1876.

MA'NIKLA L ATMARA'M v. MANCHERSHI DINSHA' COACHMAN.

and to have held it not to have been a breach of trust at all. But I say nothing as to the question whether her application of the proceeds to building or completing a temple and *dharmsala* at Gogo, (a purpose in which the objects of the charitable intentions of Bhugwan Kulla, as declared in his will, do not appear to have any interest, and from which they do not appear to derive any benefit), can be sustained. But in my opinion the proper person to institute any suit against the estate of Rajkuver, if any suit at all be maintainable, in respect of her application of the purchase money received from the defendant, would be the Advocate General on behalf of the Maharajas, and not the present plaintiff.

I may add, that, in my opinion, there is nothing in the Indian Limitation Act excluding from its benefit those asserting their right to claim under a *boná fide* purchase for value, by reason that those claiming against them are the objects of a *charitable* trust imposed on such property. It has been decided by the highest tribunal in England, in the case of the *President and Scholars of the College of St. Mary Magdalen, Oxford* v. *The Attorney General* [1], that the purchasers for value of lands devoted to charity, namely, the poor of certain parishes, were entitled to rely on the English Statute of Limitations as a defence, though they purchased with notice of the charity. I can see no reason for any different conclusion with regard to the Indian Limitation Act.

The result, therefore, is that the 1st and 7th issues must be found for the defendant, and the suit be dismissed with costs.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 327 *of* 1875.

1876. August 3.

SITA'RA'M VA'SUDEV (DEFENDANT AND APPELLANT) *v.* KHANDERA'V BA'LKRISHNA (PLAINTIFF AND RESPONDENT).

Prescriptive right—Regulation V. of 1827, *Section* 1, *Clause* 1—*Limitation—Act XIV. of* 1859, *Section* 1, *and Clause* 13—*Act IX. of* 1871, *Section* 2, *Schedule I., and Schedule II., Article* 127.

In 1873, the plaintiff sued for his share in certain ancestral property in the possession of the defendant, and alleged that the latter had been united with him in estate. He, however, admitted that he had lived separate from the defendant for

(1) 6 H. L. Ca. 189.

1876.

SITA'RA'M VA'SUDEV v. KHANDERA'V BA'LKRISHNA.

forty years previously to the institution of the suit, and that he had not, during that period, received any portion of the profits of the ancestral property. The defendant pleaded limitation. Both the Lower Courts held that the suit was governed by Act IX. of 1871, Sch. II., Art. 127, and decreed in favour of the plaintiff, on the ground that no demand by the plaintiff of his share and refusal to comply therewith had been proved.

Held by the High Court in Special Appeal that the defendant had acquired under Regulation V. of 1827, Section 1, Clause 1, a prescriptive title in the immoveable estate sued for, by his uninterrupted possession as proprietor for more than thirty years before Act IX. of 1871 came into force, and that, therefore, the plaintiff's claim was barred, the effect of that Regulation being not only to bar the plaintiff's remedy but to take away his right.

The repeal of a statute or other legislative enactment cannot, without express words, or clear implication to that effect, in the repealing Act, take away a right acquired under the repealed statute or other enactment while it was in force.

And, accordingly, although Act IX. of 1871, Section 2, Schedule I., expressly repealed Regulation V. of 1827, it did not affect any prescriptive right or title which had, under Section 1 of that Regulation, been acquired before Act IX. of 1871 was passed.

THIS was a special appeal from the decision of E. Hosking, Acting Assistant Judge at Tanna, affirming the decree of Naro Mahadeo, 2nd Class Subordinate Judge at Mahád.

The plaintiff sought to obtain a share in ancestral property in the possession of the defendant, whom the plaintiff alleged to be united with him in estate. The plaintiff, however, admitted that he had lived separate from the defendant for forty years before the institution of this suit, and had not during that time received any portion of the profits or produce of the ancestral estate.

