APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

1878
June 5.

MOBARUCK SHAH AND ANOTHER (PLAINTIFFS) *v.* TOOFANY AND ANOTHER (DEFENDANTS).*

Evidence—Presumption of Ownership of site of road.

There is nothing in this country which prevents the operation of the rule of law, that where a road has been for many years the boundary between two properties, and there is no evidence that the owner of either property gave up the whole of the land necessary for it, the site of the road must be presumed to belong to the adjoining proprietors, half to one and half to the other, up to the middle of the road.

Baboo *Rajender Nath Bose* for the appellants.

No one for the respondents.

THE facts of the case appear sufficiently in the judgment of the Court.

GARTH, C. J. (McDONELL, J., concurring).—We think that there has been some misapprehension in this case as to the actual circumstances under which the plaintiffs' claim was made.

The suit was brought to recover a portion of the site of an old road which had been used by the public for a considerable time previously to the year 1279 (1872), and which road, during all that time, formed the boundary between the land of the plaintiffs and the land of the defendants.

In the year 1279 the Deputy Magistrate changed the line of the road altogether, so that the part in question was no longer used or required as a road: whereupon the plaintiffs took possession of that half of it which adjoined their field, and cultivated it for a time by their burgodars; but then, it seems, the defendants carried off the crop thus grown by the plaintiffs'

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Prinsep, dated the 22nd February 1878, made in Special Appeal No. 2148 of 1877.

burgodars, and thus forcibly dispossessed the plaintiffs; whereupon this suit was brought.

The Munsif decided in favor of the plaintiffs upon the ground, that, as the old road lay between the two properties, and as no evidence was given on either side as to the site of the road being the property of either party, it must be presumed to belong to the adjoining proprietors, half to one and half to the other, up to the middle of the road.

The Subordinate Judge on appeal considered that the Munsif was wrong. He held, as we understand him, that although the defendants might have taken forcible possession of the whole site of the road, and although they were unable at the trial to prove any title to it, the plaintiffs could not succeed in this suit, as against the defendants, without proving not only their previous possession, but an actual title to the soil of the road; and that the Munsif was not justified in acting upon the legal presumption, which formed the ground of his judgment.

On special appeal the learned Judge of this Court thought that the Subordinate Judge was right. He seems to have considered that the plaintiffs were claiming the whole site of the old road as belonging to their property; and that, as the defendants also claimed the whole site as theirs, no presumption would necessarily arise in this country, that the road was the boundary between the two properties, or was common to both. It is in this respect that, we think, the learned Judge did not quite correctly apprehend the facts. Upon reference to the judgments of the lower Courts, it seems clear to us, that the plaintiffs were not claiming the whole site of the road. They were only claiming the eastern half which adjoined their land, and even a less quantity of it than the half of the site which the Munsif awarded them; because the Subordinate Judge says:—"The "Munsif has certainly erred. In the first place he has decreed "a greater area than was claimed by the plaintiff, and admitted "upon a view that the boundary was inaccurate. In this he "was not warranted."

Then again the Munsif finds, not as a matter of presumption, but as a fact, that the road lay between the lands of the plaintiffs' and of the defendants'; and the Subordinate Judge

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accepts that finding, and deals with the case upon that basis. He says, "the Munsif has jumped to the conclusion, that "since the evidence on both sides proves that the pathway "existed on the land, and adjoined the land of both parties, the "defendants cannot hold the land without proof of their "title, &c."

We, therefore, take the facts to be (from the judgments of both the lower Courts), that the old road did run between the two properties: that the plaintiffs sought to recover only a portion of it which adjoined their field; that no evidence was given on either side as to the site of the road being the property of either of the parties; that the plaintiffs took possession in the first instance of the portion which they now claim; and that the defendants forcibly dispossessed them of it.

Upon these facts we consider that the Munsif was perfectly right in applying to this case the well-known and the very useful presumption of law upon which he acted. We are not aware of any local or national law in this country, which prevents that presumption being made applicable to circumstances like the present.

Indeed, in many cases, where little or no evidence of actual possession or title can be procured, it would be almost impossible to administer justice, without having recourse to legal presumptions of this nature.

In fact, this very case affords a good illustration of that principle. Here no evidence was given on either side as to the title or actual ownership of the property in question. From the fact of its being used as a road, and whilst it was so used, neither party had exercised any acts of ownership over it, and therefore, in the absence of any presumption or rule of law, the Court must needs have decided in favor of the stronger party. Might in such a case would constitute right; and the party who by force and violence could possess himself first of the soil of the abandoned road, could successfully hold it, according to the view of the Appellate Courts, against all comers, till some one had proved a better title to it than himself.

It is obvious, that such a state of things would lead to lawless and pernicious consequences. The rule adopted by the Mun-

sif is a very just and reasonable one, and is always recognized in England (see Taylor on Evidence, pp. 121, 120; Roscoe on Evidence, p. 610, and cases there cited). It is founded upon the supposition, that when a road has been for many years the boundary between two properties, and there is no evidence, that the owner of either property gave up the whole of the land necessary for it, it must be presumed that each party was content to sacrifice one-half of the site for the convenience and benefit of the public.

We think, therefore, that the judgment of the Munsif was right, and must be affirmed, to the extent of the area which the plaintiffs claimed in their plaint. He had obviously no right to award the plaintiffs a larger area than they claimed.

The decree must be confined to a piece of land—25 cubits in length, 9 cubits in breadth, and about 1 cowrie in area—forming a portion of the parcel called Banakur described in the plaint, and lying within the boundaries which are specified in the schedule.

The judgment of both Appellate Courts will be reversed, and the plaintiffs will have their costs in those Courts, as well as of this appeal.

Appeal allowed.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

FAKHAROODDEEN MAHOMED AHSAN (PLAINTIFF) *v.* POGOSE AND OTHERS (DEFENDANTS).*

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May 27.

Limitation Act, IX of 1871, *sched. ii, art.* 93, *Construction of—Suit to have Deed declared a forgery.*

A suit to declare the forgery of an instrument issued or registered or attempted to be enforced is required by art. 93 of sched. ii of Act IX of 1871 to be brought within three years of the date of the issue, registration, or attempted enforcement of the document, whichever may first happen; and if a document has once been used or attempted to be used, a party having

* Regular Appeal, No. 179 of 1877, against the decree of J. Geddes, Esq., Officiating Judge of Zilla Furreedpore, dated the 28th of March 1877.