More than this. The jurisdiction to decree specific performance is discretionary, although the discretion must be judicially exercised. No Court would, even if it could, make a decree for the specific performance of a contract affecting an infant, unless the contract was shewn to be for the infant's benefit. It is not the case of any one that this contract should be enforced for the infant's benefit. The plaintiffs wish to enforce it against the infant for their own benefit, and the guardian says it is against the interest of the infant. The Judge thinks that, if the bonus of Rs. 2,200 was paid, the contract would not be for the infant's benefit; but he finds that it was not paid. The defendants, however, assert payment, and the guardian, acting for the infant, admits receipt of the money. The decision that it was not paid will not bind the guardian, or any of the defendants, as between themselves. It will not prevent the alleged payers from suing to recover the money, or the infant from charging her guardian with the receipt of it. The issue in the first Court was whether the contract was prejudicial to the infant, and this appears to have been more considered than the question whether it was for the infant's benefit that the contract should be enforced. We think it is not a case in which a decree for specific performance should have been made under any circumstances. It is unnecessary to consider whether the plaintiffs could get any relief against the guardian. It is enough to say that they are not entitled to the relief claimed as against the infant.

The appeal is decreed with costs in all the Courts. Decrees of the lower Courts set aside.

S. C. G. *Appeal allowed.*

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

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March 7.

ABZUL MIAH (DEFENDANT No. 1) *v.* NASIR MAHOMMED AND OTHERS (PLAINTIFFS).*

Jurisdiction of Civil Court—Public right of way — Special injury—Cause of action—Right of Suit.

In a suit for the removal of an obstruction in a public pathway, it was

* Appeal from Appellate Decree No. 224 of 1893, against the decree of Babu Atul Chunder Ghose, Subordinate Judge of Sylhet, dated the 1[illegible]th of November 1892, affirming the decree of Babu Akhoy Kumar Mitter, Sudder Munsif of that District, dated the 25th of August 1891.

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found by the Courts below that the plaintiffs were deprived of the only means of grazing their cattle by the obstruction, and that they lost some cows thereby. It was contended, on behalf of the defendant on second appeal, that such damage would not entitle the plaintiffs to maintain a suit in the Civil Court.

Held, that the injury caused to the plaintiffs, by the obstruction of the way, leading from the village where they resided to that in which they had their fields and pastures, was peculiar to them and to their calling, and it caused them substantial loss of time and inconvenience; and that it was sufficient to entitle the plaintiffs to maintain the action.

Held also, that the death of the cows was too remotely and indirectly connected with the obstruction to furnish a cause of action.

Winterbottom v. *Lord Derby* (1), *Ricket* v. *Metropolitan Railway Company* (2), *Cook* v. *Mayor and Corporation of Bath* (3), *Baroda Prasad Mostafi* v. *Gora Chand Mostafi* (4), *Gehanaji* v. *Ganpati* (5), *Raj Koomar Singh* v. *Sahebzada Roy* (6), *Blagrave* v. *Bristol Water Works Company* (7), and *Rose* v. *Miles* (8) referred to

THE plaintiffs brought a suit in the Munsif's Court of Sylhet against the defendants for the removal of an obstruction in a certain pathway. The allegation of the plaintiff was that the way was a public thoroughfare; that they had been using it from time immemorial; that, by the obstruction caused by the defendants, the plaintiffs were deprived of their only way to take their cattle to graze from their village to the pasture land, and, in consequence thereof, some of their cows died, whilst they were being driven along another road. The defendants, in their written statement, denied that the way was a public way, and they pleaded that the suit was not maintainable by the Civil Court, and that it was barred by limitation. The Munsif decreed the suit, holding that the way in question was a public pathway; that the plaintiffs had proved such a special injury as would entitle them to maintain a suit in the Civil Court; and that the suit was not barred by limitation. On appeal the judgment of the Munsif was confirmed by the Subordinate Judge.

From this decision the defendant No. 1 appealed to the High Court.

(1) L. R., 2 Exch., 316. (2) L. R., 2 H. L., 175.
(3) L. R., 6 Eq., 177. (4) 3 B. L. R. A. C., 295; 12 W. R., 160.
(5) I. L. R., 2 Bom., 469. (6) I. L. R., 3 Calc., 20.
(7) 1 H. & N., 369. (8) 4 M. & S., 101.

