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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 Ráv Bahádur Krishṇáráv Viṭhal Vinchurkar, Principal Ṣadr Amín of Tháṇá, amending the decree of the Munsif of Bhiwandi, in Appeal Suit No. 232 of 1864.

Anáji brought the suit to prevent Morú from passing

through his ground; and to compel him to fill in a pit, which he had made therein.

Morú answered that he had been in the habit of using the ground in question, as a way, for a period of sixty years, and also of having a pit in it.

The Munsif found that the ground was the property of the plaintiff; and that the defendant had no right to the use of it as a way, or to make a pit in it.

The Principal Sadr Amín confirmed the Munsif's decree, as to the filling in of the pit; but threw out the plaintiff's claim to prevent the defendant from using his ground as a way: finding that he had been so using it continuously for the last twenty-five or thirty years, and thereby acquired a right so to use it.

The case was heard before COUCH and WARDEN, JJ.

Ganpatrávˆ Bháskar (with him *Dhirajlál Mathurádás*) for the appellant:—In order to establish a title by prescription, enjoyment "without interruption for a longer period than thirty years" must be shown, under Reg. V. of 1827, Sec. I., Cl. 1, which is still the Law governing such cases; and it was so held in S.A. No. 391 of 1863, decided, on the 4th of December 1863, by FORBES and WESTROPP, JJ. (*a*)

Bhaíravanáth Mangesh for the respondent:—Thirty years continuous enjoyment was necessary under the Regulation; but since Act XIV. of 1859 provides twelve years' limitation

(*a*) The following is an extract from the judgment referred to:—"The Senior Assistant Judge should ascertain whether by prescription the defendant acquired an easement which would justify him in allowing rain water to fall on the premises of the plaintiff, and whether the defendant by prescription acquired any easement in respect of drains from his premises in or over the premises of the plaintiff; and whether, since the acquisition (if any) of either of such easements, the defendant has attempted to extend the same, or either of them; for instance, by projecting eaves of his house to a greater extent than formerly over the premises of the plaintiffs, or by extending the length of such eaves, or by causing the water flowing therefrom to fall from a greater height, or in greater volume, than formerly, or by increasing the size or number of the said drains, or by any other material alteration. The defendant would not be entitled to any such extension of the said easements made within the period of thirty years before the commencement of the suit."—ED.

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to suits for the recovery of immoveable property twelve years' use ought to be considered sufficient to acquire a title by prescription.

Cur. adv. vult.

COUCH, J. :—The Principal Ṣadr Amín, in his judgment, says : " If a person be in the habit of going over another's estate for a long time, he can compel a right of way over the land, even though it belong to another." That is so if the enjoyment and use have been for the length of time which the Law requires. Here, as there is no evidence to show that there was an enjoyment for thirty years,—or, if there is, it has not been pointed out by the vakíl for the respondent, —the Principal Ṣadr Amín was wrong in throwing out the plaintiff's claim.

In Special Appeal No. 391 of 1863 it was held that thirty years' enjoyment was necessary to confer a title by prescription. The question for consideration in this case is, whether Act XIV. of 1859 has introduced a new period of limitation with reference to such a title. We find that there is no clause in that Act which applies to claims of this nature. Questions similar to this have been raised in the courts in England. Lord *Mansfield* said (*b*) " that an incorporeal right, which, if existing, must be in constant use, ought to be decided by analogy to the Statute of Limitations ;" and the opinion of Mr. Serjeant *Williams* (*c*) was in accordance with this expression of Lord Mansfield.

But Mr. Gale (*d*) says ; " The view of Serjeant Williams above cited is, however, at variance with the generally received opinions upon this subject ; but, although the courts refused in form to shorten the time of legal memory by analogy to the later statutes of limitation, they obviated the inconvenience, which must have arisen from allowing long enjoyment to be defeated by showing that it had not had a uniform existence during the whole period required, by introducing a new kind of title by presumption of a grant

(*b*) 2 Evans' Pothier 136. (c) 2 Wms. Saunders 175 n.
(*d*) Gale on Easements, 3rd Edn., 136.

made and lost in modern times." In this manner juries were directed to presume a grant, till Act 2 & 3 Wm. IV., c. 71, commonly called the Prescription Act, was passed.

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The same reasoning is applicable to this case. Reg. V. of 1827, Sec. I., Cl. 1, provides that "whenever lands, houses, hereditary offices, or other immoveable property have been held without interruption for a longer period than thirty years, whether by any person as proprietor, or by him and his heirs, or others deriving right from him, such possession shall be received as proof of sufficient right of property in the same." And Act XIV. of 1859 contains no provision for these cases, which are, therefore, to be governed by the Regulation. If the time of enjoyment necessary to confer a right to an easement in India ought to be shortened, it must be done by the Legislature.

We, therefore, amend the decree of the Ṣadr Amín, by reversing so much thereof as threw out the plaintiff's claim to prevent the defendant from using the land in dispute.

Appeal allowed.

Special Appeal No. 92 *of* 1866.

June 20.

The Heirs of HUSEN BEG BA'I kom TA'J MUHAMMAD.....*Appellants.*

A'KU'BA'I *alias* TA'RA' NA'YAKI'N .....*Respondent.*

Account stated—Mortgage—Consideration.

An agreement reciting that, in consideration of the care which the plaintiff took of the defendant and her property during her infancy, and of the instruction given to her, for which the plaintiff expended her own money, the defendant had mortgaged her house to the plaintiff; and stipulating that, in the event of the defendant going to live with any man, and similarly after her death, the house should become the plaintiff's property:—*Held* good in law, and in substance an account stated, with a mortgage to secure the amount due; and the usual decree for redemption made: reversing the decrees of the courts below, which threw out the plaintiff's claim.

THIS was a special appeal from the decision of C. B. Izon, Acting Assistant Judge of Puná, in Appeal Suit No. 89 of 1864.