defendant had, in fact, got into possession of this property as widow, with the consent of the other heirs of the husband, in satisfaction of her claim of dower.

The fact of dower has been admitted throughout, and, indeed, it appears that plaintiff's counsel, on questions being put to him, did also admit the amount of dower as stated by defendant. This latter admission, however, which is now repudiated, appears to be immaterial. When the plaintiff thinks fit to bring a suit against the defendant for an account of her husband's estate, which she holds in lieu of her claim for dower with interest, that will be the proper time to determine what the dower really was, and how matters stand between the widow and the heirs. At present, all that can be determined is, whether the plaintiff is entitled to recover possession of the estate from the hands of the widow when the claim for dower remains unsatisfied.

It appears to me that, under the circumstances of the case, we ought to hold that the widow's possession was referable to her claim for dower; and that, as that claim has undoubtedly, under the Mahomedan Law, precedence over the claim of the heirs, the heirs should not be allowed to succeed in this suit, and turn her out of possession without satisfying her claim.

That being so, I think the suit ought to have been dismissed; and, therefore, that this appeal ought to be dismissed with costs.

Ainslie, J.—I concur.

The 24th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Onus probandi.

Cases Nos. 1810 and 1811 of 1870.

Special Appeals from a decision passed by the Judge of Bhaugulpore, dated the 1st June 1870, affirming a decision of the Subordinate Judge of that District, dated the 29th March 1869.

Mr. P. T. Onraet and others (Defendants), *Appellants,*

versus

Kishen Soonduree Dossee (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Baboo Nil Madhub Sein* for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

In the suit for the removal of certain outlets made by defendant in an aqueduct, on the ground that plaintiff was entitled to the exclusive use of the water of the aqueduct, where the defence set up was that the portion of the aqueduct to which the dispute related was where water flowed through the lands of the defendant's zemindary:

HELD that it was for plaintiff to make good the title he alleged.

Mitter, J.—THESE special appeals are admitted to be governed by one and the same decision here.

This suit was instituted by the plaintiff for the removal of three *singhas* or outlets made by the defendant in a certain aqueduct called the Rajdar, upon the ground that she was entitled to the exclusive use of the waters of that aqueduct.

The defence set up was that the portion of the aqueduct in which the disputed *singhas* have been constructed is where water flows through the lands of the defendant's zemindary, and that the plaintiff has no right to the exclusive use of the water thereof.

Both the Lower Courts gave a decree to the plaintiff upon the ground that the defendant had failed to prove that the *singhas* in question were ancient constructions, as alleged by him in his written statement; and that the plaintiff's title to the exclusive use of the waters of the Rajdar had been established in the case reported in page 218 of the Sudder Dewanny Decisions for 1856.

We are of opinion that the mode in which the Lower Courts have dealt with this case is erroneous in law.

The defendant was not a party to the above case of 1856, and it is, therefore, clear that the decision passed in that case cannot be used as evidence against him.

Besides, it is manifest that that decision related to a branch of the Rajdar distinct from the one now in dispute. Both the branches may be called by one and the same name; but this circumstance is by no means sufficient to render a decision passed with reference to one of them necessarily applicable to the other.

Moreover, the said decision was passed upon the ground that the branch of the Rajdar then in dispute flowed through lands

belonging to the plaintiff's zemindary; and the learned Judges were, therefore, quite justified in holding that it was upon the defendant to show by what right he claimed to use the waters of an aqueduct constructed by the plaintiff upon her own land and at her own expense. The defendant in the presen case has been throughout contending that the land through which the disputed branch flows does not belong to the plaintiff, and it was, therefore, for the plaintiff to show that she was entitled to use it exclusively for her own purposes.

The case is, therefore, remanded to the Lower Appellate Court for the determination of the question how and upon what title the plaintiff has proved his claim to an exclusive right to the use of the waters of the disputed portion of the Rajdar. The costs of this appeal and of the Lower Courts will abide the ultimate result.

The 27th January 1871.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Rights—Prescription—Issues.

Case No. 1327 of 1870.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, dated the 26th May 1870, reversing a decision of the Sudder Moonsiff of that District, dated the 28th December 1869.

Bhoobun Mohun Mundul and another (Defendants), *Appellants,*

versus

Rash Beharee Paul (Plaintiff), *Respondent.*

Baboos Sreenath Doss and *Hem Chunder Banerjee* for Appellants.

Baboo Romesh Chunder Mitter for Respondent.

In a suit for the removal of a pucca building recently erected by defendant upon land lying between the premises of the two parties to the dispute, where plaintiff's claim to use the land had been put upon his title as owner:

HELD that, having failed to make out the case originally set forth in the plaint, plaintiff had no right to fall back upon a title by prescription.

HELD that plaintiff's claim must stand or fall upon the strength of his own right, not upon any such finding as that defendant was not entitled to the exclusive use of the land.

Mitter, J.—THE dispute in this case relates to a small piece of land lying between the premises of the two contending parties.

The defendant has recently erected a pucca building upon this land, and the plaintiff seeks to have that building demolished upon three distinct grounds, namely, first, that a portion of the land upon which the building has been erected is his own property; secondly, that he has a prescriptive right to use the remainder as a pathway; and, thirdly, that the erection of the building has deprived him of the use of light and air in his own house.

The Moonsiff, who tried this case in the first instance, after holding a local investigation in person, and going carefully through the evidence on the record, came to the conclusion that the action was without any valid foundation whatever. He found that the plaintiff had completely failed to prove that he was entitled to any portion of the land in dispute, that the alleged right of way did not exist, and that the mere obstruction of one out of several openings in the plaintiff's kitchen could not entitle him, in the absence of all proof of legal right, to have the defendant's building pulled down.

This decision has been reversed by the Judge on appeal, and the present special appeal has been accordingly preferred to us by the defendant.

We are of opinion that the decision of the Lower Appellate Court is erroneous and unjust. After giving a short abstract of the Moonsiff's decision, the learned Judge goes on to say: "The erection of this new building "has deprived the plaintiff necessarily of "air and light, and has subjected him *to* "*other inconvenience*, as, for instance, in "diminishing his facilities of repairing his "wall; and if the defendant has infringed "on the plaintiff's right, whether of *ease-* "*ment or otherwise*, the plaintiff has a cause "of action, and he may claim to exercise "the right which he previously held of "opening doors and windows on the east "side of his house into the lane, if such "lane existed." This is all that the learned Judge has said upon the plaintiff's part of the case, and we are clearly of opinion that it is altogether insufficient to meet the requirements of the suit. The onus of proof was clearly upon the plaintiff, and it was, therefore, for him to make out, not merely that he has been subjected to some inconvenience by the