been right in going behind the form and deciding what was in substance the real transaction, and pointed out that the sale was really a colourable sale to disguise what was in substance a loan. I think by the same reasoning this was a colourable relinquishment to disguise what was in fact a sale. No doubt an ex-proprietary tenant can, as such, surrender his rights by a proper relinquishment. Nobody can put the point, I think, better than it has been put by Mr. *M. L. Agarwala* at page 69 of his book on the Tenancy Act in this sentence :—" It comes to this, that though a proprietor can, in fact give up his ex-proprietary rights when they accrue, by not availing himself of them, he cannot bind himself by an express stipulation to that effect in a deed of transfer of the property or the like. "

I think that is what these documents purported to do. I agree with what my brother has said about the decision in *Lekhraj* v. *Parshadi* (1). Unless the facts of that case are distinguishable from this case by something which does not appear in the judgment, I am bound to say, having regard to the fact reported that the two transactions were contemporaneous in date, I should have found difficulty in holding that the alleged relinquishment in that case was not also a colourable transaction. To that extent I am unable to agree with the decision.

BY THE COURT:—We allow the appeal, set aside the decision of the court below and dismiss the plaintiff's suit with costs. We also dismiss with costs the cross-objection filed by the plaintiffs respondents.

Appeal allowed. Cross-appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Abdul Raoof.

1918 *March*, 13.

DEBI PRASAD AND ANOTHER (PLAINTIFFS) *v.* BADRI PRASAD (DEFENDANT).*

Act No. IX of 1908 (*Indian Limitation Act*), *section* 28 ; *schedule I, article* 144—*Right recurring at uncertain intervals—Right to take wood from trees when fallen or cut—Adverse possession.*

The father of the plaintiffs in 1867 obtained leave from the Collector to plant trees alongside a road on land belonging to Government. He expressed

* Second Appeal No. 712 of 1916, from a decree of G. C. Badhwar, Additional Judge of Farrukhabad, dated the 26th of January, 1916, confirming a decree of Ali Ausat, Officiating Subordinate Judge of Farrukhabad, dated the 19th of June, 1915.

(1) (1909) 6 A. L. J., 713 ; 2 Indian Cases, 409.

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his willingness to do so at his own expense and to tend them; and the only right he asked for was to get the fallen dry wood from the trees. Subsequently the village passed out of the possession of the plaintiffs' father, and on two occasions in 1900 and in 1910, the defendant, who had purchased the village, got the proceeds of the sale of such wood. The plaintiffs on both occasions asserted their claim to wood or the price thereof, but were unsuccessful. Within six years from the date of the last sale they brought a suit for a declaration of their right to get the dry wood by virtue of the agreement of 1867. The defendant pleaded adverse possession. *Held*, that the right being one which could only be exercised on uncertain occasions and not a right recurring at fixed periods, and as there had been disputes as to the right between the parties on two previous occasions, it could not be said that the defendant had acquired a title by adverse possession.

Quaere, whether section 28 of the Indian Limitation Act, 1908, applies at all to a case like this.

THE facts of this case were shortly as follows:—

Madan Gopal, the father of the plaintiffs, was a mortgagee in possession of a village called Runni Chursai. There was a *kachcha* road leading from Runni Chursai to mauza Patia. In 1867, Madan Gopal made an application to the Collector of Farrukhabad asking for permission to plant a row of trees on either side of the *kachcha* road for the comfort and convenience of travellers. He represented further that he would never sell the trees, would watch and tend them at his own expense and appropriate for his own use dry fallen wood of the trees. The Collector gave the permission asked for, and Madan Gopal planted the trees. In 1883, Madan Gopal transferred his zamindari in mauza Runni Chursai, but did not transfer his rights in the trees planted on the roadside. Subsequently, the zamindari came into the possession of the defendant by purchase in 1887. The sale-deed in his favour included the row of trees abovementioned. The defendant thereupon began to assert his rights to the row of trees and on some occasions he appropriated the fruits to his own use. In 1900, the district board had the branches of the trees lopped off. Madan Gopal and the defendant laid claim to the price realized on the sale of the loppings. After inquiry, the district board paid the price to the defendant. In 1901, the defendant sued some persons for damages for wrongful plucking of the fruits. The suit was dismissed by the District Judge on the ground that the defendant had no right whatever in the trees. In 1910, some dry wood

