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NAN KARAY PHAW v. KO HTAW AH.

Majesty in this case that the judgment of the Special Court of British Burmah be affirmed, and that both appeals, the plaintiff's appeal and the cross appeal, be dismissed. The appeal will be dismissed with costs; and the cross appeal without costs, save those which were incurred by Nan Karay Phaw in opposing the petition for special leave to enter a cross appeal.

The second suit is a suit by the widow for the purpose of obtaining, as against the defendant, certain elephants of Phatadah which he has detained, or the price of those elephants; and further for damages for the detention and use of those elephants by the defendant for two years. The defendant seeks to justify the detention of the elephants on the double ground, first of a contract with Phatadah, by which he was entitled to detain them, and secondly of a custom of the forest. Both these contentions are negatived by both Courts, and being questions of fact, must be treated as decided. The amount of damages on which a question was raised falls under the same rule. No set-off has been pleaded in this case. The judgment therefore of the Special Court will be affirmed, and the appeal dismissed with costs, and their Lordships will humbly advise Her Majesty to this effect.

Appeals dismissed.

Solicitors for the appellants in the first suit, respondents in the second, and cross-respondents: Messrs. *Bramall & White.*

Solicitors for the respondent in the first suit, appellant in the second, and cross-appellant: Messrs. *Sanderson & Holland.*

C. B.

P. C. * 1886 *March* 17, 30.

JADULAL MULLICK (DEFENDANT) *v.* GOPALCHANDRA MUKERJI AND ANOTHER (PLAINTIFFS).

[On appeal from the High Court at Calcutta.]

Right of way—User of twenty years to support servitude—Extent and mode of user—Calcutta Municipal Act (Bengal Act IV of 1876).

As establishing his right of way over the defendant's passage, the plaintiff relied upon a user of it, several times in the year, for twenty years prior to the defendant's interruption of it, by mehters for the purpose of removing the contents of a cess-pool connected with a privy belonging to the plaintiffs' house.

* *Present*: LORD BLACKBURN, LORD HOBHOUSE and SIR R. COUCH.

The facts indicated by way of limit to the user of the passage only showed that it must be a reasonable user for the above purpose. There was no agreement specifying times, or occasions of access, and the inference was that, if the plaintiffs had thought fit to use the passage more frequently than they did, they were at liberty to do so.

In and after 1876, instead of the plaintiffs' mehters, those employed by the Municipality came and went upon the passage, not at distant intervals, but daily, the plaintiffs under bye-laws, in conformity with Bengal Act IV of 1876, being bound to give them access, and the system being to clean the place daily.

Held, that the above was neither a discontinuance by the plaintiffs of their user, nor an aggravation of the servitude. Also, that, although a servitude gained for one purpose cannot be used for another, the purposes before and after 1876 being identical, the user proved prior to that year supported a right in the plaintiffs to use the passage for giving access to the servants of the Municipality, for the above purpose, at reasonable and convenient times.

APPEAL from a decree (27th January 1883) of the High Court (1) reversing a decree (14th March 1882) made in its Ordinary Original Jurisdiction.

The decree, from which this appeal was preferred, declared that the plaintiffs, who now were the respondents, as owners of the house No. 66, Pathuria Ghât Street in Calcutta, were entitled to use a passage belonging to the defendant, now appellant, for the purpose of having a privy of the said house cleaned out by mehters at all proper and convenient times, and an injunction was awarded restraining the defendant from interfering to prevent such user.

The parties to the suit were owners of adjoining houses. The plaintiffs claimed a right of way along a passage belonging to the defendant, and the defence was that the right claimed had not been established by open and continuous user for the period of prescription. The purpose of the right claimed was to give access to mehters to empty the cess-pool of the plaintiffs' privy. It was not disputed, however, that, after the enactment of Bengal Act IV of 1876 (The Calcutta Municipal Act, 1876), the mehters employed by the Municipal authorities of Calcutta alone used the passage for the above purpose. This they did much more frequently than the plaintiffs' mehters had done; in fact daily

(1) I. L. R., 9 Calc., 779.

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instead of several times in the year, the new system requiring that the cleaning out should take place daily.

The Court of Original Jurisdiction (WILSON, J.) found that the plaintiffs had not shown that they had exercised for twenty years the right now claimed. The suit was, therefore, dismissed.

On appeal the High Court (GARTH, C.J., and CUNNINGHAM, J.) found, on the contrary, that there was sufficient evidence of the plaintiffs having used the passage, for the purpose alleged, for twenty years before the interruption by the defendant. As to the extent of the user, the Court held that the plaintiffs had been entitled to the use of the passage for the above purpose, as might be required; and the purpose for which the right was now claimed was identical with the original purpose of the user. The only alteration was that the right was now more frequently exercised than formerly. A decree accordingly was made in favor of the plaintiff.

The judgments of the Appellate Court are reported in I. L. R., 9 Calc., 779.

On this appeal,—

Mr. *R. V. Doyne* and Mr. *A. Phillips* appeared for the appellant.

