APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

RAMBHAI DABHAI PATEL (ORIGINAL PLAINTIFF), APPELLANT *v.* VALLABHBHAI JHAVERBHAI PATEL (ORIGINAL DEFENDANT), RESPONDENT*.

1920. *October 12.*

Easement—Ancient right—Immemorial user—Easement of taking water for irrigation purposes through another's field—Easement by immemorial user—Prescription—Grant—Indian Easements Act (V of 1882), section 15.

The plaintiff used to take water for irrigating his field by a water course through the defendant's field, for upwards of thirty-five years past. The defendant admitted the plaintiff's right to take the water but contended that he could do so by a longer water course in the defendant's field. The defendant prevented the plaintiff in June 1909 from taking the water by the shorter way; whereupon the plaintiff sued in 1912 to restrain the defendant by injunction from obstructing him in his user:—

Held, that the plaintiff had established his right by immemorial user; and inasmuch as his claim did not rest on prescription under section 15 of the Indian Easements Act, 1882, it was unaffected by the defendant's obstruction in 1909.

THIS was an appeal under the Letters Patent from the decision of Macleod, C. J., reversing the decree passed by B. C. Kennedy, District Judge of Ahmedabad, which confirmed the decree passed by N. N. Master, Subordinate Judge at Nadiad.

Suit for injunction.

The plaintiff owned a field which was watered from a well in an adjoining field. The water used to be taken for nearly thirty-five years past, through an artificial water course along the eastern boundary of the defendant's field. The defendant admitted the plaintiff's right to the water, but contended that he used to take it through a longer water course which ran along the western boundary of the defendant's field.

* Letters Patent Appeal No. 77 of 1919.

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In 1896, the defendant's predecessor-in-title, Samal, passed an agreement to the plaintiff admitting his right to take the water through the shorter water course.

The defendant disputed the plaintiff's right and dug up the water course in June 1909.

In 1912 the plaintiff sued the defendant for an injunction restraining him from preventing the plaintiff taking his water by the shorter way. He relied also upon the agreement of 1896.

The trial Court held that the defendant was bound by the agreement of 1896 and decreed the plaintiff's claim.

On appeal, the District Judge was of opinion that Samal's agreement, though proved, was not binding on the defendant; that the obstruction of 1909 would have been fatal to plaintiff's claim if he had rested his claim on prescription; but that the plaintiff was entitled to the injunction sought, as he had established the "ancient way for taking water".

On appeal to the High Court this decree was reversed and the suit dismissed by Macleod, C. J.

From this decision an appeal was preferred under the Letters Patent, and came before Shah and Crump, JJ.

I. N. Mehta, with *M. K. Thakore*, for the appellant.

G. N. Thakor, for the respondent.

SHAH, J. :—The plaintiff in this case sued for an injunction restraining the defendant from preventing him from taking water into his field, Survey No. 729, by the artificial water-course by the eastern boundary of the defendant's land, Survey No. 730, marked B in the plan, Exhibit 11. The water is carried from the well which

is shown in the plan in the north of these two fields. It is contended that the plaintiff has no right to carry the water by that route, though he may have the right to carry it by the longer route running by the western boundary of the Survey No. 730, marked C in the plan. The plaintiff based his claim upon an ancient right to take water to his field by the shorter route as alleged by him and also upon the acquisition of such right by prescription, i.e., by twenty years' user as provided in section 15 of the Indian Easements Act. He also referred to an agreement which was arrived at between his father and one Samal Manor who was an agnatic relation of the defendant. The trial Court raised a general issue as to whether the water-course in question was proved and found it in the affirmative. The trial Court granted the injunction asked for.

The defendant appealed to the District Court which held that the agreement between the plaintiff's father and Samalbhai was not binding upon the defendant. It also held that the title by prescription under section 15 of the Indian Easements Act was barred, as an obstruction to the easement in question was caused more than two years prior to the date of the suit. The appellate Court, however, held that the ancient way for taking water as alleged by the plaintiff was proved by the oral evidence in the case, and further observed as follows :— "As the water has passed by the way claimed from time immemorial, it follows that it was agreed between all the then land-holders, including the holder of defendant's land, that the plaintiff's water should pass that way. The plaintiff did not, therefore, acquire this right by prescription, but by agreement and grant." Accordingly the appellate Court dismissed the appeal. The defendant then preferred a second appeal to this Court. This appeal, which was heard by the learned Chief Justice, was allowed, and the