Babu *Tara Kishore Chowdhry* for the appellant.

Babu *Prosonno Gopal Roy* for the respondents.

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Babu *Tara Kishore Chowdhry*.—The lower Appellate Court has not come to any distinct finding as to the existence and nature of the way claimed. Further, the facts found in this case do not constitute "special injury," or "particular damage," as would give a cause of action to the plaintiffs. The Full Bench case of *Chuni Lall* v. *Ram Kishen Sahu* (1) lays down that the plaintiff must prove "special injury" to himself to maintain an action for obstruction on a public highway. In *Winterbottom* v. *Lord Derby* (2), which was an action for obstructing a public way, the plaintiff proved that he was on several occasions delayed in passing along it, and was obliged, in common with every one else who attempted to use it, to pursue his journey by a less direct road, or else to remove the obstruction at great expense to him. It was held that he was not entitled to maintain the action. The principle, that mere loss of time and general inconvenience caused by an obstruction, does not furnish a good cause of action, is recognized even in the case of *Rose* v. *Miles* (3), which may be supposed to be an authority against my contention. Then, again, the mere fact that a man carries on one particular profession, or calling, rather than another, and finds inconvenience in carrying on that business on account of an obstruction, does not make the damage peculiar to himself. If the mere fact that the plaintiff, in an action of this kind, shows that he has one particular calling, or trade, on account of which he usually passes along a particular pathway, and that he has been inconvenienced in respect thereto by an obstruction thereon, should be held sufficient proof of "special injury," in that case it will be impossible to draw the line and distinguish between injury that is special and injury that is not special. If, however, injury to person, or property, is caused *directly and substantially*, by the obstruction complained of, *that* only ought to be considered sufficient to furnish a cause of action for removal of the obstruction, but not otherwise. See *Caledonian Railway Company* v. *Walker's Trustees* (4), *Ricket* v. *Metropolitan Railway Company* (5). The

(1) I. L. R., 15 Calc., 460. (2) L. R., 2 Exch., 316.
(3) 4 M. & S., 101. (4) L. R., 7 H. L., 259.
(5) L. R., 2 H. L., 175.

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death of the cows under the circumstances found was certainly not caused directly by the obstruction; it was at most a very "*remote*" consequence. The mere fact that the plaintiffs in the present case have lost the shortest way to their fields and pasture lands is not special injury so as to furnish a good cause of action.

Babu *Prosonno Gopal Roy* for the respondents.—The English cases cited by the other side have no application to this case. Even admitting that these cases have any application, then in a later case, the case of *Caledonian Railway Company.* v. *Walker's Trustees* (1), where those cases were considered, it was held that inconvenience which one suffers, if he has to go by a longer route, the shorter one having been obstructed, is special injury, for which a suit would lie. The cases of *Rose* v. *Miles* (2) and *Blagrave* v. *Bristol Water Works Company* (3) go to support that view. See also Pratt on Highways, p. 120, Ed. 13th. In the case of *Raj Koomar Singh* v. *Sahebzada Roy* (4) it has been clearly laid down that special injury will entitle the plaintiff to maintain a suit for removal of an obstruction if the way is a public pathway. Here the finding of the Courts below is that the pathway is a public way, and personal inconvenience has been held to be special injury. See *Gehanji* v *Ganpati* (5), *Raj Koomar Singh* v. *Sahebzada Roy* (4), *Caledonian Railway Company* v. *Walker's Trustees* (6), *Baroda Prasad Mostafi* v. *Gora Chand Mostafi* (7).

The finding of the Courts below that the plaintiffs lost their only way to take their cattle to graze to the pasture lands is sufficient to entitle them to a decree, even if the death of the cows be left out of consideration.

Babu *Tara Kishore Chowdhry* in reply.

