

Special Appeal No. 44 of 1863.

1864.
Feb. 17.

RA'MBHA'U' BA'PU'SHET.....*Appellant.*

BHA'I BA'BU'SHET *Respondent.*

*Right of Way—User—Disturbance—Easement—Prescription—Reg. V.
of 1827, Sec. 1., Cl. 1.*

Held, that enjoyment without interruption for a period of more than thirty years was required, in order to establish a right of way by prescription in the Mofussil of the Bombay Presidency.

THIS was a special appeal from the decision of the Acting Assistant Judge of the Konkan, in Appeal Suit No. 452 of 1861, reversing the decree of the Munsif of Bhivandí.

Bháí Bábúshet brought the suit to establish a right of way to a certain well: alleging enjoyment for a period of sixty-five years; and disturbance by the defendant, who put up a gate across the path leading to the well. The defendant answered that the path referred to was in and through his ground; and had been used by him and his predecessors, as proprietors, for upwards of one hundred years.

The Munsif threw out the claim, on the ground that the land was the property of the defendant; and the Assistant Judge reversed the Munsif's decree: holding that the plaintiff had established his right of way, by proving uninterrupted user for more than twenty years.

The case was heard before ERSKINE and NEWTON, JJ.

Reid and Mádhavráv Krishná Khárkar for the appellant.

Dunbar and Dhirajlál Mathurádás for the respondent.

PER CURIAM:—The Court reverses the decree of the Acting Assistant Judge; and remands the case, in order that the plaintiff may have an opportunity of proving uninterrupted use of the way in question for a period of thirty years, that being the time required by law to establish a right by prescription. Costs to follow the final decision.

Suit remanded.

NOTE.—The mistake of the Munsif in this case arose from his not distinguishing between the right of easement or *servitude*, and the right of ownership or *dominium*; and the mistake of the Assistant Judge was that

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he applied the English law of prescription to the case, instead of Reg. V. of 1827, Sec. 1., Cl. 1, which still governs such cases in the Mofussil: see next case.

A *right of way* is of the class of incorporeal rights, called in the common law, *easement*, under which, in the language of Chancellor Kent, may be included "all those privileges (without profit) which the public or the owner of neighbouring lands hath in the lands of another, and by which the *servient* owner, upon whom the burden of the privilege is imposed, is obliged to suffer or not to do something on his own land, for the advantage of the public, or of the *dominant* owner to whom the privilege belongs." A private right of way is a right of passage over another man's grounds; and may arise either by grant of the owner of the soil, or by prescription, which supposes a grant, or from necessity. If it be a right of way "in gross," or a mere personal right, it cannot be assigned to any other person, nor transmitted by descent: it dies with the person; and it is so exclusively personal, that the owner of the right cannot take another person in company with him. "But if the incorporeal right is appendant or appurtenant to a house or land, and accessorial to the use and enjoyment thereof, it passes, with the tenement to which it is annexed, to the successive assignees and owners thereof, by a grant of the tenement, so that the benefit and burthen of the exercise and enjoyment of the incorporeal right will accompany the dominant and servient tenements into the hands of the successive assignees and owners thereof, so long as such dominant and servient tenements remain vested in the hands of separate proprietors." *Addison on Torts*, p. 26, 1st Edn. See also Sandars' *Institutes of Justinian*, Lib. II., tit. ii., *et seq.* 2 Bl. Comm. 35; and *Gale on Easements*, 3rd Edn. by Willes.—ED.

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 June 27.

Special Appeal No. 7 of 1865.

ANA'JI DATTU'SHET *Appellant.*
 MORU'SHET BA'PU'SHET *Respondent.*

*Easement—Title by Prescription—Reg. V. of 1827, Sec. 1., Cl. 1—
 Act XIV. of 1859—English Law.*

Held that uninterrupted enjoyment for a period of more than thirty years was necessary in order to acquire a title by prescription to an easement in the Mofussil of the Bombay Presidency: the Law applicable to such cases being Reg. V. of 1827, Sec. 1., Cl. 1; and that Act XIV. of 1859 had made no alteration in this respect.

THIS was a special appeal from the decision of Rāv Bahādur Krishṇārāv Viṭhal Vinchurkar, Principal Śadr Amīn of Thānā, amending the decree of the Munsif of Bhiṅdānī, in Appeal Suit No. 232 of 1864.

Anāji brought the suit to prevent Morú from passing