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plaintiff's suit dismissed with costs throughout. This decision, as I read it, is based mainly on the ground that the only mode of acquisition, pleaded in the case apart from the agreement of 1896, was that provided by section 15 of the Indian Easements Act and that no question was raised that the right had been used from time immemorial. It is also based upon the ground that there was no evidence in the case to prove the real agreement which the appellate Court purported to find. At the close of the judgment, it is observed as follows :—"He gets the water by a slightly longer route, but it has not been proved how the water came before the Indian Easements Act or the Indian Limitation Act was passed. The water coming by the longer route is just as good as the water that comes by the shorter route. Therefore it cannot be said he has suffered any injury from the defendant's obstruction to the shorter water-course. If it had been otherwise, I have no doubt I might have endeavoured to find some way of remedying the injury to the plaintiff which undoubtedly he would be suffering under. But here there is no injury."

From this decision the present appeal is preferred under the Letters Patent. It is urged in support of the appeal that the plaintiff relied not only upon the acquisition of the easement under section 15 of the Indian Easements Act but also upon his ancient right to use the water-course described in the plaint. It is urged that the plantiff's case was based upon an ancient right, that is, in effect, upon immemorial user. It is urged that the District Court has in fact found in favour of the plaintiff as regards the ancient right and the immemorial user, and that that finding ought to have been accepted in second appeal.

It is common ground before us that the plaintiff's claim, so far as it is based upon section 15 of the Indian Easements Act, is rightly disallowed. The obstruction

to the plaintiff's right admittedly occurred more than two years prior to the date of the suit and any claim based upon section 15 of the Indian Easements Act is barred. The case, so far as it is based upon the specific agreement of 1896, has been negatived by the District Court. The view taken by that Court that the agreement is not binding upon the defendant is not challenged before us.

The only question, therefore, in the appeal is whether the plaintiff's claim based upon the allegation of ancient right to take the well water by the artificial water-course along the eastern boundary of the defendant's field can be allowed. On behalf of the defendant it is argued that there is no specific allegation in the plaint as to immemorial user and that the allegation as to ancient right cannot be read as implying any case of immemorial user. It is further urged that the issues framed in the trial Court and the District Court were not specific enough to raise the question of immemorial user, and that the evidence led to prove the user with reference to the point arising under section 15 of the Indian Easements Act cannot properly be treated as supporting the inference as to immemorial user. It is also urged that the user in the present case extends over thirty to thirty-five years at the most, and that the user for such a limited period cannot be treated as a basis for the acquisition of the easement in question. It is also contended that though the agreement of 1896 is not binding upon the defendant, it shows that the user by the plaintiff was under the agreement and not as of right. Lastly it is suggested that the case made by the plaintiff with reference to this agreement is really inconsistent with any ancient right.

I have so far set forth the rival contentions urged before us on both sides. It seems to me, however, that the decision of this appeal must depend upon the view

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we take of the finding of the lower appellate Court as to the ancient right, and immemorial user. It is not disputed in this case that the plaintiff has the right to use the well water. It is not disputed that he has the right to take the water to his field by the longer route, which has been indicated in the plan. Thus in any event the plaintiff has the right to carry the well water to his field.

The question is whether he has the right to take it to his field by the shorter route along the eastern boundary of the defendant's field. There is no allegation in this case and there is no evidence as to when this well was built or as to whether any arrangement was arrived at, at the time when the well was built, among the owners of the adjoining field as to the passages by which the owners of the adjoining fields were to take water to their respective fields. The District Court has found that the ancient way for taking water as alleged by the plaintiff is proved by the oral evidence in the case. There can be no doubt that there is evidence in support of this finding. So far it seems to me that it is a question of fact based upon the evidence in the case. The learned District Judge was also of opinion that the water passed by the way in question from time immemorial. It is quite true that the expression "immemorial user" is not used in the plaint. The plaint shows that an allegation as to the ancient right to carry water by this way was, as distinguished from the right acquired under section 15 of the Indian Easements Act, made in the plaint. That allegation could refer only to the acquisition of the easement by "immemorial user" as distinguished from prescription under section 15 of the Indian Easements Act.