was sold by the district board and again rival claims were made by the defendant and the plaintiffs (as the heirs of Madan Gopal). The district board again recognized the rights of Badri Prasad and paid over the money to him. The plaintiffs instituted this suit for a declaration of their rights to the dry and fallen wood of the trees. The defendant pleaded that the trees were appurtenant to his zamindari and in the alternative that he had been in adverse proprietary possession of the trees for over twelve years. The courts below dismissed the suit. The lower appellate court found that the tree stood on Government land and were in possession of the same. It nevertheless held, that time at the latest had begun to run against the plaintiffs since the dispute in 1900, and the suit was, therefore, barred by time. The plaintiffs appealed.

Pandit *Kailas Nath Katju*, for the appellants:—

There can be no adverse possession of a right such as the one claimed by the plaintiffs. A plea of adverse possession pre-supposes two things, firstly, that the plaintiff was entitled to immediate possession of the property in dispute, and secondly that the defendant is in such possession. In the present case neither supposition holds good. Neither party is entitled to possession of the property. Government is in possession as of right. The right reserved by Madan Gopal was to the fallen wood and would only become operative whenever any wood happened to fall. Such a right is incapable of adverse possession by anybody. The party relying upon a plea of adverse possession has to make out continuous uninterrupted possession in himself for 12 years. Here wood happened to fall twice in 12 years, once in 1900 and again in 1910. The wrongful appropriation by the defendant of such wood on those two occasions would not deprive the plaintiffs of their right for ever. Every fresh invasion of a right gives a cause of action for a suit for declaration until the right itself is extinguished by operation of section 28 of the Limitation Act; *Ilahi Bakhsh* v. *Harnam Singh* (1), *Allah Jilai* v. *Umrao Husain* (2). Section 28 is expressly confined to suits for possession of property and does not apply to claims of any other kind. It was impossible for the plaintiffs to

(1) Weekly Notes, 1898, p. 215. (2) (1914) I. L. R., 36 All., 492.

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claim possession of this intangible right. Rights of this description are valuable and have been recognized by the courts; *Bishan* v. *Naipal* (1), *Bailey* v. *Stephens* (2). In order to prevent all further disputes this was a fit case for the granting of the declaration prayed for.

Dr. *Surendra Nath Sen*, for the respondent:—

The findings show that the defendant has been exercising all acts of possession which were open to him having regard to the nature of the property. He had been appropriating and selling the produce of the trees ever since 1889 and taking the fallen wood, whenever there was any, and had all along been asserting his rights. It is true that the Government was in possession of the trees, but it was open to the defendant to acquire by adverse possession all the rights which the plaintiffs had in them and much more over and above that, just as it is open to one to acquire by adverse possession the limited rights of a tenant. It is not in every case that actual physical and continuous possession should be proved to make out a title by adverse possession; *Lord Advocate* v. *Young* (3). The right of Madan Gopal has been constantly denied during the last 25 years, and it is too late now to seek a declaration. The granting of a declaration is within the discretion of the court, and such discretion should not be exercised in support of such a vague and shadowy right as claimed by the plaintiff. Further, the plaintiffs are the sons of Madan Gopal. There is nothing to show that the original grant in favour of Madan Gopal enures for the benefit of his successors. There is no formal grant in existence; and the application made by Madan Gopal in 1867 does not show that it was anything more than a personal licence given to Madan Gopal alone. To entitle themselves to a declaration the plaintiffs must prove clearly that they have the right they claim. The Government was also a necessary party.

