this court may make with regard to the costs of the present motion, and of the proceedings so removed to this court which may be hereafter incurred. Following the form of the precedent which I have mentioned, I think the record of the reasons for the removal should be in these words;—"And it appearing to this court conducive to the purposes of justice to make such order, and especially on the grounds set forth in the said affidavit of Charles Albert Winter, sworn on the 15th day of March 1871: It is ordered," &c.

1871.

Pirbhái Khimji v. B. B. & C. I. Rail. Co.

Order accordingly.

Attorneys for the plaintiff: *Jefferson & Payne.*

Attorneys for the defendants: *Keir, & Winter.*

Appeal No. 165.

April 29.

NAROTAM BÁPU .....(*Plaintiff*) *Appellant.*

GANPATRÁV PÁNDURANG.....(*Defendant*) *Respondent*

Prescription—Easement—Twenty Years' User—Act XIV. of 1859—*Indian Limitation Act,* 1871 (*Act IX. of* 1871).

Prior to the passing of Indian Limitation Act, 1871, in order to give rise to an easement by prescription over immoveable property in the island of Bombay it was necessary for a plaintiff claiming such an easement to prove twenty years' uninterrupted user of it.

THE plaint in this case stated that the plaintiff was possessed of a piece of land, with a house standing thereon, in Agiary Lane; that there was a *galli* on the west side of the house, about twenty four inches wide, which was the property of the plaintiff, and that the entrance to the *galli* from the street (Agiary Lane) was through a gate and thence over the land of the defendant, which had always been open ground, but shortly before the suit was brought had been built over by the defendant. The plaint, in its fourth paragraph, then stated that the plaintiff was entitled to a right of way from Agiary Lane through the gate over the open ground of the defendant, and back again, for him-

1871.

Narotám Bápu v Ganpatráv Pándurang.

self and his servants and workmen with or without poles timber, scaffolding, and building materials, at all times of the year. Para. V.: "The said *galli* was little used except when the plaintiff or his predecessors wanted to repair the west wall of the house, on which occasions poles and scaffolding were erected in the *galli*."

The plaint then went on to allege an obstruction of the plaintiff's said right of way by the defendant, and prayed, amongst other things, that the *galli* might be declared to be the property of the plaintiff, and that the plaintiff might be declared to be entitled to a right of way from Agiary Lane through the gate and over the said close, and back again, for himself and his servants' &c.

The defendant denied the plaintiff's right to the *galli*, and alleged that it was the defendant's property. He also denied that the plaintiff was entitled to the right of way climed in the 4th paragraph of the plaint.

The case came on for hearing before COUCH, C.J., on the 29th of January 1870, when six issues were framed, but the first and second only are material for the purposes of this report:—1*st*, whether the said *galli* in the plaint described was the *galli* of the plaintiff; 2*nd*, whether the plaintiff was entitled to the right of way described in the fourth paragraph of the plaint.

The evidence given at the trial showed that for more than twelve years prior to 1865 (when the easement was interrupted) the plaintiff had been in the habit of making use of the *galli* for the purpose of whitewashing and repairing the west wall of his house, and that the materials &c. had been carried over the defendant's open piece of ground, but the title-deeds of the premises clearly showed that the *galli* belonged to the defendant. The Chief Justice found the first and second issues in favour of the defendant.

From the finding on the second issue alone, the plaintiff appealed. The appeal came on for hearing before WESTROPP, C.J., and BAYLEY, J. Its hearing was concluded on the 15 of

December 1870, Counsel for the appellant at first contended that the evidence showed an uninterrupted user of the *galli* and its approach by the plaintiff and his predecessors for twenty years, but failing in that contention they argued that proof of twelve years' uninterrupted user was sufficient to establish the plaintiff's right.

Anstey and *Latham*, for the appellant:—Twelve years' user as of right is sufficient to entitle the plaintiff to the easement he claims in this case. The English Prescription Act (2 & 3 Wm. IV., c. 71) does not apply to India. What law then does apply? The answer is Act XIV. of 1859, Sec. 1., cl. 12. An easement or servitude over land is a fragment or piece carved out of the entire ownership, and is clearly "an interest in land." Of that interest the plaintiff has had possession for more than twelve years, and the defendant cannot now deprive him of that possession, for suits for the recovery of any interest in immoveable property must be brought within twelve years from the time when the cause of action arises, otherwise what was before mere possession becomes ownership. Possession for twelve years creates a title under the Act, and entitles the possessor to sue. Act XIV. of 1859 is thus in effect not merely an Act of limitation but also one of prescription. This is the view taken of the Act by the Lords of the Privy Council in the case of *Gunga Gobind Mundul* v. *The Collector of the 24 Pergunnahs*, where it is said: If he (the owner) suffer his right to be barred by the law of limitation, the practical effect is the extinction of his title in favour of party in possession; see Sel. Rep., Vol. VI., p. 139, cited in Macpherson, Civil Procedure, p. 81 (3rd ed.)" *(a)*, and at page 363 occurs the following dictum:—As between private owners contesting *inter se* the title to the lands, the law has established a limitation of twelve years; after that time it declares, not simply that the remedy is barred, but that the title is extinct in favour of the possessor." that case has been referred to and acted upon in three subsequent cases: *Khajah Enaetoollah* v. *Kishen Soondur* *(b)*, *Bissonath Komilla* v. *Brojo Mohun* *(c)*

(a) 11 Moo. Ind. App. 361. *(b)* 8 Calc. W. Rep., Civ. R. 386
(c) 10 Calc. W. Rep., Civ. R. 61.