I think that though the expression "immemorial user" is not used in the plaint, that was involved in the

plea of ancient right, which was distinctly alleged in the plaint. Such user is found by the District Judge. He has drawn from the finding as to immemorial user the inference that the plaintiff acquired this right by agreement or grant. He calls it real agreement as distinguished from a fictitious or presumptive agreement or grant. It seems to me that it makes no difference whether the agreement or grant thus inferred is called "real", "presumptive" or "fictitious". That is a matter of words rather than of substance. The question is whether there has been user for such length of time as would give rise to the inference as to immemorial user, from which an agreement or grant can be inferred. If we take the finding of the District Court, the case seems to come very near the decision in *Maharani Rajroop Koer* v. *Syed Abul Hossein*[1]. At page 247 their Lordships of the Privy Council, after quoting the finding from the judgment of the High Court, observe as follows :—"This being an artificial pyne, constructed on the land of another man at the distant period found by the Courts, and enjoyed ever since or at least down to the time of the obstructions complained of by the plaintiff and his ancestors, any Court which had to deal with the subject might, and indeed ought, to refer such a long enjoyment to a legal origin, and, under the circumstances which have been indicated, to presume a grant or an agreement between those who were owners of the plaintiff's mehal and the defendants' land by which the right was created. That being so, the plaintiff does not require the aid of the statute." The statute there referred to was section 27 of the Indian Limitation Act of 1871. The statute applicable to this case is section 15 of the Indian Easements Act. In that case the user found was possibly for fifty or sixty years and certainly for more than twenty years. In the

[1] (1880) L. R. 7 I. A. 240.

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present case the period is about thirty-five years and certainly more than twenty years. It seems to me that the observations in that case apply to the present case. This case was relied upon by this Court in *Punja Kuvarji* v. *Bai Kuvar*[1]. The facts there found are somewhat similar to the facts of the present case with this difference that the length of the user is not indicated in the report, but it was found generally that the right had been enjoyed from time immemorial. It has been suggested in the course of the argument before us that immemorial user or ancient right cannot be inferred from user extending over a period of thirty-five years, but no case has been cited to us in which the minimum limit of time, which would justify the inference as to immemorial user, has been laid down. It would appear from the observations in the case of *Maharani Rajroop Koer* v. *Syed Abul Hossein*[2] that their Lordships did not lay any particular emphasis upon the number of years so long as it was in excess of twenty years. It seems to me that no such limit can be definitely laid down. It must depend upon the circumstances of each case. The question whether immemorial user or ancient right is established in any case must depend upon the evidence and the circumstances of that case. In the present case the District Judge has been satisfied as to the existence of the ancient right and the immemorial user.

The practical inconvenience to the plaintiff, if he is prevented from taking water by the shorter route and required to take it by the longer route, is a matter which cannot affect the point of law with which we are concerned. But, as that matter has been referred to in the argument, it seems to me that the practical inconvenience to the plaintiff would be appreciable

(1) (1881) 6 Bom. 20.

(2) (1880) L. R. 7 I. A. 240.

if he has to take water from the well by the longer route. It would certainly mean greater labour and greater loss of water on the way. It is a distinct advantage to him to have the water by the shorter route, if he is otherwise entitled to it.

I may briefly notice the other contentions which I have already set forth. I do not think that the agreement of 1896 is either inconsistent with the immemorial user or that it shows any interruption in the enjoyment of the easement in 1896. It seems to me that the defendant, who is not bound by the agreement, cannot rely upon this agreement as showing that the enjoyment of the easement was under the agreement. If the agreement is not binding upon him, the user is as of right as against him and not under the agreement. The agreement with a third person does not make the user in any sense permissive, so far as the defendant is concerned. If the agreement had any validity at all against him it seems to me that the defendant would be bound by it, and he would have no answer to the plaintiff's claim. The mere fact that there is a recital as to some dispute between the parties at the date of the agreement does not, in my opinion, indicate any interruption in the enjoyment of the right. There is nothing in the agreement to justify the suggestion that the user was interrupted. I do not think that the fact that the plaintiff has relied upon this agreement of 1896 is in any sense inconsistent with the acquisition of his right in any of the two alternative modes, which are set forth in the first paragraph of the plaint.

On the whole it seems to me that out of the two modes of acquisition relied upon in that paragraph, that referable to section 15 of the Indian Easements Act was negatived. The other mode was open to him

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and he has been able to establish it to the satisfaction of the District Court. Having regard to the terms of the plaint, I think that this mode is not outside the pleadings. It seems to me on the judgment of the learned Chief Justice that if he was satisfied that the plea of ancient right—or rather immemorial user—was within the scope of the plaint he would probably have taken the same view of the case as we do.