The judgment of the Court (MACPHERSON and BANERJEE, JJ.) was as follows :—

This appeal arises out of a suit brought by the plaintiffs, respondents, for declaration of their right of way over a piece of land and for removal of the obstruction caused to it by the defendants. The case of the plaintiffs, as stated in their plaint,

(1) L. R., 7 H. L., 276. (2) 4 M. & S., 101.
(3) 1 H. & N., 369. (4) I. L. R., 3 Calc., 20.
(5) I. L. R., 2 Bom., 469.
(6) L. R., 7 H. L., 259. (7) 3 B. L. R. A. C., 295; 12 W. R., 160.

is, that the land in dispute has been used as a public pathway from time immemorial, and the plaintiffs had been using it as such from the time of their ancestors; that the pathway leads from the village where they reside to the villages where they have the lands which they cultivate and the pastures where they graze their cattle; that the defendants have wrongfully caused obstruction to the way and thereby stopped it; that there is no other convenient pathway for leading the plaintiffs' cattle to another village, and some of their cattle had died in consequence; and that, owing to the obstruction of the pathway, the plaintiffs feel great inconvenience and suffer great loss.

The defendants urge that the suit is barred by limitation, and by the principle of *res judicata;* that the land is their property and was never used as a pathway by any one; and that, on the plaintiff's own allegation that the way is a public pathway, the suit is not cognizable by the Civil Court.

The Courts below have overruled the objections of the defendants, and have decreed the suit.

In second appeal, it is contended for the defendants, *first*, that the Court of appeal below is wrong in affirming the decree of the first Court in favour of the plaintiffs, without coming to a distinct finding as to the existence and nature of the way claimed; and, *secondly*, that neither the facts found by the Court below, nor even those alleged in the plaint, are sufficient to constitute such special injury as is necessary to entitle the plaintiffs to maintain a civil suit for the removal of obstruction in a public way.

Upon the first contention, it is enough to say that we think the lower Appellate Court has come to a definite finding that the existence of the pathway in dispute is proved, and that it is a public way. The learned Subordinate Judge says: "The Munsif himself has testified to the fact of the existence of the pathway;" and, a little further on, he adds, "The claim is not barred by limitation, as it is not dependent merely on section 26 of the Limitation Act" and the Munsif whose judgment is thus affirmed said: "The present suit is not based on user, but on special inconvenience caused in a public thoroughfare. The said section 26, therefore, does not apply."

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The second point, which is the one that was elaborately argued on both sides, requires a more close examination.

The rule of English law on the subject is, that, in order to entitle a plaintiff to maintain an action for obstruction of a highway, he must show a particular damage suffered by himself over and above that suffered by all the Queen's subjects. Where this is shewn, a suit for damages, or for an injunction, would lie. See *Winterbottom* v. *Lord Derby* (1), *Ricket* v. *Metropolitan Railway Company* (2), *Cook* v. *Mayor and Corporation of Bath* (3); and the same rule has been substantially followed in this country. See *Baroda Prasad Mostafi* v. *Gora Chand Mostafi* (4), *Gehanaji* v. *Ganpati* (5), *Raj Coomar Sing* v. *Sahebzada Roy* (6). In the last mentioned case, Garth, C.J., in delivering the judgment of the Full Bench, said: "We are of opinion that, as the obstruction in this case has caused special injury to the plaintiff, the Civil Court was perfectly justified in directing it to be removed.

"The Criminal Code, no doubt, contains provisions for the removal of obstruction in public thoroughfares by summary proceedings before a Magistrate, but there is nothing in the provisions which shows that the Legislature intended to deprive a private individual of the redress which the law affords him under such circumstances by means of a civil suit." And the provisions of the Criminal Procedure Code, which the Full Bench had under consideration (Act X of 1872, section 521), were substantially the same as those of the present Code (Act X of 1882, section 133), so far as the question now before us is concerned.

That being so, the question for consideration is, whether the facts found in this case are sufficient to constitute particular damage within the meaning of the rule as enunciated in the English cases, or special injury within the meaning of the rule as laid down by the Full Bench in the Calcutta case last cited.

