APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Tottenham.

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July 29.

IN THE MATTER OF THE PETITION OF KHAMIR.

THE EMPRESS *v.* KHAMIR.*

Penal Code (Act XLV of 1860), ss. 114, 372, 479, 498—Discharge by Magistrate—Order of Commitment by Sessions Judge—Omission to call on Accused to show cause against such Commitment—Criminal Procedure Code (Act X of 1872), ss. 296, 283.

A Sessions Court has no power, under s. 296 of the Criminal Procedure Code, to direct the commitment of a person discharged by a Deputy Magistrate, without first giving such person an opportunity of showing cause against such commitment.

But under s. 296, as amended by Act XI of 1874, the Court has power to direct the subordinate Court to enquire into any offences for which it considers a commitment should be ordered.

When, however, a trial under such a commitment made by order of a Sessions Judge has been duly held, and no actual failure of justice has been caused by the error of the Sessions Judge, s. 283 of the Criminal Procedure Code would be a bar to the reversal of his judgment.

THE accused in this case was charged before a Deputy Magistrate of the second class, under s. 498 of the Penal Code, with enticing or taking away, or detaining with criminal intent, a married woman. He was, however, discharged by the Magistrate under s. 215 of the Criminal Procedure Code.

The complainant then moved the Sessions Judge to take action under s. 296 of the Criminal Procedure Code, and after calling for the record, the Sessions Judge was of opinion, that the facts alleged against the accused really amounted to abetment of rape and adultery; and he, therefore, directed the Magistrate to commit the accused under ss. 114 and 376 and 114 and 497, and to send him up for trial before the Sessions Court, remarking that, even if the case came under s. 498, the Deputy Magistrate had no jurisdiction to try it, he being only vested

* Criminal Appeal, No. 349 of 1881, against the order of T. M. Kirkwood, Esq., Sessions Judge of Mymensing, dated the 19th May 1881.

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with second class powers. The commitment was made, and the trial held before the Sessions Judge.

The assessors were of opinion that the accused should be convicted under ss. 114 and 497 of the Penal Code; but the Sessions Judge, differing from both the assessors, found that the accused had committed an offence under ss. 114 and 376 of the Penal Code, and sentenced him to four years' rigorous imprisonment.

The prisoner appealed to the High Court.

Baboo *Grish Chunder Chowdhry* for the appellant contended, that the Sessions Judge had no power to order the commitment under ss. 376 and 497, as the Magistrate was competent to try the case under s. 498, and had discharged the accused; and further, that the order for his commitment was made without calling upon the accused to show cause against the order—*Re Bundhoo* (1), *Nowab Singh* v. *Kokil Singh* (2). The commitment ought, therefore, to be set aside.

The judgment of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

MORRIS, J.—In this appeal it is contended, *first*, that the order under which appellant was committed to take his trial in the Court of Sessions, is on two distinct grounds illegal and *ultra vires*; and *next*, that, on the merits, the prisoner ought not to have been convicted.

The case had been instituted against the prisoner under s. 498 of the Penal Code. The Deputy Magistrate, after hearing the evidence for the prosecution, discharged the accused under s. 215, Criminal Procedure Code.

The complainant then moved the Sessions Judge to take action under s. 296, Criminal Procedure Code.

That officer was of opinion that the facts alleged against the accused really amounted to abetment of rape or of adultery; and those offences being triable only in the Sessions Court, he directed the Deputy Magistrate to commit the accused accordingly.

(1) 22 W. R., Cr., 67. (2) 24 W. R., Cr., 70.

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He remarked, that even if the case properly came under s. 498, the Deputy Magistrate had no power to try it, inasmuch as he was vested with only second class powers. This dictum is opposed to the provision made in sched. iv of the Criminal Procedure Code in regard to s. 498 of the Penal Code.

It is quite clear, however, that the case before the Deputy Magistrate was one under s. 498; and that he being duly empowered by law to try such a case, discharged the accused under s. 215. The Sessions Judge had, therefore, no power to order a commitment under ss. 376 and 497. He had, under the proviso added to s. 296, Criminal Procedure Code, by Act XI of 1874, power to direct the subordinate Court to enquire into these offences, but no more. In ordering the commitment the Judge unquestionably transgressed the law.

