation from the opinion of Lord Davey in that case :—

> "The owner . . . . of the dominant tenement "is entitled to the uninterrupted access through his "ancient windows of a quantity of light the measure of "which is what is required for the ordinary purposes of "inhabitancy or business of the tenement according to the "ordinary notions of mankind . . . . The single "question in these cases is still what it was in the days of "Lord Hardwicke and Lord Eldon—whether the obstruction "complained of is a nuisance" ?

And the Court of Appeal although they do not

so directly base their judgment on the above passage in Lord Davey's opinion, appear to their Lordships to have substantially taken the same test. But in their Lordships' opinion it is not necessary to examine minutely the verbal differences between the expressions used in the Court of Appeal and by the Judge of First Instance. They accept in full the finding in fact of the Judge of First Instance, and they are of opinion that he has consistently applied to them the legal test above formulated. The only question therefore is whether it accurately formulates the law on the subject.

It is evident on reading the opinion of Lord Davey that he intended the passage to be a precise formulation of the rights of a dominant tenement in respect of ancient lights, and his opinion was formally accepted by Lord Robertson who also took part in the decision. The opinion of the Lord Chancellor in that case is equally clear on the essential points that the easement acquired by ancient lights is not measured by the amount of light enjoyed during the period of prescription, and that there is no infringement unless that which is done amounts to a nuisance. It has been suggested that a different view is to be found in the opinions of Lord Macnaghten and Lord Lindley, but although there are passages in these opinions which might if they stood alone indicate that those noble Lords considered that to some extent the amount of light enjoyed in the past might influence the rights acquired for the future, there is no reason to think there was any intention on the part of those noble Lords to differ from the conclusions of their colleagues. It must be taken therefore that the House of Lords adopted the formulation of the law given by Lord Davey as above mentioned.

But if any doubt remained on the point it is in their Lordships' opinion set at rest by a con-

sideration of the subsequent decision of the House of Lords in the case of *Jolly* v. *Kine*. In that case Mr. Justice Kekewich had found as a fact that the obstruction amounted to a nuisance, but in the course of his judgment said that the room affected was "still a well-lighted room." He gave judgment for the plaintiff. On appeal to the Court of Appeal there was a division of opinion among the judges. Romer, L.J., held that under the decision in Colls's case the finding that it was still a well-lighted room was fatal to the plaintiffs' claim. Vaughan Williams and Cozens Hardy, L.JJ., held to the contrary. On appeal to the House of Lords their Lordships were equally divided and accordingly the appeal was dismissed. But this division of opinion was not due to any doubt as to the law to be applied. The Lord Chancellor gives his opinion on the law as laid down in *Colls's case* in the following words :—

"The right of the owner or occupier of a dominant "tenement to light is based upon the principle stated by "Lord Hardwicke in 1752, in *Fishmongers' Company* v. *East* "*India Company*, that he is not to be molested by what "would be equivalent to a nuisance. He does not obtain "by his easement a right to all the light he has enjoyed. "He obtains a right to so much of it as will suffice for the "ordinary purposes of inhabitancy or business according to "the ordinary notions of mankind having regard to the "locality and surroundings. That is the basis on which "the decision of this House proceeded.

Lord James of Hereford concurred in the judgment delivered by the Lord Chancellor.

These were the judgments of the two noble Lords who were in favour of dismissing the appeal. On the other hand Lord Robertson was of opinion that the appeal should be allowed and in his opinion says :—

"I adhere, as I did in *Colls's case*, to the definition given "by Lord Davey in entire accordance with the judgments of "the other noble and learned Lords. According to that

" definition the quantity of light to which right is acquired " in 20 years is ' what is required for the ordinary purposes " ' of inhabitancy or business of the tenement according to " ' the ordinary notions of mankind.' "

Lord Atkinson, who was the other member of the Court, was also in favour of allowing the Appeal, and referring to the decision in *Colls's case*, he says :—

"It would appear to me that that case established the " principle that there must be an invasion of the legal right " of the owner of the dominant tenement sufficient to amount " to a nuisance in order to give him a right of action, and " that as long as he receives through the windows of his " dwelling-house, or in the case of a particular room in his " dwelling-house, through the windows of that room, an " amount of light which, to use the words of James, L.J., in " *Kelk* v. *Pearson* is ' sufficient according to the ordinary " ' notions of mankind for the comfortable use and enjoyment ' " of his dwelling-house, or of the room in it, as the case may " be, no nuisance has as regards him been created, and no " legal wrong has been inflicted upon him."

And although he does not expressly repeat the well-known passage from Lord Davey's opinion in *Colls's case* he shows by the language which he uses that he thoroughly agrees with it, and says that to him it appears to be of general application.

In the judgment of the House of Lords in *Jolly* v. *Kine*, there is therefore an authoritative exposition of the decision in *Colls's case*, and it is established that the law as formulated by Lord Davey is the law laid down by that decision. It is somewhat remarkable therefore that counsel for the appellants should have sought to treat the decision in *Jolly* v. *Kine* as throwing some doubt upon the interpretation of the decision in *Colls's case*, operating, if such an expression could be used, to weaken it in the direction of directing that regard should be had to the extent of previous enjoyment of light. The only explanation of such a view is that the appeal was in the end dismissed, inasmuch as the House was equally divided. But this was

in no way due to any difference of opinion as to the law, but to the fact that the Lord Chancellor felt himself entitled to disregard the finding that the room was "still a well-lighted room" in the sense which those words would naturally convey and to hold them as meaning that it would have been considered to be well-lighted "according to the standard of a crowded city." His Lordship was led to this conclusion by passages in the evidence and the context of Mr. Justice Kekewich's judgment. It was on this ground alone that he was in favour of dismissing the appeal, and therefore the actual result in that case has no bearing on its effect as an authoritative explanation of the law laid down in *Colls's case*.

Their Lordships are therefore of opinion that the learned Judge at the trial took the proper test as to whether or not there had been an infringement of the rights of the appellants and that he applied it correctly to the facts of the case. They are therefore of opinion that his judgment was right and that the Court of Appeal was right in affirming it, and they will humbly advise His Majesty that the present appeal should be dismissed with costs.

In the Privy Council.

PETER CHARLES ERNEST PAUL AND ANOTHER

v.

WILLIAM ROBSON AND OTHERS.

[DELIVERED BY LORD MOULTON.]

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