that the judgment-debtor in this case was vigilant over his own interest, or took any action in the matter. It may be that he had no notice of what was going on. I have no objection to the case standing over for three weeks as proposed by my learned colleague.

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BANDHU ROY v. HANUMAN SING

Before Mr. Justices Kemp and Mr. Justice Markby.

RUPCHANDRA GHOSE (PLAINTIFF) *v.* RUPMANJARI DASI (DEFENDANT).*

1869 *Aug* 4.

User—Prescriptive Right—Period of Time to create.

No period has been definitively fixed to create a right by prescription. There is no decision to the effect that a finding that the user has lasted for at least 12 years is necessary, or that such a finding of a user for 12 years would be conclusive. *See Kartic Chandra Sirkar* v. *Kartic Chandra Dey* (1) *Krishna Mohan Mookerjee* v. *Jagannath Roy Jugi* (2) explained

THE plaintiff sued on the allegation that the defendant had without her consent opened a water passage on the southern side of her tank, and irrigated her lands: that the defendant had no prescriptive right thereto; and prayed that the defendant might be restrained from so doing, and that the passage opened by her may be closed, as well as for recovery of damages and the value of water taken. The defence set up was that the defendant had a prescriptive right to irrigate her lands by water from the defendant's tank, and that the water passage was opened in the exercise of that right.

The defendant called three witnesses. Witness No. 1 deposed that he had seen the land of the defendant being all along irrigated from the tank of the plaintiff. Witness No. 2 deposed that he was a laborer and had once, ten or fifteen years ago, irrigated the land of the defendant with the water of the plaintiff's tank. Witness No. 3, who was 60 years old, deposed that he had seen for 10 or 12 times the land of the defendant being

* Special Appeal, No. 324 of 1869 from a decree of the Judge of Beerbhoom, dated the 5th November 1868, reversing a decree of the Moonsiff of that district, dated the 12th June 1868.

(1) 3 B. L. R., A. C., 166. (2) 2 B. L. R. A. C., 322.

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irrigated with water from the plaintiff's tank, but could not say how long ago.

To rebut this evidence the plaintiff called six witnesses who deposed that they never saw defendant's lands being irrigated with water from the plaintiff's before 1272 (1865) when an order to do so was given by the Criminal Court.

The Moonsiff passed a decree in favor of the plaintiff restraining the defendant from irrigating her land by water from the defendant's tank.

On appeal the Judge found that the existence of the user was proved by the evidence of defendant's witnesses from a time from which a right would be gained, and that this evidence had not been rebutted by the evidence adduced by the plaintiff. He accordingly dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Baboo *Bani Madhab Roy*, for the appellant, contended that uninterrupted, undisturbed, and continuous user for at least a period of 12 years was necessary to create a prescriptive right. *Joy Prokaus Sing* v. *Ameer Ally* (1), and *Kartic Chandra Sirkar* v. *Kartic Chandra Dey* (2). The evidence upon which the ower Appellate Court relied did not show that the defendant had been in the enjoyment of the user for upwards of 12 years. The expression "*barrabar*" (all along) is not sufficient. *Mooktaram Bhuttacharjee* v. *Huro Chunder Roy* (3).

Baboo *Ambika Charan Banerjee* for the respondents was not called upon.

KEMP, J.—This was a suit to have a drain, dug for the purposses of irrigation, closed and to recover damages, namely, 01 rupees for 10 haths of land in length and 7 haths in breadth, and 9 rupees, the price of the water. The first Court decreed the plaintiff's claim. The Judge in appeal has reversed the decision of the first Court, and has found that the existence of the user had been proved from a time from which a right would be gained, and that the plaintiff's witnesses have not rebutted this

(1) 9 W. R. 91. (2) 3 B. L. R. A. C, 166. (3) 7 W. R., 1.