It further appears upon an affidavit made on behalf of the appellant, that the order for his commitment was made by the Judge without giving him any opportunity of showing cause against it, which procedure is not in accordance with what the High Court has laid down on this subject; see *Re Bundhoo* (1), *Nowab Singh* v. *Kokil Singh* (2). It has been submitted that the trial and conviction ought to be set aside for the two reasons above set forth. These are, no doubt, serious irregularities, and more especially the first, which is a direct transgression of the law; and if they had been brought to the notice of this Court before the trial had taken place, the commitment would properly have been quashed; but as the trial has been held, and as we do not consider that any actual failure of justice has been caused by the errors, we are disposed to hold that s. 283, Criminal Procedure Code, is a bar to the reversal of the judgment on these grounds.

(His Lordship then proceeded to consider the merits of the case, and set aside the conviction.)

Conviction set aside.

(1) 22 W. R., Cr., 67. (2) 24 W. R., Cr., 70.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

CHUNDER COOMAR MOOKERJI AND OTHERS v. KOYLASH CHUNDER SETT AND OTHERS. 1881 *July* 20.

Easement—Right of Way—Unity of Possession—Severance—Nuisance arising from acts of several Persons.

The words 'appurtenant' or 'belonging' will ordinarily carry only actual existing easements, and therefore will carry no right of way over the land of the grantor, though, under certain circumstances, even these words will have a wider construction—*Whalley* v. *Tompson* (1), *Pheysey* v. *Vicary* (2), *Barlow* v. *Rhodes* (3), *Morris* v. *Edgington* (4).

Where further words are used, such as 'therewith held or used,' such words will carry a way formerly enjoyed as an easement, but as to which 'the right has been suspended by unity of possession. But such words will not carry a way made by the owner of both properties during the unity of possession for his own greater convenience in the use of the two properties jointly—*James* v. *Plant* (5), *Thomson* v. *Waterlow* (6), *Langley* v. *Hammond* (7).

But where, during the unity of possession, a way, which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards severed, the authorities show that the words in question are large enough to carry it—*Kooystra* v. *Lucas* (8), *Watts* v. *Kelson* (9), *Kay* v. *Oxley* (10), followed.

One who has a right of passage over any place, must not, any more than the owner of the soil might, use it in an excessive or improper manner so as to obstruct the exercise by others of their rights.

The acts of several persons may together constitute a nuisance, though the damage occasioned by the acts of any one, if taken alone, would not be appreciable—*Thorpe* v. *Brumfitt* (11).

THIS was a suit for an injunction to restrain the defendants from trespassing on, or in any way using, a certain lane to

(1) 1 B. and P., 371.
(2) 16 M. and W., 484.
(3) 1 C. and M., 439.
(4) 3 Taunt., 24.
(5) 4 A. and E., 749.
(6) L. R., 6 Eq., 36.
(7) L. R., 3 Exch., 161.
(8) 5 B. and Ald., 830.
(9) L. R., 6 Ch., 166.
(10) L. R., 10 Q. B., 360.
(11) L. R., 8 Ch., 650.

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which the plaintiffs laid claim under an express grant from the original owner of the property.

The plaintiffs stated that they were the owners of certain premises known as Nos. 119 and 120, Bulloram Dey's Street, in Calcutta, and also of a certain lane which led from Bulloram Dey's Street to the main entrance of their houses; that the defendants, who were the owners of the premises Nos. 124, 125, 126, and 127 in Bulloram Dey's Street, but who, as they said, had no rights or user by prescription in the said lane, had, prior to the 7th June 1880, claimed to be entitled to use this lane for their own purposes and for the purposes of drainage from their premises, and that they had opened certain doors in their premises abutting on the lane, and claimed to be entitled to enter, and had entered, through such doors into and upon the land of the plaintiffs, and had used the lane for the purpose of removing their nightsoil to the injury and annoyance of the plaintiffs. They further charged them with breaking down a certain wall built by the plaintiffs, and they, therefore, brought this suit against the defendants to restrain them from further trespassing on or using the lane in question.