1871.

Narotam Bápu v. Ganpatráv Pándurang.

and *Rajah Burodakant* v. *Prankristo Paroee* (*d*). There is also a case in Boulnois Reports P. 70, to the same effect. [BAYLEY, J. referred to *Bagram* v. *Khettranath Karformah*°]

If this construction of the Act is erroneous, then we contend that there is no statutory period of prescription applicable to the case, and that courts, in laying down the law as to the time when an easement will be acquired by prescription, must be guided by analogy to the existing law of limitation. It was thus that, in analogy to the statute of James (21 Jac. I.), the period of prescription was fixed in England at twenty years; *Doe dem. Harding* v. *Cooke* (*e*). Easements were looked upon as a *casus omissus* from the words of the statute, but as within its spirit the whole subject is discussed in the note to the case of *Yard* v. *Ford* in Williams Saunders (*f*). It will be said that the plaintiff here is seeking to establish a right, and not merely setting up a defence, as the easement has been discontinued; but that is immaterial. The old statute of James only barred the remedy, and did not in words confer a title or create a right in the possessor, but a person under that statute who had possession of land for twenty years was allowed to recover the land on the strength of such a title: Bacon's Abr., Vol. IV., p. 463, Tit. Limitation, B.; *Yard* v. *Frod*. He also cited on this point *Incorporated Society* v. *Richards* (*g*); *Burroughs* v. *M'Creight* (*h*); Taylor on Evidence, Vol. I., P. 89 para. 65 The current of authority in India is in favour of applying the analogy that we contend for: *Sri Viswambhara Rajendra* v. *Sri Suradhi Charana* (*i*), *Joy Prokash* v. *Ameer Ally* (*j*), *Kartik Chander Sirkar* vi *Kartik Chandra Dey* (*k*), *Kristo Chunder Chuckerbutty* v. *Kristo Chunder Burnick* (*l*) *Durga Churn* v. *pearee Mohun* (*m*).

McCulloch and *Farran*, for the respondent:—Act XIV. of 1859 is an Act passed with regard to procedure, and never

(*d*) 12 *Ibid.* 192.
° 3 Beng. S. Rep. G. J. 18.
(*e*) 7 Bing. 346. (*f*) 2 W 175 e.
(*g*) 1 Dr. & W. 258. (*h*) 1 Jon. & L. 299
(*i*) 3 Mad. H. C. Rep. 111. (*j*) 9 Calc. W. Rep., Civ. R. 91
(*k*) 3 Beng. L. Rep., A. C. J. 166. (*l*) 12 Calc. W. Rep., Civ. R. 76
(*m*) 9 Calc. W. Rep., Civ, R. 283.

1871.
Narotam Bápu v. Ganpatráv Pándurang.

was intended to terminate or create rights. Its preamble and first section show clearly that that is its scope: "Whereas it is expedient to amend the laws relating to the limitation of suits, it is enacted as follows:—(1) *No suit shall be maintained*, in any Court of Judicature, &c., unless the same is instituted within the period prescribed by the Act." The distinction between statutes of limitation which bar the remedy, and statutes of prescription which confer a title, has always been recognised by jurists. It was probably intended to supplement Act XIV. of 1859 by a prescription Act, but that has not yet been done. The case in Moore's Indian Appeals was decided under an old Bengal Regulation, and does not affect the present case. If the appellant were in the position of a defendant in possession, the section relied upon might avail him. It is then contended that the Court ought to act upon the analogy of Act XIV. of 1859, and fix a prescriptive period, as the Judges in England have done in analogy to the statute of James; but the Judges here are not in the same position. The law as administered in this Island by the Supreme Court definitely fixed the period of prescription at twenty years; that law is as binding on this court as if it had been enacted by the Legislature, and will so continue until altered by the Legislature. That the existing *statute* law was not affected by Act XIV. of 1859 appears from the cases of *Anaji Dattashet* v. *Morushet Bapushet* (*n*), *Bembhau* v. *Bai Bapushet* (*o*). How then can judge-made law, which is equally binding, be affected? All the cases relied upon by the other side are cases from the Mofussil, where no law of prescription prevailed, and the Judges thought themselves at liberty to create one from analogy to the period of limitation laid down by the Indian Limitation Act. That this is so, appears from the judgment of Scotland, C.J., in the case of *Ponnusawmi Tevar* v. *The Collector of Madura* (*p*). In the only case cited from the Presidency Towns the twelve years' rule was considered inapplicable. That is the case of *Lagram* v. *Khettranath*

(*n*) 2 Bom. H. C. Rep. 234 (2nd ed.) (*o*) *Ibid.* 333.
(*p*) 5 Mad. H. C. Rep. 6, and see p. 29.