Pandit *Kailas Nath Katju*, in reply:—

The case has been fought throughout on the footing that the right reserved to Madan Gopal was a heritable and transferable right. In fact the defendant himself had in the first instance

(1) Weekly Notes, 1885, p. 299. (2) (1862) 12 C. B., N. S., 91.

(3) (1887) 12 A. C., 544.

claimed as a transferee from Madan Gopal. The defendant should not be allowed to raise a new point in second appeal. Having regard to the very nature of the right, the presumption was that it must have been regarded as heritable. The Government had never denied the existence of the right and was wholly indifferent as to the merits of the rival claimants.

TUDBALL and RAOOF, JJ. :—This is a plaintiff's second appeal. The facts of the case are as follows. In the year 1867 the father of the two plaintiffs, one Madan Gopal, was the mortgagee of certain zamindari rights in the village of Runni Chursai. There was a public unmetalled road which ran from the village lands of this village up to the *pucca* road some short distance away. This public road belonged to the State and still belongs to it. In 1867 there were no trees standing on it and Madan Gopal applied to the Collector of the district in writing, pointing out this fact and that he wished to plant trees upon the public road for the benefit of the public; that he would tend and look after them, and that he would only claim the wood that might fall from the trees as his own. He would have no right to sell the trees. The Collector agreed to this and Madan Gopal planted these trees along the public road. It is quite clear, as the land vested in the state, the ownership of the trees did not vest in Madan Gopal, but as the Collector had agreed to the condition that he was to take the fallen wood, he no doubt continued to take it so long as he remained in the village. In the years 1885 and 1887 there were certain transfers of the zamindari shares in the village and Madan Gopal lost all interest in the zamindari of mauza Runni Chursai. In 1887 Badri Prasad became a co-sharer in the village by a sale deed under which his transferor purported to sell to him, not only the zamindari share, but also the trees which had been planted upon the road, as being his. In 1890 and again in 1892, Badri Prasad sold the fruit of these trees to various persons. In 1899 he had some civil litigation in regard to the fruit of the trees against a third party. In 1901 the chairman of the district board, under whose control the road is, sold the fruit to a third party. Badri Prasad objected, and the Collector cancelled his sale. In 1900 the trees were lopped and the loppings were sold by the district board. Badri Prasad claimed title to

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the loppings. Madan Gopal objected to his claim. The Collector finally decided that Badri Prasad was entitled and paid over to him the proceeds of the sale of the loppings *minus* expenses. In 1901 Badri Prasad had some civil litigation against certain other persons who were co-sharers in this village. They had taken the fruit of the trees and he sued them for damages. They denied his title in every way to the trees or to the fruit. The court of first instance gave Badri Prasad a decree. On appeal the suit was dismissed by the District Judge on the clear finding that Badri Prasad had not a shadow of a title whatsoever to the trees or to the fruit or to any of the produce thereof. Madan Gopal in that suit was called as a witness and testified to his claim and to the proceedings of 1867 on the basis of which the District Judge decided against Badri Prasad. In 1910 some more branches fell from these trees and there was a dispute between the plaintiffs who are the sons of Madan Gopal on the one side and Badri Prasad on the other. Again the proceeds of the sale of the wood were made over to Badri Prasad by the district board. The present suit was brought within six years from this, that is, on the 18th of March, 1915, in the court of the Subordinate Judge of Farrukhabad. The plaintiffs in their plaint claimed that they were the owners of and in possession of the trees; that they had been protecting and looking after the trees and had been taking all the produce thereof; that their father had been in continuous possession of the trees and that they were like him still in possession; that the defendant Badri Prasad had no right or title or interest whatsoever in these trees; that in the absence of the plaintiffs the defendant had realized the value of the wood from the district board; that they had got to know of it in the month of November, 1914, hence the present suit. They asked for a declaration that the trees were planted by their father; that they were still in possession of the trees and that they were the owners thereof. They further asked for an injunction restraining the defendant from interfering with the plaintiffs' right. The defendant in reply pleaded that the land on which the trees stood was zamindari land and not the property of the state and that it belonged to him; that the property had been sold and purchased by him in 1887 and that he was the owner and in possession of the trees; that the plaintiffs had no title whatsoever;