The defendants contended, that the block of buildings formerly belonged to one Bydonauth Dutt, who, in 1864, sold to Gooroo Churn Sen, and that the Dutts had, previously, more than twenty years ago, let out the land to tenants as ryotti lands, and had opened the said lane and dedicated it to the public as a passage from Bulloram Dey's Street to the various portions of the land so let out by him; that they all claimed through Gooroo Churn Sen, and that, since the time they had erected houses on the land so acquired from Gooroo Churn Sen, they had respectively used the lane as a means of passage from the backdoor of their premises, and that, had they no other title, the user of the lane for a period of twelve years before suit gave them an indefeasible title to the user thereof.

The effect of the evidence on both sides was, that both the plaintiffs and defendants had equally a right to use this lane; and that the plaintiffs were not the owners of the soil of the lane. The wording of the different deeds of sale on which the parties particularly relied as giving a title to the lane in

question, are fully discussed in the judgment. A question whether or not there had been a misjoinder of defendants was entered into at the hearing.

Mr. *Bonnerjee* (with him Mr. *Allen*) for the plaintiffs.

Mr. *Jackson* (with him Mr. *Mitra*) for the defendants.

WILSON, J.—The plaintiffs in this suit are the owners and occupiers of a house and premises Nos. 119 and 120, Bulloram Dey's Street. The defendants, the Setts, are owners of No. 124; the defendant Tara Soondery, of No. 125; the next group of defendants, of No. 126, which is a temple, of which they are trustees; and the defendant Shama Churn Dey, of No. 127.

The plaintiffs' premises have no frontage on the street, but are reached by a lane running first north from the street, and then west along the south of the plaintiffs' premises. The defendants' houses all have a frontage to the street, but also abut on the lane.

The plaintiffs' complaints are three—

1*st*. That the defendants use the lane for the passage of mehters and the cleaning of their privies.

2*nd*. That they, or some of them, have used the western portion for drainage of their houses.

3*rd*. That they combined together to pull down a wall erected by the plaintiffs to prevent their access to the lane. That the defendants did combine to do this is admitted.

The plaintiffs allege themselves to be owners of the soil of the lane, and claim to treat the defendants as trespassers. They put their case in the alternative as one of obstruction of their right of way over the lane.

The rights of the parties have been contested with much pertinacity both here and elsewhere, and this is natural, for the value of their respective houses must be materially affected by the result of this case.

The case is, to my mind, one by no means free from difficulty.

The site of all the houses in question, together with a good deal of land besides, was conveyed by Bydonath Dutt and others to Gooroo Churn Sen many years previously to October 1864.

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It has, however, been shown, I think very clearly, that Gooroo Churn was a mere benamidar for his father Gunga Gobind Sen, with whose money the land was bought. And on the 4th of October 1864, Gooroo Churn conveyed whatever remained unsold of the property to his father.

The land so sold had a comparatively narrow frontage to Bulloram Dey's Street on the south; on the north it was bounded by what was then an open public drain, having generally some depth of water in it; on the east it was bounded by the land of other persons; on the west by the land of other persons, and by the drain already mentioned. It was thus completely landlocked except on the south. This is now changed, because the drain has been covered over and made into a lane.

Prior to the sale to Gunga Gobind Sen in the name of Gooroo Churn, the land was partly waste and partly tenanted. There was no defined lane where the present lane is. The tenants made their way amongst the huts as best they could.

The Sens bought with a view of re-selling in plots for building, and for that purpose they laid out the lane in question. The exact order of events is not very clear upon the oral evidence. Gooroo Churn's deposition in a former suit was put in by consent. He contradicted himself a good deal as to whether the lane was made before or after the earlier sales of land. His brother Doorga Churn Sen was examined. He says, the lane was reserved before the conveyance to Gungamoney, which was very nearly the first in date. I think it clearly appears on the evidence, that, from the time the lane was made, all the tenants, upon all the lands ultimately plotted out and sold, used it as they pleased. Indeed, as it completely cut the property in two by a line running east and west, this must have been so.

On turning to the documents the order of dates becomes, I think, fairly clear.