The only point argued in this case, both in the Lower Appellate Court and in the High Court, was the question of limitation.

The special appeal was argued before WESTROPP, C. J., and MELVILL, J.

Mahadeo Chimnáji Apte for the special appellant:—Both the Lower Courts were wrong in holding that the case was governed by Act IX. of 1871, Schedule II., Article 127. The plaint was filed on the 10th November 1873. The plaintiff admits in Exhibit No. 2 that he and the defendant have been living separately for forty years before the institution of the suit, and that he was not, during that time, in possession or enjoyment of any part of the family property in which he now claims a share. Regulation V. of 1827, Section 1, Clause 1, gave a prescriptive right to the party in uninterrupt-

1876.

SITA'RA'M VA'SUDEV v. KHANDERA'V BA'LKRISHNA.

ed possession for thirty years. The family property, therefore, became completely vested in the defendant by prescription under that Regulation by his forty years' possession as owner before Act IX. of 1871 came into force on the 1st April 1873. A Hindu coparcener under Section 1 of that Regulation was held to have acquired a complete prescriptive right to the undivided family property in his possession uninterruptedly for thirty years, held by him as proprietor: *Gurávi* v. *Gurávi* (1), *Ráne* v. *Ráne* (2). The prescriptive title given by Section 1 of the Regulation could not be taken away either by Act XIV. of 1859 or Act IX. of 1871, in the absence of any provision, either express or implied, to that effect. But neither of the Acts contains any such provision. Section 1 of the Regulation, as held by the Privy Council in *Mahárání Fatesangji* v. *Desái Kaliánráyáji* (3), remained unaffected and unrepealed by Act XIV. of 1859. That section not only barred the remedy, but extinguished the right itself. Supposing the case was governed by Act XIV. of 1859, the plaintiff's claim was still barred. Adverse possession for more than twelve years under that Act both barred the remedy and extinguished the right in favour of the person in possession: *Raja Baradakkant Roy* v. *Prankkishna Paroo* (4). Under that Act such adverse possession was of itself sufficient to create a title: *Ram Sahoy Singh* v. *Kooldeep Singh* (5). *Ameeroonissa Begum* v. *Amir Khan* (6); *Brindabund Chunderroy* v. *Táráchand Banerjee* (7). If a claim was once barred under Act XIV. of 1859, it could not be revived under the new Limitation Act IX. of 1871: *Vencatachella Mudali* v. *Sashagherry Rau* (8), *Molakatalla Naganna* v. *Pedda Narappa* (9), *Eathamukala Subbammah* v. *Ragiah* (10), *Vencataramanier* v. *Manche Reddy* (11). If a person suffers his right of action to be barred by limitation, the practical effect is the extinction of his title in favour of the party in possession for more than the period of limitation: *Gunga Gobind Mundul* v. *The Collector of the 24 Pergunnahs* (12).

(1) 3 Bom. H. C. Rep. 170 A. C. J. (2) *Ibid.* 173.
(3) 10 Bom. H. C. Rep. 281, see p. 288; S. C. L. R. 1 Ind. Ap. 34, see p. 51.
(4) 3 Beng. L. R. 343 (A. C.) S. C. 12 Calc. W. R. 192 Civ. Rul.
(5) 15 Calc. W. R. 80, 82 Civ. Rul.
(6) 17 Calc. W. R. 119 Civ. Rul.; S. C. 8 Beng. L. R. 540.
(7) 20 Calc. W. R. 114 Civ. Rul.; S. C. 11 Beng. L. R. 237.
(8) 7 Mad. H. C. Rep. 283. (9) *Ibid.* 288. (10) *Ibid.* 293. (11) *Ibid.* 298.
(12) 7 Calc. W. R. P. C. 21; S. C. 11 Moore Ind. Ap. 345.

1876.

SITA'RA'M VA'SUDEV v. KHANDERA'V BA'LKRISHNA.