that even if the defendant had no real title in the beginning, still he and his predecessors had been in proprietary and adverse possession and enjoyment of the trees since the year 1881, and therefore the suit was barred by limitation, the defendant having acquired title by prescription. The court of first instance found that the trees were planted on the land of the road; that the land was the property of the state; that the trees had nothing to do with the zamindari of the defendant; that the plaintiffs' claim, however, was barred by twelve years adverse possession, and that they were not entitled to the declaration, the defendant having held adverse possession since the year 1885. In the course of the suit on the 16th of June, 1915, the plaintiffs' pleader, vide *rubkar* 65A., clearly stated to the court that his client only claimed a right to tend the trees and to take the fallen wood; that he claimed no greater right than this; that he had nothing to do with the fruit, etc. The plaintiffs appealed. The court below has treated the case as if it was clearly a suit in respect to the ownership of the trees and the possession thereof. It has said that the questions for determination in the appeal are:—Whether the plaintiffs have been in possession within twelve years of the suit or whether the defendant has been in adverse proprietary possession for more than twelve years; also whether the suit is barred by limitation. In the preamble of its judgment the lower appellate court has stated the facts as to the planting of the trees. In the body of its judgment it has stated as follows:—"No trees nor any rights in them were transferred to the defendant, nor are the trees standing on village lands. Under the contract with the Collector the plaintiffs' father reserved to himself only the right to take the fallen wood of the trees, but nothing else. No rights in the trees could be transferred by the planter of the trees. The plaintiffs have no zamindari left in the village and they do not reside in mauza Runni Chursai. They brought this suit for a declaration that they were the owners of these trees and had the right to take the fallen wood and also for an injunction that the defendant should not interfere with the exercise of their right." The appellate court held that the defendant had been in possession (presumably of the trees, though it does not say so clearly) for more than twelve years and has

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dismissed the appeal and the suit. The plaintiffs come here in second appeal. It is clearly admitted before us that the only right which the plaintiffs claim and can claim is the right to tend the trees and to take any wood that may fall; that they have no concern whatsoever with the fruit, and that they have no other right whatsoever in the trees. It is conceded before us *on behalf of both parties* that these trees, planted in the manner stated above, and standing on public property belonging to the state, do not belong to either party; that in so far as they are in anyone's possession, they are in possession of the Government. It is urged on behalf of the plaintiffs that there has been no adverse possession and cannot be any such adverse possession in a case like this such as is contemplated by section 28 of the Limitation Act. On behalf of the respondent, however, it is urged that in so far as any right could be exercised by the parties, it has been regularly exercised by the defendant and his predecessors-in-title for well over twelve years. We think it should be made quite clear that the only right which is in dispute before us is the right to take the fallen wood. Under the application of 1867 that was the only right which was given to Madan Gopal. The plaintiffs, therefore, are not and cannot be concerned with the fruit and if the district board or the Collector has in the past allowed Badri Prasad to take the fruit, that is no concern of the plaintiffs, for they themselves have no right to it admittedly. As to the fallen wood, there are only two years in which there has been any dispute whatsoever. One was in the year 1900 and the other was in the year 1910. In both these years there were disputes and in both years the Collector gave the value of the fallen wood to Badri Prasad. It is impossible, therefore, in our opinion, to say that these two occurrences show that the defendant has been in adverse proprietary possession of the right which the plaintiffs now claim before us. There is no question of proprietary right in the trees. No doubt the parties litigated in respect thereto in the courts below, but one fact is clear, and that is that neither party is the owner of the trees and that the sole right in dispute before us is the right to take the fallen wood. We have considerable doubt whether section 28 of the Limitation Act has any application whatsoever to this case, but even assuming that it has, it is impossible to hold that by reason of the two disputes

