Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.

GOPAL CHUNDER MUKERJEE AND OTHERS (PLAINTIFFS)
v. JUDDOO LALL MULLICK (DEFENDANT.)

1883 January 27.

Right of way—Extent of user—Purpose for which right claimed is strictly identical with original purpose contemplated at commencement of right.

Where a right of way for a particular purpose is proved to have existed for upwards of 20 years, the Court is not bound to confine the right to the precise number of times in the year that it has been exercised, but may construe it *as a right to use the road at all convenient times for the particular purpose.*

THIS was a suit brought by two infants, by their next friend, to have their right to an alleged passage over the defendant's land declared, and to have certain obstructions to such passage, and also certain alleged obstructions to the grating of a drain running under the land, removed, and for damages and for an injunction.

The plaintiffs alleged that they were the owners of a certain house, to which was attached a privy which, before the construction of the underground drainage by the Municipality, used to be drained as of right by, and through, a small drain which ran between their own house and the house of the defendant, finally discharging itself into the large Municipal drain, and that their privy had been at all times as of right cleaned by their servants, who for such purpose passed and repassed over the drain, and that this right of way both they and their predecessors in title had enjoyed for more than forty years; that in 1879 the Municipality constructed an underground drain in the place of their large drain, and stopped the large drain up, and that they (the plaintiffs) at their own expense opened out a communication, by means of pipes, between this underground drain of the Municipality and their own small drain, the privy since that date being drained through the pipes so laid down. That they then filled in their original small drain, and made a path over it, which was used both by themselves and their servants in passing and repassing to the privy; that in December 1880 the defendant obstructed this pathway by placing rubbish upon it, and

thus prevented them (the plaintiffs) and their servants from using the same, and at the same time the defendant also blocked up the grating of a certain surface drain belonging to the plaintiffs and thereby obstructed the discharge of water into their pipes.

The plaintiffs did not claim any ownership in the soil of the pathway, but brought this suit for the purposes abovementioned.

The defendant claimed to be absolute owner of the land claimed as the plaintiffs' right of way, and denied the plaintiffs' claim to the right of way, asserting that it had not been enjoyed as of right since February 1877. He further stated that the filling up of the drain took place in December 1877 and not in 1879.

Mr. *Palit* for the plaintiffs.

Mr. *Branson* and Mr. *Phillips* for the defendant.

Mr. Justice Wilson found that the soil of the place in question was in the defendant, and that the plaintiffs had not satisfactorily shown that they exercised, for twenty years, the right they claimed; that it was impossible for the plaintiffs to have exercised their right of way during the time the small drain was in existence; and that the fact that it had been filled in, and made into a passage about ten or twelve years back, made it impossible for the plaintiffs to have used the right of way for twenty years; and, further, considering that the user of the Municipal mehters was not such as to furnish evidence of previous user, he dismissed the suit.

The plaintiffs appealed.

Mr. *Evans*, Mr. *Bonnerjee* and Mr. *Palit* for the appellants.

The *Advocate-General* (*Offg.* Mr. *Phillips*) and Mr. *Branson* for the respondent.

Mr. *Phillips*.—The ordinary practice at the time that the alleged user of the plaintiffs began, was to clear the privies three or four times a year, but now they are cleaned out very day; I don't, however, restrict them to the three or four times, but I restrict them to the user they had before the sudden change in the practice, in