Mr. *J. Rigby, Q.C.*, and Mr. *J. D. Mayne* for the respondents.

For the appellant it was argued that a continuous user of the passage in dispute had not been established. Even if a right of occasional user of the passage, for the limited purpose described, had existed in the plaintiffs before the new drainage system of the Calcutta Municipality had come into operation, the change in 1876 was such that a discontinuance of the user had taken place, extinguishing the formerly existing right. The evidence shewed that, under what might be called the cess-pit system, there had been a user of the passage, for the purpose described, a few times in the year. This could not be, for the purpose of carrying out another system, enlarged into a daily user. The right now claimed was not identical with the formerly subsisting one, and could not be so treated without aggravation of the obligation upon the owner of the servient tenement. The right of way

now claimed whether it might, or might not, rest upon the provisions of Bengal Act IV of 1876, could not rest upon the original user.

Reference was made to *Wimbledon and Putney Commons' Conservators* v. *Dixon* (1); Bengal Act IV of 1876, ss. 235, 238 and 340.

For the respondents, Mr. *J. Rigby, Q.C.*, and Mr. *J. D. Mayne* contended that the user had been established as the Appellate Court had found. The altered mode of user had not operated as a discontinuance, and there had been no aggravation of the servitude. The extent of the user was a mode, no doubt, whereby the extent of the right was indicated; but the purpose for which the right was exercised was the main point for consideration. As to this, the evidence showed that the user, since the alteration of the system, had not been extended beyond the identical purpose for which the original servitude had all along existed.

It could not be considered possible that all easements of this class in the Town of Calcutta were destroyed by the legislation of 1876 having compelled an increased number of clearings. Reference was made to *Daud* v. *Kingscote* (2) as showing that, even under a grant, a right was not necessarily confined to such modes of exercise as were in use at the time of the grant—Goddard on Easements, Chapter III, s. 2; *The Corporation of London* v. *Riggs* (3).

Mr. *R. V. Doyne* replied.

On a subsequent day (March 30th) their Lordships' judgment was delivered by

LORD HOBHOUSE.—The plaintiffs below who are the respondents here, and the defendant who is the appellant, occupy contiguous houses and premises in Calcutta, with a southern frontage in Pathuria Ghât Street. The plaintiffs' house lies to the eastward of the defendant's. Adjoining the north side of the defendant's premises lies a piece of ground also belonging to him, and fronting northwards to a street called apparently by various names, of which Jorabagan is one. At a point between the two streets the defendant's property juts out a few feet to the

(1) L. R., 1 Ch. D., 362. (2) 6 M. & W., 177.
(3) L. R. 13 Ch. Div., 798.

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eastward, and to that extent overlaps the property of the plaintiffs, and lies to the north of it.

The following facts are common to the case of both parties: that an open drain used to run along the eastward boundary of the defendant's property from the point where it juts eastward into Jorabagan; that at the same point there communicated with this drain one of the drains of the plaintiffs' house leading directly from one of their privies; that at the point of communication there was a doorway in the plaintiffs' wall; and that in the year 1876 the drain was filled up, and has never again been opened.

The plaintiffs brought evidence to show further that their house was constructed with a double wall so as to form a narrow passage from the privy to the doorway; that periodically, some three or four times a year, scavengers hired by the plaintiffs, or their predecessors, entered the drain at Jorabagan and made their way up it to the doorway; that the doorway was furnished with a door which was kept locked, but was opened by the plaintiffs' durwan on these occasions; that the scavengers came through the doorway, passed along the plaintiffs' drain between the double walls, and so reached the privy, from which they carried the refuse away through the doorway and down the defendant's drain into Jorabagan. Certainly one of the witnesses, and probably another, deposes to the continuance of this practice from dates more than 20 years prior to the defendant's interruption of it, which was in December 1880. The suit was instituted in June 1881.

Against this evidence the defendant has produced nothing at all except that he never saw the plaintiffs' scavengers at work, and that he and Mr. Edwards, a surveyor, say that it was impossible for the scavengers to go where several witnesses saw them go. And, in cross-examination, the defendant admitted that the doorway could only lead to the drain.

Indeed in this part of the case the defendant appears to have relied mainly upon imperfections in the plaintiffs' evidence. Mr. Justice Wilson, who presided in the Original Court, thought that the plaintiffs had failed to show user for 20 years. But it is observable that he says there is only one witness, *viz.*, Tarrabullub Chatterjee, who professes to carry his memory back to 20 years at all. He does not notice Dwarka Nath Bonnerjee, who had

known the privy and drain for upwards of 25 years, and who speaks of the action of the plaintiffs' scavengers, apparently, for the note of the evidence is not perfectly clear, for that space of time. Neither does he notice the probability afforded to the plaintiffs' story by the construction of their walls and of their doorway, both of which date more than 20 years before the interruption.