in 1900 and 1910, the defendant has established continuous adverse possession of this right as against the plaintiffs. The right is one which clearly can only be exercised on occasion, that is when any wood may fall or be cut from the trees. It does not occur every year or at stated times. It is urged that the plaintiffs' suit should have been brought at least within six years of the dispute of 1900, but we do not think the plaintiffs were bound to come into court on the occasion of that invasion of their right. It was again invaded in the year 1910, and they have come into court within six years of that invasion to establish their right to take the fallen wood. We therefore cannot agree with the court below that the suit is barred by limitation in any way at all. It has, however, been urged before us that the plaintiffs have no right whatsoever even to the wood, under the petition and order of the year 1867 and that this Court, therefore, should grant them no declaration whatsoever. This is a point which has not been raised before in the course of this litigation. It amounts to asserting that Madan Gopal's right under the transaction of 1867 was purely a personal right which could be transferred neither by inheritance nor by sale, but this has not been the position which the parties have taken up in the courts below. Badri Prasad's claim was actually based on a transfer in his own favour and the litigation having been fought out on the assumption that the right was a transferable and heritable one, we can see no necessity whatsoever to allow this point to be raised at this stage of the case. The district board or the Secretary of State for India are neither of them parties to the present litigation and the decree therein will not affect them in any way. It will be time enough to decide this question when either of these two parties is involved in litigation with the plaintiffs or the defendant. This appeal is decided on the assumption that the right of Madan Gopal to take the fallen wood is a transferable right which descends to his heirs. The result, therefore, of our findings is this, that the plaintiffs are entitled to a declaration that they have a right to take the fallen wood of the trees in dispute which were planted by Madan Gopal on the basis of his application of 1867, and that the defendant has no right to interfere with the plaintiffs taking of that wood. There is no necessity whatsoever for any injunction, as the exercise of this right

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can only occur from time to time, and the person who will be in possession of the wood will be the Collector or the district board until either party claims it. The rest of the plaintiffs' claim is dismissed. In view of the exaggerations on both sides in the course of this litigation and the fact that both parties claimed originally much more than they were entitled to, we think that the proper order as to costs of this litigation will be that each party shall bear their own throughout. We direct accordingly.

Decree modified.

PRIVY COUNCIL.

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January, 22, 24, 29, 31 *February*, 1, 25.

RAJINDRA BAHADUR SINGH (DEFENDANT) *v.* RAGHUBANS KUNWAR (PLAINTIFF).*

And two other appeals. Three appeals consolidated.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu law—Inheritance—Descent of taluqa in Oudh—Oudh Estates Act (I of 1869), sections 7, 8, 10, 22—Sanad granting descent by primogeniture—Properties subsequently acquired—'Accretions' and 'properties appurtenant to taluqa'—Properties purchased by taluqdar—Intention to vary descent—Substitution of villages by Government—Crown Grants Act (XV of 1895), section 2—Power of Crown to alter or limit descent—No such power in subject.

In British India the Crown has power to grant or transfer lands, and by its grant, or on the transfer, to limit in any way the descent of such lands. But a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent applicable to the particular lands or property so dealt with.

The present appeal related to a taluqa granted in 1861 by the Crown to a Hindu, the grant containing a condition that "in the event of your dying intestate or of your successor dying intestate the estate should descend to the nearest male heir according to the rule of primogeniture." On the death of one of the holders of the taluqa a suit was brought, which in 1905 came on appeal to the Privy Council for decision as to the succession to the deceased taluqdar's estate, and an Order in Council was made which declared that "the taluqa as constituted at the date of the sanad with accretions (if any) or properties (if any) appurtenant to the taluqa" passed to the appellant as the next male heir according to the rule of primogeniture; but that the residue of the property passed to the respondent, and the suit was remitted to India for determination under the Order in Council. There was no allegation of any family custom of primogeniture. On appeal from the final decrees of the Judicial Commissioner—

* *Present*—Viscount HALDANE, Sir JOHN EDGE, Mr. AMEER ALI, and Sir WALTER PHILLIMORE, BART.