

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

KALISHUNKUR DOSS (PLAINTIFF) v. GOPAL CHUNDER DUTT
(DEFENDANT).*

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May 31.

*Res Judicata—Prescriptive Right—Civil Procedure Code (Act X of 1877),
s. 13, expl. 5.*

Explanation 5 of s. 13 of Act X of 1877 only applies to cases where several different persons claim an easement or other right under one common title, as for instance, where the inhabitants of a village claim by custom a right of pasturage over the same tract of land or to take water from the same spring or well.

Where therefore *A*, in defending a suit brought against him by *B*, to have it declared that he had a right to build a wall across a drain, set up a prescriptive right to use the drain, and it was decided that no such prescriptive right existed in *A*;

And, subsequently, *C* brought a suit against *B*, claiming to use the same drain as an easement and asking for the removal of the wall in question in the former suit, and *B* set up the judgment in the suit between himself and *A*. as a bar to the suit,—

Held, that the right claimed by *C* not being one which he and other inhabitants of the neighbourhood claimed under one common title, but a prescriptive right which he claimed individually *in respect of his own house and premises*, and depending upon the length of time he had used the right, was a separate claim, and that the judgment in the suit between *B* and *A* did not operate as a bar to his suit.

THIS was a suit brought by one Kalishunkur Doss, to establish his right to a certain easement, and for an injunction restraining one Gopal Chunder Dutt from interfering with that easement, and for the removal of a wall.

The plaintiff was the owner of a house, the back premises of which adjoined certain lands of the defendant; at the extremity of these premises was a privy belonging to the plaintiff, the refuse from which was in part carried away by a drain over the defendant's land, and partly was removed by the plain-

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice Tottenham, dated the 13th January 1880, in appeal from Appellate Decree, No. 892 of 1879.

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tiff's sweeper, who was accustomed to pass along the drain for that purpose. The plaintiff claimed a prescriptive right to the use of the drain and to the passage of his sweeper along it. The defendant denied the plaintiff's right to any such easement, having some time previously built a wall across the drain in question, in such a manner as to impede the channel and passage; and further contended that the matter was barred by s. 13 of the Civil Procedure Code, inasmuch as, in a former suit brought by him, Gopal Chunder Dutt, against one Koylas Chunder Pal (referred to in the judgment in the present case as "A") to establish a right to build and maintain the wall in question in the present suit, the then defendant had set up a similar right to that claimed by the present plaintiff, and the Court had held that no such right existed. The lower Court held that the judgment between the present defendant and Koylas Chunder Pal operated as a *res judicata* in the present suit, and debarred Kalishunkur Dutt from setting up the present claim.

The plaintiff appealed to the High Court, and the case was heard before a single Judge, who delivered the following judgment:—

TOTTENHAM, J.—In my opinion, the lower Courts were right in holding that the subject of this suit was *res judicata* as explained in s. 13 of the Civil Procedure Code.

It is quite true, generally, that a decision as to one person's right of easement can by no means determine whether or not other persons have or have not a similar right; but I think that, in the suit brought by the present defendant, respondent, against Koylas Chunder Pal, the question whether his neighbours, including the present plaintiff, were or were not entitled to oppose the erection of the wall, was directly and substantially in issue, and was decided by the Court. Although that suit was brought only against Koylas Chunder Pal, he, by his answer, and no doubt, in good faith, claimed the right of passage as belonging to himself and to the occupants of houses on both sides of the drain; the present plaintiff was one of those, and he personally came forward in support of the alleged common right. It is clear that he is, therefore, claiming under

Koylas Chunder Pal within the meaning of expl. 5 of s. 13; and although the decree in the previous suit expressly negatives only the right of easement set up by Koylas Pal, still I am of opinion that the Court must have had in its mind the fact that the claim raised in the defence was asserted on behalf of all the parties interested in supporting it, and that the decision was intended to settle it as against all. I, therefore, dismiss this appeal with costs.

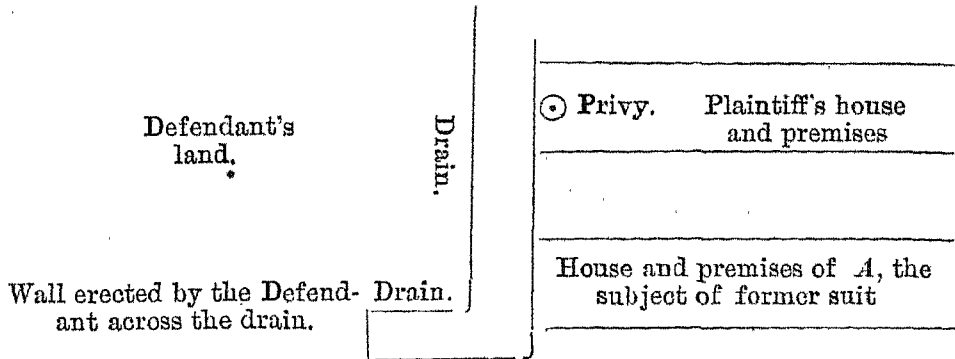
From this judgment the plaintiff appealed under s. 15 of the Letters Patent.

Mr. *C. Gregory* for the appellant.