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consequence of the Municipality taking up the work, in other words, to the ordinary and reasonable user at the commencement of the user. It is in such a user that the defendant is assumed to have acquiesced, and although he may have acquiesced, for the last four or five years in a larger user, this will not enlarge the right, unless continued for 20 years, although it might, if known, have been evidence to show that the increased user was in accordance with the right. A user cannot be increased. *Allan* v. *Gomme* (1) was a case of an increased or altered user in consequence of the conversion of a wood house into a cottage. In *Henning* v. *Burnet* (2) Parke, B., says: "A right of way to a cottage ceases if the cottage is turned into a tan yard." These were cases of grants, but they show that if you have a limited right of way you cannot increase the user to make it a general right of way. In the case of *Williams* v. *James* (3) the defendant, who was entitled to a right of way by user over the plaintiffs' land from field N, honestly and without the intention of increasing the right of user, used the way for the purpose of carting from field N some hay stacked there, which had been grown partly there, and partly on land adjoining, and it was held not to be an excess user in the user of the right of way; the principle is, however, clearly laid down that the right is measured by the actual user. In *Baxendale* v. *McMurray* (4), the defendant had obtained the prescriptive right to discharge into a river washings arising from the manufacture of rags in the manufacture of paper; he afterwards made his paper from vegetable fibre and discharged the refuse as before into the river; it was held in a suit to restrain the defendant from polluting the river to a greater extent than it was polluted before the change in the system of manufacture, that the easement to which he was entitled was a right to discharge into the river the washings produced by the manufacture of paper in the reasonable and proper course of such manufacture, using any proper materials for the purpose, but not substantially increasing the pollution; and that the onus lay on the plaintiff to show any increase of pollution.

Where an easement to land is granted, the use of it will be restricted to a reasonable use for the purpose of the land in the

(1) 11 A. and E., 759.
(2) 8 Exch., 187.
(3) L. R., 2 C. P., 577.
(4) L. R., 2 Ch. App., 790.

condition in which it was when the grant was made or the user took place. *Wood* v. *Saunders* (1) was the case of a grant; there A demised to B a house with the right to the free passage of water and soil in and to the existing cesspools, and to certain drains then in existence. B was not at liberty to alter the buildings without the lessor's consent, which was never obtained. B in 1872 bought the house, and at that time part only of the drains from the house ran into a moat which belonged to A. B in 1873, enlarged his house and turned it into a lunatic asylum with 150 inmates and discharged the whole drainage of the house into the moat. A threatened to stop the drains, and B filed a bill to restrain him from so doing, and the plaintiff obtained an order protecting him in the reasonable use of the cesspool, to the extent to which the same was used prior to the demise to him. See also *Wimbledon and Putney Commons Conservators* v. *Dixon* (2).

The case of *Finch* v. *Great Western Railway Co.* (3) recognizes the principle that the extent of a right by user is to be measured by the extent of the user. But there are other objections to the plaintiff's claim.

The user alleged is in its nature likely to escape observation, and it is not shown to have been open, or such as would be likely to attract any attention. Morever, from the situation of the buildings, there would be very little opportunity to observe the plaintiffs' mehters. A burden ought not to be imposed upon another, upon such a user as this—see *Bhuban Mohun Banerjee* v. *Elliott* (4). Again the plaintiffs claim a right for themselves and their servants: the Municipal mehters are not their servants nor under their control. At any rate, even if they could exercise their right through them, the plaintiffs could not acquire such a right by their choosing to come to the defendant's house over the plaintiffs' land.

But there is a fatal objection, and that is, that according to the evidence all that the Municipal mehter did was to come to plaintiffs' privies, clean them and then go on to the defendants',

(1) L. R., 10 Ch. App. 582.
(2) L. R., 1 Ch. D., 362.
(3) L. R., 5 Ex. D., 254.
(4) 6 B. L. R., at pp. 98 and 104.

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This took place for about the last three years, and there is no other evidence as to their proceedings. This, however, is not a user of the way at all: the mehter came on the defendant's land not in exercise of any right of the plaintiffs, but for the purpose of cleaning the defendant's privy, and he merely went on from there for his own convenience, and not in the exercise of any right of the plaintiffs'. Then, if this is so, there is no user within two years of suit, as required by s. 27 of the Limitation Act. User ought to be proved in every year, or at any rate, in the first and last years of the term. *Parker* v. *Mitchell* (1); *Lowe* v. *Carpenter* (2).