The Munsif found that the plaintiffs "have been deprived of the only means of grazing their cattle;" that "plaintiffs Nos. 1

(1) L. R., 2 Exch., 316.
(2) L. R., 2 H. L., 175.
(3) L. R., 6 Eq. 177.
(4) 3 B. L. R., A. C., 295; 12 W. R., 160.
(5) I. L. R., 2 Bom., 469.
(6) I. L. R., 3 Calc. 20.

and 2 have sustained special injury, namely, plaintiff No. 1, by losing two, and plaintiff No. 2, by losing one of his cows;" and that "this special inconvenience and special injury gave jurisdiction to the Civil Court;" and the lower Appellate Court has substantially affirmed this finding.

The learned vakil for the appellant contends that the loss of the cows was not a proximate and necessary consequence of the obstruction of the pathway; and he further contends that the inconvenience complained of was one which was not special to the plaintiffs, but must have been felt by them in common with the rest of the public; so that neither the loss sustained, nor the inconvenience felt, would be sufficient to entitle them to maintain the action, and, in support of his contention, he relied upon some of the English cases referred to above.

We agree with the learned vakil for the appellant in thinking that the loss of the cows was but remotely and indirectly, if at all, the result of the obstruction, and that it would not afford ground for maintaining this suit. But we are of opinion that the other injury complained of in the plaint as set out above, and found in effect by the Courts below, is special injury within the meaning of the law sufficient to entitle the plaintiffs to bring this suit. The plaintiffs are cultivators and they keep cattle; and the way in question leads from the village where they live to their fields and pastures, and the path being stopped, they have been "deprived of the only means of grazing their cattle," and put to special inconvenience. In *Winterbottom* v. *Lord Derby* (1) Kelly, C.B., observes: "Upon the authorities there, and especially relying on *Iveson* v. *Moore* (2) and *Ricket* v. *Metropolitan Railway Company* (3), I am of opinion that the true principle is that he and he only can maintain an action for an obstruction who has sustained some damage peculiar to himself, his trade or calling." We think upon the facts of this case the requirements of this principle are fully satisfied.

We may here refer to two more cases in support of the view we take. In *Blagrave* v. *Bristol Water Works Company* (4) the plaintiff, in the ninth count, alleged that the defendants, by ob-

(1) L. R., 2 Exch., 316.
(2) 1 Ld. Raym., 486.
(3) L. R., 2 H. L., 175.
(4) 1 H. and N., 369.

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structing a public footpath connecting two of his fields, caused him loss of time and work, and the Court held that this count was good. And in *Rose* v. *Miles* (1) Lord Ellenborough said: "If a man's time, or his money, are of any value, it seems to me that the plaintiff has shown a particular damage."

We are clearly of opinion that the injury caused to the plaintiffs by the obstruction of the way leading from the village where they reside to that in which they have their fields and pastures is peculiar to them and to their calling; it causes them substantial loss of time and inconvenience; and it is of a kind different from that which the public generally may suffer by reason of the obstruction; and that, upon reason and authority, it is, therefore, sufficient to entitle them to maintain this action.

The grounds urged before us, therefore, both fail; and this appeal must consequently be dismissed with costs.

S. C. G. *Appeal dismissed.*

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1895
March 15.

SHAM LAL PAL AND OTHERS (DECREE-HOLDERS) *v.* MODHU SUDAN SIRCAR AND OTHERS (JUDGMENT-DEBTORS). *

Execution of decree—Transfer of Decree for execution—Execution against representative of debtor—Civil Procedure Code (Act XIV of 1882), sections 234, 248, 249 and 578—Application by decree-holder for execution of decree by substitution on death of the judgment-debtor to the Court where the decree has been transferred.

A decree was transferred to another Court for execution. Pending the proceedings, one of the judgment-debtors died. On an application to that Court by the judgment-creditor to execute the decree against the legal representative of the deceased judgment-debtor, a notice was issued under section 248 of the Code of Civil Procedure. The legal representative objected that the Court had no jurisdiction to entertain the application, and that the application should have been made under section 234 of the Code to the Court that passed the decree.

Held, that the power of the Court executing a decree to order execution under section 249 against the legal representative of a deceased judgment-

* Appeal from Order No. 157 of 1894, against the order of A. E. Staley, Esq., District Judge of Backergunge datedthe 20th of March 1894, reversing the order of Babu Dwarkanath Mitter, Subordinate Judge of that District, dated the 5th of September 1893.

(1) 4 M. and S., 101.