Shántárám Náráyán (with him the Honourable Rao Saheb *V. N. Mandlik*, Government Pleader) for the special respondent:—The suit was brought when Act IX. of 1871 was in force. That Act expressly repealed Regulation V. of 1827. The present case, therefore, does not come under that Regulation. At one time, Regulation V., Section 1, was not held applicable to partition suits between Hindus. The late Sádr Adálat, however, in subsequent cases, applied it to such suits by analogy, and presumed partition or separation in a case of thirty years' uninterrupted possession: *Ráne* v. *Ráne* (1). So the Regulation was applied to a partition suit merely by legal fiction. Under Section 8 of that Regulation the defendant may be regarded as a managing coparcener, managing the family estate on behalf of the plaintiff, and as such was in the position of a trustee. His possession, therefore, will not affect the plaintiff's right. The case cited from 7, Weekly Reporter P. C. 21 was one under Bengal Regulation II. of 1805, and not under Act XIV. of 1859. The same may be said with respect to the two other cases quoted from the 12th and 15th vols. of the Calcutta Weekly Reporter. There was no law of prescription in Bengal, so the High Court there created one out of Act XIV. of 1859.

The judgment of the Court was delivered by—

WESTROPP, C.J.:—This is a suit in which the plaintiff seeks to obtain a share in ancestral property in the possession of the defendant, whom the plaintiff alleges to be united with him in estate. The plaintiff admits that he has lived separate from the defendant for forty years previously to the institution of this suit in the year 1873, and that he (the plaintiff) has not, during that period, received any portion of the produce or profits of the ancestral property.

Reg. V. of 1827, Chap. I., Sec. 1., Cl. 1, enacted 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 a right from him, such pos-

(1) 3, Bom. H. C. Rep. A. C. J. 174 *in notis*; *Girdhur Purshotum* v. *Govind*. 7 Harr. S. D. A. 371.

1876.

SITA'RA'M VA'SUDEV v. KHANDERA'V BA'LKRISHNA.

session shall be received as proof of a sufficient right of property in the same."

That section has, both in the Sádr Adálat and in the High Court, been held applicable to suits, such as the present, to recover a share in undivided, immoveable estate belonging to a Hindu family: *Girdhur Purshotam* v. *Govind Kasidas* (1), *Gurávi* v. *Gurávi* (2), *Ráne* v. *Ráne* (3).

Of Sec. 1, Chap. I., Reg. V. of 1827, Sir J. Colvile, in giving the judgment of Her Majesty's Privy Council in *Mahárána Fatesangji* v. *Desái Kaliánráyaji* (4), says that it is "an enactment which, inasmuch as it relates only to the acquisition of a title by positive prescription, seems to be unaffected by Act XIV. of 1859 and to stand unrepealed in the Presidency of Bombay." In saying that it was unrepealed in the Presidency of Bombay, their Lordships, who gave their judgment in 1873, only meant, as the context shows, that it was not repealed by Act XIV. of 1859. It was expressly repealed by Act IX. of 1871, Sec. 2 and Sch. I.

Act XIV. of 1859, Sec. 1, Cl. 13, also applied to such suits as the present, but the whole of that Act, except Sec. 15 (which has no bearing on the present case), has been repealed by Act IX. of 1871, Sec. 2, Sch. I. The Courts below have held that this suit is governed by Sch. II. Art. 127 of that repealing Act, and that, as no demand by the plaintiff of his share and refusal to comply with such claim had been proved, his suit is not barred by that Act.

But the defendant had, in our opinion, acquired a prescriptive title in the immoveable estate, the subject of this suit, by his uninterrupted possession as proprietor for more than thirty years previously to the passing or coming into force of Act IX. of 1871. Any Court in which his title was agitated, whether in a suit brought by himself, or by the plaintiff, would have been bound, on satisfactory and conclusive evidence of the defendant's uninterrupted possession as proprietor for more than thirty years, to have received such evidence as proof of a sufficient right of property in the immoveable estate. In short, the effect of Reg. V. of 1827, Chap. I., Sec. 1, was not merely to bar the present plaintiff's remedy, but to take away his right.