The following judgments were delivered :—

GARTH, C. J.—I regret very much that the parties in this case should not have been able to adopt the suggestion of the Court, and settle their differences out of Court; but as they have failed to do so, it is necessary that we should give our judgment; and I feel bound to say that I cannot take the same view of the case as the learned Judge in the Court below.

I quite think that the plaintiffs' evidence is not as precise as it might have been, either as to the number of years, during which the right claimed has been exercised, or as to the particular mode or times of the alleged enjoyment.

It very rarely happens in my experience that the evidence of native witnesses in cases of this kind is very accurate. But on the whole I think it sufficiently appears that a right, such as the plaintiffs' claim, has been exercised from time to time for upwards of 20 years before suit; and the probabilities of the case seem to me greatly in favor of that view.

Certain facts giving rise to those probabilities are almost beyond dispute. The plaintiffs' house has existed substantially in its present state for a great number of years; the western wall of that house abutted upon the defendant's premises; and certain privies, habitually used by the inmates of that house, were situate in the south-west corner of the plaintiffs' compound.

Before the new sanitary rules were made by the Calcutta Municipality, these privies were used and managed in the same way as

(1) 11 A. & E., 788. (2) 6 Ex., 825.

most others in the native quarters of Calcutta; that is to say, their contents were received into cesspools sunk in the ground, and were then emptied and carried away from time to time as convenience or necessity required.

There also seems no doubt that the fall of the ground, on which the plaintiffs' house was built, was from south to north, and that from these privies there was a passage enclosed by two walls running from south to north along the western boundary of the plaintiffs' premises, by means of which all the refuse water from the cesspools flowed away to the north-west corner of those premises, where there was a door opening out upon a drain, into which certain privies, used by the defendant's family, emptied themselves.

This drain, the soil of which belonged to the defendant, was an open one. It received through the door, which I have just mentioned, the refuse water of the plaintiffs' privies; and it then continued to run from south to north into Prosunno Coomar Tagore's Street, receiving also in its way the contents of other privies.

The plaintiffs' case is, that from time to time their cesspools were emptied by mehters in the usual way, and their contents carried along the passage between the two walls, and so along this open drain into Prosunno Coomar Tagore's Street. It is clear that if the privies were used, about which there seems to be no doubt, their contents must have been emptied somewhere; and it is neither proved nor suggested by the defendant that there was any other mode by which their contents were removed, except that which has been deposed to by the plaintiffs' witnesses. And it is very difficult to understand for what purpose the inner wall forming the passage from south to north could have been built, except for carrying off the contents of the cesspools.

The only real question of fact, as it seems to me, is, whether there is sufficient proof that the plaintiffs have used the open drain for the purpose alleged for the period of 20 years before suit. Now it certainly seems highly probable that if the house itself has existed in its present condition for some 30 or 40 years, the same means has been always adopted for emptying the cess-

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pools; and it is certainly proved to my satisfaction that the door at the north-west corner of the plaintiffs' premises, through which it is said that the mehters passed, is a very old door; and it is difficult to see for what purpose that door could have been placed there or used, except that of cleaning out the cesspools.

The durwan, who has been in the plaintiffs' service for from 20 to 25 years, says that he has known that door ever since he was in their service; and that it was an old door when he came there. He tells us that mehters used always to come through it for the purpose of removing the night-soil; that when they came, they used to call to him to open the door, and that when they went away they used to call to him to lock it; and that he invariably kept the door locked from the inside. He says this was always done three or four times a year; and he has also done the same for the Municipal mehters since they have cleaned the privies.

The evidence of this man is confirmed by that of Oghore, the sweeper, who tells us that he has been in service of the plaintiffs and their father for 16 or 17 years; that he employed the mehters to wash the privies and clean the drain; and that he used to bring mehters of his own for the purpose, whom he paid with his master's money. He describes clearly enough the way in which they used to clean the cesspools, and carry out the contents, along the west side of the plaintiffs' premises into the open drain beyond.

