Before Mr. Justice L. S. Jackson and Mr. Justice. Markby.

KRISHNA MOHAN MOOKERJEE AND ANOTHER (DEFENDANTS) *v.* JAGANNATH ROY JUGI AND OTHERS (PLAINTIFFS.)* 1869 *March* 13.

Prescription—Evidence—Ancient Right.

No fixed period has been laid down within which a right by prescription may be gained in this country. The evidence must be such as to justify the Court in inferring the existence of a valid ancient right, having regard to the nature of that right and the circumstance under which it has been exercised. See Act XV of 1877 Part IV.

THIS was a suit to establish an alleged right to use the waters of a tank for irrigation, and also to recover from the defendant the sum of rupees 28, as damages occasioned to the plainitiff by the defendants' interruption of the use of the right, whereby the plaintiffs' crops had been dried up and ruined.

The Moonsiff gave the plaintiff a decree, on the ground that he had established the existence of the right in question; and being also of opinion that he had suffered some damage, although it was uncertain what the amount of that damage was, the Moonsiff directed that the precise amount should be ascertained in execution of the decree. The defendant appealed to the Zilla Court, and the Subordinate Judge confirmed the decision.

The point was raised in special appeal that the plaintiff having failed to prove the existence and use of the right which he claimed for a period of at last 12 years, no decree declaring that right ought to have been passed.

Baboo *Nalit Chandra Sen* for appllants.

Baboo *Nabakrishna Mookerjee* for respondents.

JACKSON, J.—I think we are not called upon to reverse the decision of the Courts below. I am not aware that, in any case yet decided, it has been finally laid down that any particular

* Special Appeal, No. 2227 of 1868, from a decree of the Subordinate Judge of West Burdwan, dated the 21st May 1868, affirming a decree of the Moonsiff of Bishtopore, dated the 18th March 1868.

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period is necessary to the establishment generally of what is called a prescriptive right. The Legislature has, probably, with very good reason, abstained from laying down any precise rule, and it is not, I think, the province of the Courts to usurp the functions of the Legislature, and to lay down a positive rule. It seems to me that cases are quite conceivable in which the plaintiff might not be able to give evidence of actual use for more than four or five, or six years, and yet the circumstances might be such that a Court would be warranted in inferring the existence of a right. In this case the plaintiff went very much beyond that. He called witnesses, of whom one went to prove the enjoyment of this right for 10 or 20 years; another for 10 years; and the third from a period extending as far back as he could remember. I think that the Courts below intended to infer, from that evidence, the existence of a valid ancient right, and that they were justified in so doing.

The respondents are entitled to their costs in this appeal.

MARKBY, J.—I am of the same opinion. I think it is quite clear that in this country, while the law recognises that rights may be gained by long and continuous enjoyment, or, in other words, by prescription, no fixed period has been laid down, within which such right may be gained. It is true that there are some considerations which would make it convenient to have such a recognised period; but, on the other hand, it is perfectly clear that the circumstances under which the right is exercised, and the nature itself of the right which is claimed, would give rise to very different inferences in different cases as to the existence of the right, and this would render the fixing of an arbitrary period unadvisable.

The vakeel for the appellant has attempted to show that a certain fixed number of years has been defined as the period within which the existence of this right may be inferred, and has relied upon the case of *Joy Prokash Sing* v. *Ameer Ally* (1). But I think it is perfectly evident, upon a consideration of that case, that the Chief Justice, who delivered the judgment, sitting with Mr. Justice Dwarkanath Mitter, most carefully abstained from

(1) 9 W. R., 91.

laying down any such thing. In that case the Zilla Judge, upon ascertaining that it was impossible that the right could have existed for more than 25 years, came at once to the conclusion that the claim of right, by prescription, could not be established. The Court held that, in coming to that conclusion on that ground, he was wrong, and remanded the case to him for re-consideration, with the directions "that the Judge should find whether the "right was exercised and was ancient, that is to say, whether "it was so ancient as to confer a right;" and the only passage in which any defined number of years is mentioned, is where the Chief Justice says:—"I am inclined to think that, by analogy "to the Indian Limitation Act, an adverse and uninterrupted "use of an easement for 12 years would confer a right to it." That, in itself, is not an expression of a final opinion, but an expression of an inclination of opinion; and it is by no means an expression even of an inclination of opinion that a period of 12 years would, in all cases, be necessary and sufficient. But, in truth, it is not an expression of any opinion all, but only an expression of what was passing through the Judges mind at that time. The Chief Justice, seems to me, expressly to guard himself from giving a final opinion, in the direction to the Zilla Judge, which is the important part of the judgment, only says that the exercise of the right must be "so ancient as to confer a right," leaving it wholly undefined what that period would be. It appears to me that, all that the Judge in this case has considered is, whether the evidence establishes satisfactorily that the user has been sufficiently ancient to support the claim, and he considers that it does so. There is upon the record ample evidence to support that finding, and I think it is sufficient, although the Judge does not find specially for what number of years the right has been enjoyed.