(1) 7 Harr. S. D. A. Rep. 371. (2) Bom. H. C. Rep. 170 A. C. J. (3) *Ibid.* 173.
(4) 10 Bom. H. C. Rep. 281, 288; S. C. L. R. 1 In. App. 34, 51.

1876.

SITA'RA'M VA'SUDEV v. KHANDERA'V BA'LKRISHNA.

The repeal of a statute or other legislative enactment cannot, without express words, or clear implication to that effect, in the repealing Act, take away a right acquired under the repealed statute or other enactment while it was in force: *Restall* v. *London and South Western Railway Co.* (1), *Oldreeve* v. *Puckridge* (2).

With reference to the Bengal Regulations of Limitation [III. of 1793, Sec. 14, and II. of 1805, Sec. 3,] in relation to immoveable property in the Mofussil, there are some important remarks of Sir Lawrence Peel, C.J. and Sir James Colvile in their valuable judgments in *Sibchunder Doss* v. *Sibkissen Bonnerjee* (3). The question there was whether the *lex fori* of the Supreme Court, viz., the Stat. 21, Jac. I., which required an adverse possession of twenty years, or the *lex loci rei sitæ*, viz., the Regulations above mentioned, which prescribed a twelve-years' limit, should be applied to an action of ejectment, brought in the Supreme Court of Calcutta, to recover some lands at Tittaghur in the Mofussil. The Court held the latter to be applicable, and, accordingly, that the lessor of the plaintiff must fail, as he was unable to prove that his right of entry had accrued within twelve years. If the right of entry ever existed, it had accrued twenty years, less four days, before the filing of the plaint, and, therefore, would have been within the statute of James. Sir L. Peel said, at page 76:—"In my opinion, the weight of authority is in favour of the position, that though a law in terms limits *the suit* only as to immoveable property, it in effect gives the possessor, who is protected against outstanding claims founded on original right, the property as against those persons as well as the possession. It is undoubtedly the law in all the Courts in the Mofussil, and has long been so, that, after twelve years' adverse possession, no exception applying to the case, and when all claimants are barred in those courts as to suits, the occupant has title, and may confer title;" and again, at p. 77, "but in the case of these Regulations" (the Bengal Regulations above mentioned) "the construction which has prevailed in the Mofussil, viz., that adverse possession for the prescribed period not merely bars the remedy, but gives title, is in harmony with the presumable will of their framers, with the opinion of the most able jurists on laws as to real estate,

(1) L. R. 3 Exch. 141. (2) *Ibid.* 145. (3) 1 Boulnois 70.

1876.

SITA'RA'M VA'SUDEV v. KHANDERA'V BA'LKRISHNA.

similarly worded, and with the whole course of decisions on analogous branches of the English law;" and again, at p. 78, "There may be found in the writings of Lord Coke, in reference to this subject, passages to the effect that the mere right subsists still, and that a 'right' can never be lost unless released or surrendered. But Lord Coke, if these observations were read generally and without limitation, would be putting forth rather a sort of moral or metaphysical abstraction, not founded on any clear notions of the origin and foundation of the right of property, than a legal rule of property. This legal view of the subject will be learned on reference to what he says as to the doctrine of remitter. There was no remitter to a bare title, nor to a right for which the party had no remedy by any action at all. The doctrine is thus laid down in Co. Lit. 349 a—'Here it is to be understood that regularly a man shall not be remitted to a right remediless, for which he can have no action, for Littleton here saith,' &c. &c. It was always an established maxim in the law that a disseisor acquired *the fee*, that is to say, there might be a *tortious fee*, and consequently *property*, even as against the rightful owner, founded on wrong, and in the dispossessed person property was turned to a right. In this respect there was an important difference between the disseisin of lands and the wrongful taking of goods under an unfounded claim as owner. When all rights of action and entry as to lands in all other persons were barred by efflux of time, the legal title of the disseisor, or of those claiming under him, was complete, perfect, andindefeasible;" and subsequently he adds, at page 81, "But if the disseisor or any one under him was put out of possession, or the lands were so left as to be subject to occupancy, general or special, and the rightful owner entered where his entry was congéable, *i.e.*, allowable, and whilst any remedy by action remained to him, then by the doctrine of remitter, which only took effect on an entry with lawful title to enter, the tenant was in of his original title, which was superior to that of the demandant. At no time in our law could a tortious entry be made the foundation of a remitter, or be available to revive 'a right' which once existed, but against which effluxion of time had set up a bar in favour of long possession." Sir James Colvile, speaking of the two Regulations