I confess I see no sufficient reason for doubting the truth of what these men have stated, and their evidence is certainly corroborated by Tarrabullub Chatterjee, an attorney of this Court, who knew the premises upwards of 25 or 30 years ago, and speaks to the way in which the mehters used to come and cleanse the privies; and also by Dwarkanauth Banerjee, who lives in an adjoining house, and who says that he has known the drain between plaintiffs' and defendant's premises for upwards of 25 years.

The only point which the defendant has attempted to make in opposition to this evidence of the plaintiff's is, that the open drain along which it is said the mehters passed, was generally

in such a filthy state from the quantity of foul matter which flowed into it, that it was impossible for mehters to pass down it in the manner described by the plaintiffs' witnesses.

In support of this view the defendant himself, Baboo Juddoo Lall Mullick, was called as a witness. He describes the dirty state in which the drain was, partly from his own privies and partly from those of his tenant's being emptied into it. He says it was choked with filth and weeds, and that he never saw any one pass down there; and Mr. Edwards, who is the Road and Conservancy Overseer under the Municipality, says that he has known the drain since 1875, and that it was in a very foul state and very full of night-soil. He states, however, that while the drain was being cleaned, he did go up it himself, but not beyond a certain distance.

I observe that the learned Judge in the Court below, in dismissing the plaintiffs' case, has laid some stress upon the evidence of these two witnesses. Now I have no doubt it is quite true that Baboo Juddoo Lall Mullick, who is a gentleman of good fortune and position, may never have seen the mehters going backward and forward to plaintiffs' privies, because they did not go there very often, and when they did, it was very early in the morning, and I can quite understand that Mr. Edwards would naturally be disinclined to walk through a quantity of night-soil, unless pressed by some urgent necessity to do so. But this was all part of the mehters' business, and it appears, moreover, that there were certain seasons in the year when Baboo Juddoo Lall Mullick's privies were cleaned out, and it is probable that these seasons were selected by the plaintiffs' servants to employ mehters to clean out their master's cesspools.

On the whole it appears to me that the evidence adduced by the plaintiffs shows a user of the right which they claim for upwards of twenty years before suit; and I see nothing in the defendant's evidence to rebut it.

The only difficulty which I feel is, *as to the extent of the plaintiffs' right.* Are they entitled to the use of the drain only three or four times in a year, which, according to the evidence

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of the durwan, was as often as they were in the habit of using it; or ought we to give the evidence of user a more liberal construction, and say that they had a right to the drain for the purpose of cleansing their privies as often as necessity required? I confess I have had some doubt about this and I have found no direct authority upon the subject; but I have come to the conclusion that the latter is the more reasonable view to adopt. The times at which the plaintiffs' cesspools were cleansed were (according to the evidence) no particular stated periods. The cesspools were emptied, according to native custom, as many times in the year, as they became full; and I cannot doubt that if the number of the plaintiffs' family had increased, so that it became necessary to empty them more often, the plaintiffs would have had a right to use the drain for that purpose.

It has now become necessary, in consequence of the new Sanitary Rules of the Municipality, to cleanse the privies every morning; and if the true construction of the plaintiffs' right was, as I conceive it to be, to use the drain as often as was necessary for cleansing the privies, it follows that they may now use them every morning.

The times at which they should do this should of course be proper and convenient times. The evidence is that the filth was removed in the early mornings; and probably this would be the most convenient time now for its removal.

It has been strongly urged upon us that if we put this construction upon the plaintiffs' right, we shall be imposing upon the defendant, as the owner of the servient tenement, a much heavier burthen than according to the ancient user of the drain he ought to bear. But it must be borne in mind that, so far as *the quantity* of sewage is concerned, no larger quantity will be carried down the drain now than has always been carried heretofore. It will only be carried more frequently, and in much smaller quantities, and, so far as health is concerned, I suppose that the present system is likely to be more healthy than the former one.

I think, therefore, that the judgment of the Court below should be reversed, and that the plaintiffs should be declared entitled to use the drain in question, for the purpose of carrying away their night-soil at all convenient times in the year.