On the 26th of November 1862, there is a conveyance to Issur Chunder Dey and Shama Churn Dey of a portion of No. 127. In that conveyance the lane is not mentioned. But six days afterwards, on the 2nd of December, two sales take

place. One is to Kunnuckmoney Dossee, of No. 117 (the position of which is shown on Mr. Bayne's plan), "together with your pathway to and from the said land." Therefore, at that time the eastern arm of the lane was in existence. On the same day there is a sale of No. 126, and the northern boundary described as "the ryotti road."

On the 6th of December, four days later, there is a sale to Gungamoney of a part of No. 124. The northern boundary is "a narrow passage of six feet in breadth;" and the eastern, "a gully six feet in breadth." And on the same day No. 125 is sold, the northern boundary being described in the same words.

The fair conclusion from the evidence seems to me to be, that the lane was in existence, and was in use by the tenants upon all the various portions of the property, when the series of sales in question commenced.

So far I have examined certain of the deeds in evidence, all prior to the first conveyance to the plaintiffs, only with a view to ascertain at what time the lane began to be used. It is necessary, however, to consider those and other deeds more carefully in order to ascertain what rights over the lane they conveyed to the various parties concerned.

The plaintiffs' title commences with a conveyance to them from Gooroo Churn Sen of No. 120, dated the 17th of March 1863. It describes the plot sold as bounded "on the south by the land of the said Gooroo Churn Sen, out of which he has allowed a passage six feet broad, running almost straight west to east, and terminating in another passage leading to Bulloram Dey's Street, and which two passages the said Gooroo Churn Sen hath granted and allowed, and doth hereby grant and allow, as the passage for the said Chunder Coomar Mookerji, Gungadhur Mookerji, Gopal Chunder Mookerji, and Ram Cally Mookerji, their heirs, representatives, and assigns, and all other the purchasers of the northern portion of the said piece of land, No. 68-7." Another deed, dated the 27th of July 1863, executed in consequence of a change in the direction of the lane, declares, that "no one shall be able to throw sweepings or filth on the said road, or make it unclean." By a deed of the 5th of June 1872, Gooroo Churn Sen purported to convey to

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the plaintiffs the soil of the lane in question. And by a deed of the 9th of June 1873, No. 19 was conveyed to the plaintiffs.

The effect of the deeds prior to that of the 5th June 1872 has already been decided by an Appellate Bench of this Court, and that decision I am bound to follow. It was to the effect that the plaintiffs took no title to the soil of the lane, but only a right of way. That right would, of course, be subject to any right previously granted to other persons. And it would not interfere with the right of the owner of the soil to grant subsequently any rights over it to other persons, provided they did not conflict with the right granted to the plaintiffs.

Nor can the deed of the 5th of June 1872 alter the case. Gooroo Churn had, from the first, been a mere benamidar for his father. He had, in 1864, conveyed everything to his father. The plaintiffs, therefore, cannot, as against the defendants, gain anything under that deed.

The rights of the various defendants must be examined separately.

The title to No. 124 begins with the conveyance of the 6th of December 1862, which describes the property as bounded on the north and east by the passage and the gully. It is at least doubtful whether that description would of itself carry a right of way over the passage. See *Harding* v. *Wilson* (1); but see also *Roberts* v. *Karr* (2) and *Espley* v. *Wilkes* (3).

The deed goes on to grant, amongst other things, all "ways, paths, passages to the said hereditaments and premises . . . . . belonging . . . or reputed so to be . . . or with the same . . . now or at any time or times heretofore held or used;" and the question arises whether these latter words carried the right to use this passage.

About the law applicable to this question, there is, I think, no doubt. The words 'appurtenant' or 'belonging' will ordinarily carry only actually existing easements, and therefore will carry no right over the land of the grantor—*Whalley* v. *Tompson* (4), *Barlow* v. *Rhodes* (5), *Pheysey* v. *Vicary* (6)—though

(1) 2 B. and C., 96.
(2) 1 Taunt., 495.
(3) L. R., 7 Exch., 298.
(4) 1 B. and P., 371.
(5) 1 C. and M., 439.
(6) 16 M. and W., 484.

it would seem that, under certain circumstances, even these words might have a wider construction: *Morris* v. *Edgington* (1).