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fact; but, on the contray, have admitted that the defendant has irrigated from the tank for upwards of two years. In special appeal it is contended that the Judge is wrong in deciding that the defendant acquired a right of user when the depositions of the witnesses do not prove such a continuous and uninterrupted user as would be sufficient in law to establish a right by prescription, and that the testimony of the defendant's witnesses is too vague to establish the right claimed by her. I am of opinion that this special appeal must be dismissed. It is clear that the right has been admittedly enjoyed by the defendant for upwards of two years; it is also in evidence that there was a dispute in the Criminal Court about this right, and that an order was passed in favor of the defendant, and the Court may therefore assume that she was in the enjoyment of that right when that order was passed. There is evidence on the part of the defendant, which the Judge has believed, of one witness who deposes that the defendant has all along and therefore continuously irrigated from this tank; another witness deposes that about 10 or 15 years ago the defendant irrigated from this tank; and a third witness, who is now 60 years old, deposes that for as long as he can remember, or from his boyhood, he had seen the defendant in the enjoyment of this right. There is no decision of this Court which has definitely decided what period would confer a right of prescription in cases of this description. Opinions have been given on various occasions by different Benches and by different Judges, but there has been, as far as I am aware, no definite decision on the subject. The learned Chief Justice in the case of *Joy Prokaus Sing* v. *Ameer Ally* (1), says, that he is inclined to think that by analogy to the Indian Limitation Act, an adverse and uninterupted user of an easement for 12 years would confer a right to it, but he carefully abstains from pronouncing any decision on the point, observing that it had not been argued before him, and that any decision would at most amount to a dictum; but in the case referred to, in ordering the case to be remanded, the learned Chief Justice directed that the Judge of the lower Appellate Court should find whether

(1) 9 W. R., 91.

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the user was or was not so ancient as to confer a right by prescription. In this case I think that the Judge on the evidence before him was justified in finding that there had been such an ancient user, uninterrupted and continued, as to confer a right by prescription. The special appeal is therefore dismissed with costs.

MARKBY, J.—I am of the same opinion. The Judge finds that there has been a user from a time from which a right would be gained. The special appellant in his grounds of appeal objects that some of the witnesses do not prove such a continuous and uninterrupted user as is sufficient in law to establish a right by prescription; and that the testimony of the witnesses is too vague to establish the right claimed by the defendant. With regard to his second objection, I think the evidence does establish in this case that the user has been continuous, and that it has lasted for a very considerable period, extending much beyond 12 years. As far as I can understand, the ground which has been argued before us on the first objection is not precisely that which has been taken, but rather this that the Judge's finding is defective, because he does not find as a fact that the user has lasted for more than 12 years. Now I entirely agree with Mr. Justice Kemp that there is no decision of this Court from the first to the last which says, either on the one hand that a finding that the user has lasted for at least 12 years is necessary, or that such a finding of a user for 12 years would be conclusive. None of the decisions of this Court appear to have fixed any distinct or definite period within which a right of this kind by continuous user can be gained. In saying this, however, I do not wish in any way, to throw any doubt upon the wisdom of the observations of those Judges who have thought proper to advise Judges in the lower Appellate Courts, who are Judges of fact, not to infer a right from a user of less than 12 years; and I was very much taken by surprise to find that it was supposed I had said, in the case of *Krishna Mohan Mookerjee* v. *Jagannath Roy Jugi* (1), that a user of 5 or 6 years without any

(1) 2 B. L. R., A. C., 323

thing else was, in my opinion, sufficient to confer a right. Judgment in that case was based precisely on the same ground upon which the judgment of Mr. Justice Kemp and mine are based in the present case, namely, that where there is evidence showing a long and continuous user, it is sufficient for the Court to find whether it has or has not lasted long enough to confer the right to it without particular reference to any specific number of years. The observation as to evidence of a user for 4, 5, or 6 years only being possibly sufficient in certain cases, was made in that case, not by me, but by my learned colleague Mr. Justice Jackson. Not having consulted him I have no authority to place any interpretation upon the words of his judgment, but from what passed between us on that occasion, I should be extremely surprised if his words could bear the meaning which has been sought to be placed upon them, namely, that a user of 5 or 6 years alone, without anything more, and without any special circumstances in the case, would be sufficient to confer a right by prescription. As I have said before, I have no authority to place any interpretation upon the words used, but I certainly do think that Mr. Justice Jackson did not mean that, and that he never had any intention, as far as I know his opinion, to say anything of the kind.

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RUPCHANDRA GHOSE *v.* RUPMANJARI DASI.

Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.

SASHI BHUSAN BANERJEE (PLAINTIFF) *v.* TARACHAND KAR AND OTHERS (DEFENDANTS)*

1869 May 29

Evidence—Unstamped Bond—Intention to evade the Stamp Laws.

A bond executed between a plaintiff, who sued upon it, and the defendants, contained the following clause. "And inasmuch as we (the defendants) are "urgently in want of money, and are unable to procure a stamp at the "moment, we have executed the bond on plain paper. Should it be necessary "for you (plaintiff) to bring a suit against us, whatever penalty you may "have to pay shall be made good by us, with interest."

The Small Cause Court Judge, before whom the case was tried, considered the above clause in the bond to be evidence of an intention between the parties to avoid the stamp law, and refused to receive evidence to the contrary. He also

* Reference from the Judge of the Small Cause Court at Ranaghat.