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The defendant will be restrained from interfering with the plaintiffs' proper user of the drain; but as the suit was brought to try what was a question of right, we do not consider that there is any ground for awarding substantial damages.

The plaintiffs will be entitled to their costs in both Courts on scale 2.

CUNNINGHAM, J.—I concur in holding that the enjoyment of an easement for twenty years prior to the suit is established by the evidence, and also in the view that the easement must be taken to have been a right of way for the purpose of cleansing the plaintiffs' privies at all such times as the plaintiffs could reasonably claim to exercise such a right. Several cases were cited before us in support of the contention that, as in cases of rights which depend on user, "the right acquired must be measured by the extent of the enjoyment which is proved," we ought in this instance to limit the plaintiffs' right of way to the number of occasions in the year on which it could be shown that the way had been used: but the cases do not appear to me to justify such a restriction. It is no doubt the rule that where there is a right of way proved by user, the extent of the right must be proved by the extent of the user. *Wimbledon and Putney Commons Conservators* v. *Dixon* (1); *Finch* v. *G. W. Railway* (2); but neither these cases nor the others cited, *Williams* v. *James* (3), *Allan* v. *Gomme* (4), *Henning* v. *Burnet* (5), appear to me to justify the view that, where a right of way for a particular purpose is proved, the number of occasions on which it may be enjoyed must be limited to the number of occasions on which it can be shown to have been exercised. The "extent of user," which the Courts have had occasion to consider in these cases, has had reference rather to some departure from the original purpose, or the application of the right to some matter other than that contemplated at the commencement of the right, than to frequency of the occasions on which the right may be enjoyed. In the present instance the purpose for which the right is claimed is strictly identical

(1) L. R., 1 Ch. D., 362.
(2) L. R., 5 Ex. D., 254.
(3) L. R., 2 C. P., 577.
(4) 11 A. and E., 759.
(5) 8 Exch., 187.

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with the original purpose, though inclination, custom, or a change of the law may lead to its more frequent exercise. On these grounds I concur in admitting the appeal with costs throughout.

Appeal allowed.

Attorneys for the appellants: *Messrs. Swinhoe & Co.*

Attorneys for the respondent: *Messrs. Beeby & Rutter.*

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Wilson.

1883 *February* 26.

ISHAN CHUNDER BANDOPADHYA (DEFENDANT) *v.* INDRO NARAIN GOSSAMI (PLAINTIFF).*

Sale in Execution of Decree—Payment not certified to Court—Fraud—Setting aside Sale—Cause of action—Regular suit.

A obtained a money decree against *B* and others jointly for Rs. 112; and in consideration of a payment of Rs. 25 made by *B* agreed to release *B* from all liability under the decree. This payment was not certified to the Court, and *A* afterwards in execution of the decree had certain immovable property belonging to *B* put up for sale, and this property he purchased himself.

Held, that a suit would lie by *B* to set aside the sale and to recover the property from *A*.

THE facts of this case are stated as follows by the Judge of the lower Appellate Court:—

"On the 19th of April 1873 the defendant, Ishan Chunder Bandopadhya, obtained a decree against Nuffer Chunder Gossami and four others jointly, by which the debtors were directed to pay to the decree-holder Rs. 112. An application for execution was made on the 28th of February 1876, but without any satisfactory result. The application appears to have been removed from the file in March 1876. The next application for execution was made on the 20th of December 1878. Notice was served on the debtors on the 14th of Magh 1285 (29th January 1879), and returned on the 3rd of February 1879. On the very next day Indro Narain Gossami came in and objected to the execution, saying that he had paid Rs. 25 to the decree-holder, and that the decree-holder

* Appeal from Appellate Decree No. 1614 of 1881, against the decree of Baboo Brojendro Coomar Seal, Judge of Bankoora, dated the 3rd June 1881, affirming the decree of Baboo Jogendro Nath Bose, Munsiff of Gangajal Ghat, dated the 22nd March 1880.