Where further words are used, such as those in this deed, 'therewith held or used,' the case is different. Those words will carry a way formerly enjoyed as an easement, but as to which the right has been suspended by unity of possession: *James* v. *Plant* (2). On the other hand, such words will not carry a way made by the owner of both properties during the unity of possession for his own greater convenience in the use of the two properties jointly: *Thomson* v. *Waterlow* (3) and *Langley* v. *Hammond* (4). Where again, during the unity of possession, a way, which has never existed as an easement, is in fact used for the convenience of one of the tenements afterwards severed, the authorities show that the words in question are large enough to carry it: *Kooystra* v. *Lucas* (5), *Watts* v. *Kelson* (6), and *Kay* v. *Oxley* (7).

I think the facts of this case bring it within the last of these three classes of cases. The lane in question was certainly not made by the vendor Gunga Gobind Sen for the more convenient use of the property as a whole while in his own hands. It was made with a view to the sale of the land in plots, for the benefit, as I think on the evidence, of all those who might purchase; and it was used, I think, by the tenants upon all the plots prior to the sale of No. 124. In my opinion, therefore, the original deed of conveyance gave the purchaser of that plot a right of way over the lane.

The subsequent conveyance of a further portion of No. 124 does not, I think, affect this question.

The title to No. 125 is also based upon a conveyance of the same date, the 6th of December 1862, which contains exactly similar general words. That deed, therefore, also gave, in my judgment, a right of way over the lane. The subsequent conveyance of a further portion does not affect the matter.

The title to No. 126 rests upon a conveyance of the 2nd

(1) 3 Taunt., 24.
(2) 4 A. and E., 749.
(3) L. R., 6 Eq., 36.
(4) L. R., 3 Exch., 161.
(5) 5 B. and Ald., 830.
(6) L. R., 6 Ch., 166.
(7) L. R., 10 Q. B., 360.

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December 1862. That is a Bengali conveyance, and describes the plot sold as bounded on the north by the ryotti road; but it contains no words appropriate to pass a right of way.

And the subsequent conveyance of a further area does not, I think, carry matters further.

The title to No. 127 rests upon a conveyance of the 26th of November 1862, which contains general words as to ways similar to those in the deed I have already considered.

Another document has to be considered in connection with Nos. 125, 126, and 127. That is a deed, dated the 23rd of July 1864, between Gooroo Churn and the owners of the lands in question. It is subsequent to the first conveyance to the plaintiffs, and cannot, therefore, convey any right inconsistent with those given to the plaintiffs, but it might well give any right not inconsistent. The object of the deed was to give a means of draining the premises in question by means of a drain which is shown in the map running towards the north along with the west boundary of the plaintiffs' land.

The deed, as translated in the first place by one of the Court translators, runs thus: "In the year 1269, I sold to you several parcels of land for your dwellinghouses. For the purpose of passing in and out therefrom, I gave you a lane, and as disputes and quarrels have arisen amongst you in respect of keeping a watercourse or drain by the side thereof, in order to settle such disputes, I fix the price of a strip of land;" and then it goes on to describe and convey the strip of land running north.

The deed so translated expressly declares that the lane had been granted to the persons in question, and such a declaration would, I think, be a perfectly good grant to any of them who had not a right of way already.

A question was, however, raised as to the correctness of the translation, and I referred the matter to Mr. Owen, the Chief Interpreter. He reports that the words of the deed are capable of two meanings. They may express a passage 'into' your lands, or a passage 'within' your lands, in the latter case only describing the locality of the lane; there being this ambiguity, the context and the circumstances existing at the

time must be looked at. The object of the deed was, as appears from its terms, to settle a controversy and to give a mode of drainage to the north. The controversy was as to the keeping of a drain at the side of the lane. The drain was part of the lane as appears from the evidence of Mr. Bayne and other witnesses. The controversy was, therefore, about the use of this lane by the owners of the houses in question, and the grant was of a drain running north which could only be reached from those houses by using the lane. Under these circumstances, I think 'I have provided' must mean, 'I have provided for you;' and, therefore, that a right of way passed to any of the parties to that deed who had not one before.

The result is, that, in my opinion, the owners of Nos. 124, 125, 126, and 127 have equally, with the plaintiffs, a right to use this lane.

I have now to consider whether the plaintiffs have shown any right to relief in respect of any of their grounds of complaint.