already mentioned, said at page 93 :—" The wording undoubtedly shows that the law of limitation is one which in terms goes to the remedy rather than the right ; and as the law applies to all subjects, if the subject here were an obligation arising out of a contract, the wording of the law would be an irresistible argument against its application to this *forum*. But the subject of the suit is immoveable property, and the necessary effect of the law, which takes away the remedy in that locality, is to give a title in that locality to the adverse possessor."

While the Bombay Regulation named a longer period of limitation than that in the Bengal Regulations, it used distinct language to indicate that when that period had expired, the right of property should be regarded as vested in the person who had enjoyed uninterrupted possession during the thirty years, and accordingly the Privy Council, as we have seen, did not hesitate to describe Bombay Regulation V. of 1827, Section 1, as an enactment of positive prescription. It, too, was specially conversant of immoveable estate, while Bengal Regulation III. of 1793, Section 14, was applicable to all suits. Bengal Regulation II. of 1805, Section 3, applied to immoveable property only, but was not quite so express as to the transfer of the right of property as the Bombay Regulation. However, the mention of "a prescriptive right of property" in the 4th clause of Section 3 of Bengal Regulation II. of 1805, when taken in conjunction with the other clauses in that section and with the enactment of 1793, does lead to the inference that such a transfer was worked by the adverse possession for the prescribed period of twelve years.

In the Privy Council case, already mentioned [1], and to which the law of limitation applicable was that of those same Regulations, Lord Romilly said :—" It is of the utmost consequence in India that the security which long possession affords should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands. Contiguous owners are apt to charge one another with encroachments. If twelve years' peaceable and uninterrupted possession of lands, alleged

(1) *Gunga Govind* v. *The Collector of the* 24 *Pergunnahs*, 11 Moore Ind. Ap. 345 ; S. C. 7 Calc. W. R. 21 P. C.

1876.

SITA'RA'M VA'SUDEV *v.* KHANDERA'V BA'LKRISHNA.

to have been enjoyed by encroachment on the adjoining lands, can be proved, a purchaser may take that title in safety."

It is not clear from the reports of *Raja Barakant Roy* v. *Prankkishna Paroi* (1) whether those Regulations or Act XIV. of 1859, Sec. 1, Cl. 12, was the law applied. The same remark applies to *Ram Sahoy Singh* v. *Kooldeep Singh* (2). In *Ameeroonissa Begum* v. *Amil Khan*(3) twelve years' adverse possession under Act XIV. of 1859, Sec. 1, Cl. 12, was held not only to bar the remedy, but so to transfer the right as to enable the party, who had such possession, but was subsequently ousted, successfully to maintain a suit to recover possession. The case of *Grindaban Chander Roy* v. *Tarachand Bundepadhya* (4) was decided in the same way and upon the same Act.

Purchasers have been compelled to accept a title depending upon the Statute of Limitations (3 and 4 Wm. IV., C. 27), which not only bars the remedy, but takes away the right and title of the person whose remedy is barred: *Scott* v. *Nixon* (5); Sugden's Vendors and Purchasers, pp. 389, 475, 476, Ed. of 1862; 1 Dart Vendors and Purchasers 369, 4th Ed. We think that Reg. V. of 1827, Chap. I., Sec. 1, though not in terms so express as the English statute, but more distinct than the Bengal Regulations, has the same effect of barring the right as well as the remedy.