Mr. Justice Wilson dismissed the suit. On appeal the High Court took a different view, and gave the plaintiffs a decree establishing their right to use the passage in dispute for the purpose of carrying away their night-soil at all proper and convenient times in the year. Their Lordships concur in the view which the Appellate Court has taken of the evidence, and think that the user on which the plaintiffs rely is sufficient unless it has been interrupted or altered in character by the events which took place in and after the year 1876.

In that year the Legislature of Bengal passed an Act for the more efficient Municipal Government of Calcutta. Under the powers conferred by that Act, the Town Commissioners made bye-laws to regulate the removal of refuse. It is not to be discharged in any other way than as the Commissioners direct. The servants of the Municipality are to cleanse daily the privies of every house, on account of which a night-soil fee is levied, and for that purpose every occupier of a house is to give free access to his privy. An occupier of land on which a privy is situated, and to which such free access is denied, is not to allow night-soil or filth of any kind to accumulate for more than twenty-four hours. Under these regulations the open drain bordering the defendant's land was, as before stated, filled up, and the surface has been used by the scavengers of the Municipality ever since to gain access to the privy of the plaintiffs' for the purpose of removing the refuse. This they do daily.

Mr. Doyne has argued for the defendant that the change of system thus brought about operates as a breach of the user by the plaintiffs, and so destroys their title by prescription. But their Lordships cannot see that the change of system works any discontinuance of the prior user. In point of frequency the user is much more active than before. The purpose is still

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the purpose of cleansing the privy. The mode of access from Jorabagan to the privy is not altered, except that the scavengers, instead of walking in the drain, walk on the surface of the earth that fills it. And it cannot make any difference that the plaintiffs no longer use the passage to admit their own scavengers, but use it to admit those of the Municipality, to whom they are bound to afford free access.

It is then argued that the change from the practice of cleansing at long intervals to the practice of cleansing daily is so great that the servitude gained by user is materially aggravated, indeed that it is applied to a new purpose, which the plaintiffs have no legal right to do.

But it is difficult to see how the servitude is aggravated, even in the sense of causing more annoyance to the defendant. In order to afford the requisite access only three or four times a year, the passage must be kept open and unobstructed. That being so, it cannot be much more onerous to the defendant that a small quantity of refuse should be removed daily than that a large quantity should accumulate and be removed at long intervals of time.

The real question, which is not free from difficulty, is whether the user proved prior to 1876 is one which sustains the right affirmed by the decree under appeal. A servitude gained for one purpose cannot lawfully be used for another. What then is the servitude which the plaintiffs have acquired over the defendant's land? There is no agreement specifying times or occasions of access. The defendant has never till now interfered with the access, or claimed to exercise any control over it. The servants of the plaintiffs came and went at their own discretion, or at the discretion of their employers. What is the inference to be drawn? It is difficult to suppose that if they thought fit to use the passage twice as often, or four times as often, as they actually did use it, they were not at liberty to do so. There is nothing in the proved facts to indicate a limit to the user of the passage, except the limit that it must be a reasonable user for the purpose of cleansing. It seems to their Lordships that if, without any action on the part of the Municipality, the plaintiff had chosen to cleanse out their privy every morning, they might have used the

passage at a convenient hour for that purpose. If so, they may now use it for giving access to the servants of the Municipality at reasonable and convenient times. And in a legal sense they are not aggravating the servitude at all, for this is the servitude to be inferred from the proved facts.

The result is that, in their Lordships' opinion, the decree appealed from is right, and this appeal should be dismissed. They will humbly advise Her Majesty to that effect. The appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Sanderson & Holland.*

Solicitors for the respondents: Messrs. *Wrentmore & Swinhoe.*

C. B.

CIVIL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Norris.

SHERE ALI AND ANOTHER (PLAINTIFFS) *v.* C. L. PRENDERGAST AND ANOTHER (DEFENDANTS.) *

1886 *March* 5.

Army Act (44 and 45 Vict., c. 58), s. 148—Courts of Requests, their jurisdiction—Court of Small Causes, Power of—Construction of s. 151, cl. 1, of the Army Act.

The Army Act (44 and 45 Vict., c. 58) gives jurisdiction to a Court of Small Causes in all actions of debt and personal actions against persons subject to military law (other than soldiers in the regular forces) over which such Court would ordinarily exercise jurisdiction, and provides a Court of Requests (s. 148) for those cases only where an action of the value of Rs. 400 or under has to be brought against such persons at a place lying beyond the jurisdiction of any Small Cause Court.

Held, also, that the words "within the jurisdiction" in s. 151, cl. 1, referred to "actions" and not to "persons."

THIS was a reference from the Court of Small Causes at Patna under s. 617 of the Civil Procedure Code. Sheik Shere Ali and another brought a suit in the Court of Small Causes at Patna against Major C. L. Prendergast, Deputy Judge Advocate General, residing in Rawalpindi, and Shiva Gobind living at Dinapur, within

* Civil Reference No. IA of 1886, made by Baboo Troilokya Nath Mitter, Judge of the Small Cause Court, Patna, dated the 15th December 1885.