With respect to the wall which the defendants pulled down, I have stated my reasons for holding that the plaintiffs are not the owners of the soil of the lane, and that the defendants have a right of way over it. The defendants had, therefore, a right to pull down the wall erected to exclude them from the lane.

As to the drain, it may probably be that, as against the plaintiffs, whose grant was of the use of a way six feet wide, none of the defendants had any right to use any part of the lane as a drain. But I think it clear that the drain has been in use for many years, and that the owners of Nos. 125, 126, and 127 were allowed, without objection, to arrange the drainage of their houses with reference to it. Mr. Bayne shows it to be an old brick-drain, and I have no doubt it must be as old as the drain running north with which it connects. It has not been shown that the plaintiffs have suffered, or are ever likely to suffer, any inconvenience from it, the more so as it is in a part of the lane some distance beyond the door of their houses. Under these circumstances, I think it is too late for them to come now and ask for an injunction.

The remaining ground of complaint is as to the use of the lane for the passage of mehters and the cleansing of privies;

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and as to this the rights of the parties are not quite so easy to determine.

I have said that, in my opinion, all the parties concerned have a right of passage over the lane. One, however, who has a right of passage must not, any more than the owner of the soil might, use it in an excessive or improper manner so as to obstruct the exercise by others of their rights. And I think it was rightly argued that the number of persons using the lane in a particular manner may be taken into account; because that which might be no nuisance if done by one, may become a serious nuisance if done by many—*Thorpe* v. *Brumfitt* (1).

Attention was called to the fact that, in the former suit, already referred to by the now plaintiffs, against the owner of No. 114, the latter was restrained from cleaning his privies by the lane as being an *obstruction of the plaintiffs'* right of way. But that does not conclude this case. In that case it was decided, on the evidence given, that the plaintiffs' use of the lane had been materially obstructed. This case must be decided on its own evidence.

In the second place, that was a suit against a mere wrong-doer, who had no right to go upon the lane at all.

In the third place, at the time of the transaction then under consideration, the Municipality had not taken charge of the cleaning of privies; it was provided for by the occupiers of houses themselves, so that the then defendant was responsible not only for the fact of cleaning the privies through the lane, but also for the mode in which it was done; whereas the present defendants, though they are, no doubt, liable for using the lane for that purpose, if it be wrong of them to do so, are not, in my opinion, responsible for any negligence or impropriety in the mode in which the Municipal mehters carry on their duties.

It appears to me, that a right to use a passage, enjoyed as incident to a house, must in general include a right to use it for all ordinary household purposes, for the passage of mehters among the rest. The circumstances existing at and before the date of the plaintiffs' conveyance strengthen this view. The whole of the land bought by Gunga Gobind Sen was being

(1) L. R., 8 Ch., 650.

sold off in plots for building, and all the plots, except the four having a frontage to the street, were completely landlocked but for this lane. It must have been evident, therefore, at the time the plaintiffs bought, that the lane must be used by mehters, and the practice has been in accordance with this. It is clear that the occupiers of the plots to the east, Nos. 115, 116, 117, and I think 118, sent their nightsoil to the street by the lane until other means of egress were provided by the owner of No. 117 purchasing other land to the east, and the turning of the open drain into a lane. The occupiers of No. 119 did the same until the plaintiffs purchased and added it to their house. The occupiers of Nos. 121, 122, and 123, sold after the plaintiffs purchased, did the same. The plaintiff, who was examined, admitted that he has done so too, at least at times. I am satisfied too, that the soil from the several defendants' privies has always been removed by the lane. No doubt, there is much conflict of testimony about this. Most of the plaintiffs' witnesses declare that the defendants' privies were, till June of last year, always cleaned through the houses to the street. But one of the plaintiffs' witnesses, Hari Madhub Lahiri, who lived in No. 127, from about 1876 to 1878, admitted the contrary. And Mr. Bayne's evidence as to the construction and arrangement of the houses and privies makes the plaintiffs' story incredible. Indeed, in the case of No. 126, the temple, it is all but physically impossible.

These considerations are, I think, sufficient for determining how far the plaintiffs are entitled to redress in this matter of the privies and the mehters.