No doubt, as Lord Tenterden said in *Surtees* v. *Ellison* (6), "it has been long established, that when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it never existed;" but we consider that a title, acquired under an enactment of positive prescription such as Reg. V. of 1827 before it was repealed, is a transaction past and closed, and fully comes within Lord Tenterden's exception. Being of opinion that Act IX. of 1871, although it repealed Reg. V. of 1827, did not affect any prescriptive right or title which had under Chap. I., Sec. 1 of that Regulation, been acquired by any

(1) 3 Beng. L. R. 343 A. C.; S. C. 12 Calc. W. R. 192 Civ. Rul.

(2) 15 Calc. W. R. 80, 82 Civ. Rul.

(3) 17 Calc. W. R. 119 Civ. Rul.; S. C. 8 Beng. L. R. 540.

(4) 11 Beng. L. R. 237; S. C. 20 Calc. W. R. 114.

(5) 3 Dr. & War. 388; S. C. 2 Con. & L. 185; Ir. Eq. R. 8.

(6) 9 B. & C. 750, 752.

1876.

SITA'RA'M VA'SUDEV v. KHANDERA'V BALKRISHNA.

possessor of immoveable property before Act IX. of 1871 was passed, inasmuch as neither by express words nor by clear implication does there appear to have been any intention on the part of the Legislature to take away any such right or title, it is unnecessary for us to consider this case with reference to Act XIV. of 1859, or to pronounce any opinion upon the cases which have been cited for the appellant as to that Act.

We must reverse the decrees of the Courts below, and make a decree for the defendant (appellant), with costs of the suit and of both appeals.

[APPELLATE CIVIL JURISDICTION.]

Special Appeal No. 135 *of* 1876.

1876. August 7.

ABDUL KARIM (PLAINTIFF AND APPELLANT) *v.* MANJI HANSRAJ AND OTHERS (DEFENDANTS AND RESPONDENTS).

Limitation—Act XIV. of 1859*—Act IX. of* 1871, *Section* 22 *and Schedule II., Article* 60*—Evidence—Onus probandi—Proof of payment—Misjoinder.*

On 2nd August 1872, A. K. filed a plaint against M. H. and M. R., in which he alleged that on 1st April 1870 M. R. had given a *hundi* for Rs. 500, for value received, to A. K.; that on 27th March 1871 M. H. purchased this *hundi* from A. K., promising to pay him Rs. 534 for it; that M. H. gave the *hundi* to his brother I. H., for the purpose of obtaining payment of the amount from M. R., and that I. H. subsequently informed A. K. that the *hundi* had been lost. A. K. accordingly prayed that the defendants M. H. and M. R. might be decreed to pay to him Rs. 534 with profit and interest. M. H. denied that he had purchased the *hundi* from A. K., who, he alleged, had given the *hundi* to I. H. for the purpose of getting it cashed. M. R. admitted that he had executed the *hundi*, and had given it to A. K. for Rs. 500. He further alleged that it had been presented to him for payment by I. H., to whom he had paid the amount with interest on 31st March 1871, and he produced the *hundi* with a receipt, purporting to be by I. H., indorsed on it. The trying Judge, after settlement of the issues, on 25th June 1874, added I. H., as a party defendant. I. H. alleged that A. K. had given him the *hundi* for the purpose of getting it cashed, denied the payment by M. R., alleged the indorsement on the *hvndi* to be a forgery, and pleaded limitation.

Held that the admission by M. R. of the drawing of the *hundi* for value received, laid on him the burden of proving payment, and that, though the possession by M. R. of the *hundi* was a circumstance in his favour, yet, as it did not in itself amount to proof of payment, the *onus probandi* was not thereby shifted to the plaintiff.