I would reverse the decree appealed from, and restore that of the trial Court with costs throughout on the defendant.

CRUMP, J.:—I agree. The case made by the plaintiff in his plaint was clearly in the alternative. He set out specifically that his right was of a very ancient origin and that on that account and also on account of twenty years' user he was entitled to take water from the well by the channel in suit. That is, in my opinion, a sufficient plea of immemorial user. When I consider the manner in which the Courts dealt with this plea apparently without objection from the defendant I am confirmed in the conclusion that the parties so understood it.

The first Court in reality dealt with three points. It held that the specific agreement in 1896 on which the plaintiff also relied was not binding upon the defendant. It also held that the plaintiff had acquired an easement in the method permitted by section 15 of the Indian Easements Act, that is to say, by twenty years' enjoyment. It further held that there must have been an arrangement between the persons by whom the well was built though it remarked that that arrangement was not definitely proved. This latter finding is in reality only one aspect of the plea of immemorial user or ancient right which was set up in the plaint. The lower appellate Court also dealt with these three points but the judgment is not as specific as could have been desired. The District Judge found that there was an ancient

right to take water by the channel claimed by the plaintiff and further that the agreement of 1896 was not binding on the defendant, and that the plaintiff could not rely upon the acquisition of an easement in the manner allowed by section 15 of the Indian Easements Act because two years had elapsed since his enjoyment had been interrupted. But with reference to the ancient user which the District Judge has held established he came to the conclusion that from the evidence in the case, which shows an user of at least thirty-five years as also from the situation of the property considered in the light of the plaintiff's admitted right to use water from the well, the inference was that when the well was built, the persons using the well, of whom the plaintiff's ancestor was admittedly one, agreed between themselves that the plaintiff should take the water by the shortest route to his land. That appears to me to be a finding of fact and I do not see that in arriving at that finding the learned District Judge has fallen into an error of law. When he draws a distinction between a real agreement and a fictitious or presumptive agreement I do not precisely understand what he means, but, though it is true that there is no direct evidence of any such grant or agreement as he has found proved, the circumstances are such as to entitle him to infer an agreement such as he has found in this case. It was not necessary for the purpose of that finding that there should be any direct evidence, indeed there could not be, in the circumstances of the case. It was open to him to find from the oral evidence that the user is of ancient origin. It was open to him to infer from the plaintiff's right to take the water read along with the ancient user that there must have been an arrangement such as is found to exist. It appears to me also that it was open to him to rely upon the agreement of 1896 not as binding upon defendant but as evidence to show

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that the plaintiff's right had been admitted at the date of that agreement. Upon all these grounds his conclusion was one which he was entitled to form and is not, in my opinion, one which should be disturbed in second appeal. I, therefore, agree with the order proposed by my learned brother.

Decree reversed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Fawcett.

1920. *October* 15.

BAI DHANLAXMI, DAUGHTER OF MANILAL UTTAMRAM (ORIGINAL DEFENDANT No. 2), APPELLANT *v.* HARIPRASAD UTTAMRAM DESAI AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 1), RESPONDENT*.

Will—Hindu testator—Creation of estates unknown to Hindu law—Invalidity of bequests—Indian Succession Act (X of 1865), section 118.

A Hindu made his will whereby he bequeathed his property successively to the three sons of his sister in the following manner. In the first place, it was to go to one of the sons absolutely, subject to the condition that, if he died without male issue surviving, it was to go to the second. The latter was also given an absolute estate, similarly liable, however, to be defeated if he in his turn died without leaving male issue, in which event the property was to go to the third son subject to a similar condition. Ultimately the property was devised in favour of charity. The first two sons having died without male issue surviving, the third son sued for construction of the will and for a declaration of his right to the property in the events that had happened :—

Held, that although the testator might have defeated the absolute estate which he gave to the first son by a gift over to the second son in accordance with the provisions of section 118 of the Indian Succession Act, he could not attach a condition to the gift over, and thus further restrict the devolution of the estate in a manner unknown to Hindu law by directing that the second son was not to take an absolute estate, but what would be, in the language of the English law of real property, "an estate in tail male."

Held, further, that the estates which were intended to be created by the testator being thus in fact a succession of estates in tail male, the original gift over was bad in its creation and failed absolutely, and the first son took an absolute estate, which on his death would go to his daughter as his heiress.

* First Appeal No. 29 of 1919.