When the evidence for the plaintiffs is closely examined, their complaints seem to me to resolve themselves into three,—

First, it is complained that the lane is used for the passage of mehters with nightsoil from the defendants' premises to the street. For the reasons I have stated, I think the defendants have a right to this extent to use the lane. And I do not see any evidence that this alone really obstructs the plaintiffs' right of way.

The second complaint is, that the mehters are in the habit of placing tubs of nightsoil in the lane, and letting them stand

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there. And this, it is said, and I have no doubt said with truth, is a serious annoyance to the plaintiffs' customers coming to and from their premises in the early morning. It is further said, and I doubt not with truth, that the same practice hinders the plaintiffs in moving casks and cases of goods along the lane from their godown to the street. This practice is shown, I think, on the evidence to be wholly improper; and I should be quite disposed to restrain it by injunction in this suit if I could; but (subject to what I have to say about certain of the premises in question) I think it has also been shown to be wholly unnecessary. I do not see, therefore, how the defendants can be made answerable for what is apparently the negligence or misconduct of the Municipal mehters. The plaintiffs must address themselves to the officers of the Municipality, and if this unnecessary nuisance should continue, the plaintiffs would not be without remedy.

The third complaint is, that certain of the defendants actually clean their privies direct on to the lane. This is not the case with No. 124. In that house the only entrances to the privy are upon the premises themselves. The privies therefore are, and must be, cleaned upon the premises. And if anything is done beyond simply carrying the nightsoil from the backdoor to the street, the fault lies with the mehters, and the case is the same with No. 126.

But with Nos. 125 and 127 it is otherwise. Those premises are so constructed that the mehter's doors are in the lane, and the privies are cleaned direct into the lane. I am satisfied on the evidence that this is a cause of serious annoyance, and I think it is entirely in excess of any right of the defendants occupying those premises. Mr. Bayne said, no doubt, that everything beyond the mere carrying away of the nightsoil might be done on the premises. But these cases must be looked at, not with reference to abstract possibility, but *practically*. And I think, it quite clear that so long as the present state of things continues, these defendants will be improperly using the lane and causing a nuisance to their neighbours. They may make whatever doors they may find necessary, but they must clean their privies on their own premises. An injunction will issue

restraining the defendants Tarasoondery, the owner of No. 125, and Shama Churn Dey, the owner of No. 127, from using their present mehter's doors for cleaning their privies into the lane, or in any way cleaning their privies directly into the lane, or otherwise using the lane in connection with the cleaning of their privies, except merely for the carriage of the night-soil from their premises to the street.

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CHUNDER COOMAR MOOKERJI v. KOYLASH CHUNDER SETT.

The plaintiffs will recover their costs on scale No. 2 from the defendants Tarasoondery and Shama Churn Dey. As against the other defendants, the suit will be dismissed, and if any extra costs have been incurred by reason of those defendants having been joined, the plaintiffs must pay them.

Attorneys for the plaintiffs: *Wilson* and *Chatterjee*.

Attorneys for the defendants: *Harris & Co.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

RAMANATH DASS AND ANOTHER (PLAINTIFFS) *v.* BOLORAM PHOOKUN AND OTHERS (DEFENDANTS).*

1881 *June* 23.

Mortgagor and Mortgagee—Mortgage-Bond—Money-Decree—Mortgage-Decree—Lien—Sale in Execution—Purchaser.

Where a mortgagee obtains a decree against his mortgagor for sale of the mortgaged property to satisfy his debt, he cannot sell that property reserving his own rights over it, because it is for the very purpose of satisfying those rights that the sale is made. And if, instead of obtaining a decree for the sale of the mortgaged property, the mortgagee obtains only a simple money-decree and sells the mortgaged property under it, he is precisely in the same position as far as his own interest is concerned. In either case, the purchaser at the execution-sale takes the property sold freed from the mortgagee's lien.

* Appeal from Appellate Decree, No. 1764 of 1879, against the decree of W. E. Ward, Esq., Judge of the Assam Valley District, dated the 5th May 1879, reversing the decree of Baboo Shib Prosad Chuckerbutty, Extra Assistant Commissioner of Gowhatty, dated the 23rd November 1878.