1871.

Saroram Bápu v. Ganpatráv Pándurang.

Karformah (*q*). The High Court of Bombay has adopted the law of prescription as laid down by the late Supreme Court *Pranjivandas Harjivandas* v. *Mayaram Samáldas* (*r*). There is an unreported case where this point was raised and decided by Sausse, C.J., and Arnould, J., and if the Court were to hold otherwise now it would not adjudicate, but legislate.

Latham, in reply:—The formula as to statues of limitation only barring the remedy has application only where there is a question as to the conflict of laws: Story on the Conflict of Law, para. 576; *Huber* v. *Steiner* (*s*); *Don* v. *Lippmann* (*t*). The case last cited for the respondents may be distinguished; if not, the Court will overrule it.

Cur. adv. vult.

9th April 1871. WESTROPP, C.J. (after stating the facts and issues as given above), proceeded:—At first the learned counsel for the appellant contended that the evidence of De-Silva and Dámodhar Pándurang showed at least a twenty years' enjoyment of the right of way without interruption. Their evidence not being very clear so far as it appeared on the notes of the learned Chief Justice, we caused those witnesses to be recalled and further examined. This further examination showed that it was quite evident that they could not establish a twenty years' uninterrupted enjoyment. It was, however, argued for the appellant that since Act XIV. of 1859, Sec. I., cl. 12, came into force, the necessary period of enjoyment was reduced from twenty years to twelve years.

The Supreme Court of Bombay (before the passing of that Act) always required, in support of a claim to a right of way or other easement in the island Bombay (not resting upon express grant), proof of at least twenty years' enjoyment. The case of *Pranjivandas Harjivandas* v. *Mayaram Samaldas* (*u*), being a suit instituted in 1861 (Act XIV. of 1859 came into operation on January 1st, 1862), was decided by the High Court in 1862 in conformity with that old-established rule.

(*p*) 3 Beng. Law Rep., O. J. 18. (*r*) 1 Bom. H. C. Rep. 143.
(*s*) 2 Bing. N. C. 202. (*t*) 5 Cl. & F. 1.
(*u*) 1 Bom. H. C. Rep. 143.

1871.

Narotam Bápu v. Ganpatráv Pándurang.

Subsequently; in an unreported case, *Ramji Keshavji* v. *Jamnadas Khushaldas* (10th or 11th April 1865), it was contended before Sir Matthew Sausse and Sir Joseph Arnould that the suit, not having been instituted until 1864, was governed by Act XIV. of 1859, Sec. I., cl 12, or rather that, by analogy to the limitation of twelve years after the accruer of the cause of action fixed by that enactment for bringing suits for the recovery of immoveable property, the period of enjoyment necessary for the establishment of an easement was reduced from twenty years to twelve years. But the court said that it would be legislation on its part were it to adopt that argument, and accordingly adhered to the old rule as to twenty years. There was not any appeal prefeared against the decision, and it is directly in point here. On a question of the nature of that before us, we should, even if we felt doubts upon it, greatly hesitate before we overruled the judgment of two such able and expeirenced Judges as those who decided that case, and interferred so far with the rights of property as to disturb what has, we have reason to believe, been regarded as the law here both before and since Act XIV. of 1859 came into force. So far, however, from entertaining any such doubts, we, after full consideration of the arguments addressed and authorities quoted to us, concur in that decision, and in the opinion of those learned Judges, that were we to substitute twelve years for twenty as the necessary period of enjoyment for a right of way, we should depart from the long-established law of this Island without any legislative sanction for such a course. We do not think it necessary to discuss this matter any further, and shall content ourselves with saying that the cases of *Bagram* v. *Khettranath Karformak* (*v*) and *Bhuban Mohan Banerjee* v. *Elliott* (*w*), which arose with reference to the right to light and air, do not afford any countenance to the argument on behalf of the appellate here. Both of those cases arose within the city of Calcutta, and the English law, as it stood before the passing of the Prescription Act, Stat. 2

(*v*) 3 Beng. L. Rep., O. J. 18.

(*w*) 6 *Ibid.* 85.

1871.

Marotam Bápu v. Ganpatráv Pándurang

& 3 Wm. IV., c. 71 (which statute does not extend to India) was the law held to be applicable. Cases which arose in the Mofussil of Bengal and Madras which have been cited to us, have not, we think, any bearing upon the present case, which arose within the island of Bombay.

We, therefore, affirm the decree of Sir Richard Couch with costs.

We are happy to find that the Indian Legislature has, in the recently passed Limitation Act (IX. of 1871), legislated on the subject of easements, and adopted the twenty years' period for the whole of British India.

Decree affirmed with costs.

Attorneys for the plaintiff: *Rimington, Hore, & Langley.*

Attorneys for the defendant: *Manisty & Fletcher.*