Baboo *Umbica Churn Bose* for the respondent.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

GARTH, C.J. (who, after setting out the facts, continued as follows):—The following sketch will suffice to explain roughly the position of the premises, the nature of the easement, which is the subject of dispute, and the defence to the suit, which we have to consider in this appeal.



That defence, upon the strength of which the lower Courts and the learned Judge of this Court have dismissed the plaintiff's case is, that, in a former suit, in which another person, whom we will call *A*, set up a similar right against the present defendant to that now claimed by the plaintiff, it was decided that no such right existed; and it has been held by the lower Courts, and by the learned Judge in this Court, that this judgment between the defendant and *A* operates as a *res judicata* in this case to debar the present plaintiff from prosecuting his claim.

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We think, however, upon a review of the circumstances of that case, and of the grounds upon which the judgment proceeded, that the plaintiff in this suit is in no way barred by that judgment.

The circumstances are these :—*A* was the owner of a house, (the position of which is shown in the above plan) the back premises of which adjoined the drain in question, in the same way as the plaintiff's premises adjoin it, and *A* claimed to use the drain in the same way as the plaintiff claims to use it, for the passage of his refuse, and as an access for his servants to his back premises.

It then appears that, some time ago, the present defendant, with a view of stopping up this drain, commenced to build the wall, which is now the subject of dispute, and *A* then took proceedings before the Magistrate with a view of preventing the defendant from building the wall, and so stopping up the drain.

The Magistrate, however, finding that the question between the parties was one of civil right, very properly declined to interfere, except so far as to stay the defendant from building his wall until the question of right had been decided by the Civil Court.

A suit was then brought by the present defendant against *A*, asking for a declaration from the Court, that he (the present defendant) had a right to build the wall, and that *A* had no easement which ought to interfere with the defendant's right to build it. *A*, in that suit, set up no doubt a similar right to that which is claimed by the present plaintiff,—*i. e.*, he claimed, that by prescription he had a right to use the drain for the purposes aforesaid, and he went on to say, that other persons (including the present plaintiff), whose premises adjoined the drain, were entitled to a similar right.

Upon the trial of that case, the defendant and his witnesses were examined upon the question, whether he had obtained a twenty years' prescriptive right to use the drain; and the plaintiff and others were also called as witnesses, for the purpose of showing that they too had used the drain for many years in a similar way; but the real claim in that case was founded

entirely upon *A*'s alleged prescriptive right, and the question upon which the judgment of the Court turned was, whether *A* and the occupiers of *A*'s premises had acquired such a prescriptive right, and the Judge eventually decided against *A*, upon the express ground, that he had only proved a user of the drain for fifteen years, and consequently had not acquired a prescriptive right under the Limitation Act.

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It is perfectly true, that in that case *A* endeavoured to avail himself of the fact that other persons besides himself had also used the drain; but no general or public right of drainage was in fact claimed by him, nor did the question of any prescriptive title enjoyed by the plaintiff or others enter into the consideration of the case. Nor could it have done so, as a matter of law, because, from the very nature of the right claimed, *A* could only succeed upon the strength of his own title in respect of his own premises; and no right which the present plaintiff or other persons might have acquired in respect of their premises would have been of any assistance to *A*.

Now, in this case, the point which has been raised by the present defendant, and which all the three Courts have found in his favor, is this,—that the judgment in the former suit has, in fact, decided the same question of right which is raised by the plaintiff in this suit, and the enactment upon which this judgment has proceeded is contained in expl. 5 of s. 13 of the new Civil Procedure Code.

That section enacts, “that no Court shall try any issue, the subject-matter of which has been heard and finally decided by a Court of competent jurisdiction in a former suit.” Then expl. 5 says, that, “where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of s. 13, be deemed to claim under the persons so litigating.”

It has been decided by the previous judgments in this case, that the right claimed by *A* in the former suit, and the right claimed by the plaintiff in the present suit, is a *private right*, “which he claims in common for himself and others” within the meaning of expl. 5.

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We cannot agree in this view; and it appears to us, that the mistake has arisen in consequence of the nature of the right claimed not being correctly understood.

The right claimed by the plaintiff is not one which he and other inhabitants of the neighbourhood claim under one common title. It is a prescriptive right which he claims individually *in respect of his own house and premises*, and depends upon how long he or the occupier of the house have used the right. It would not avail the plaintiff, if all the other owners of the houses in the same locality could prove, that they had used the drain for the prescribed period, if he himself or the occupiers of his premises had not used it for that period. The claim, therefore, of each owner is essentially a separate claim in respect of his own premises. Expl. 5 of s. 13 does not, therefore, apply to such a case. It only applies to cases where several different persons claim an easement or other right by one common title, as for instance, where the inhabitants of a village claim by custom a right of pasturage over the same tract of land or to take water from the same spring or well; see *Arlett v. Ellis* (1) and *Blewett v. Tregonning* (2).

In this particular case it is very possible that the plaintiff may be able to prove a twenty years' user of the drain, and so establish his right to it in respect of his own premises, although *A*, who claimed a similar right, failed to establish it, because he could not prove a user for the full period of twenty years.

We think, therefore, that all the previous judgments in this case should be reversed; and that the case should go back to the Munsif's Court to be tried upon its merits.

The costs in all the Courts will follow the ultimate result of the cause.

Judgment reversed and case remanded.

(1) 7 B. and C., 346.

(2) 3 Ad. and E., 554.