trespasser, as a matter of right, whether strictly legal or not, yet lawful to the extent of excusing a trespass.[7] In the words of Erle, J., "if the enjoyment has been clandestine, contentious, or by sufferance, it is not of right."[8] It is evident that, in the Indian Acts on the subject, the expression "as of right" has a *less* extensive meaning, for the Legislature here expressly requires that the enjoyment must be "as of right," *as well as* "open" and "peaceable."

In *Alimoodeen* v. *Wuzeer Ali*,[9] Justice Markby, after referring to the difficulties which arose upon the interpretation of this expression in the English Statute, held, that here it signifies no more than that the enjoyment must be by a person *in the assertion of a right*. It is not necessary that the claimant should have enjoyed the easement "rightfully" or "without trespass."[10] If he *claims a title* to the easement, and the easement is *not* enjoyed *under a license or permission* from the owner of the servient heritage, his enjoyment is "as of right," or *nec precario*.[1] A person who, during the requisite period of enjoyment, *asks the permission* of the servient owner, does not assert a right to the easement. By asking for permission, he admits that he then has no right. Each renewal of the license rebuts the presumption that the enjoyment is had under a *claim of title* to the easement.[2]

[7] Tickle *v.* Brown, 4 A. & E., 369; Goddard, 152. The easement must have been enjoyed in the manner that a person rightfully entitled would have used it, and not as a trespasser would have done. And the claimant must not have occasionally *asked the permission* of the servient owner. See the judgment of Parke, B., in Bright *v.* Walker, 1 Crompton, Meeson and Roscoe's Reports, 211, 219.

[8] 17 Q. B., 275; Gale, 209.

[9] 23 W. R., 52.

[10] Markby's Elements of Law, para. 402.

[1] Gale, 213.

[2] Gale, 168, 171, 213; Goddard, 153. See note 5, p. 407, *supra*.

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In the case of a negative easement (*e. g.*, of light or air), the inchoate enjoyment of the right is, in the eye of the law, no injury or wrong to the owner of the adjacent heritage who is at liberty to obstruct the enjoyment by some act done on his own heritage.[3] If the open enjoyment of such an easement is not actually obstructed, and it is "not had in such wise as to involve the admission of an obstructive right" in the owner of the adjacent heritage, the easement is enjoyed "as of right" within the meaning of Act XV of 1877.[4] Enjoyment which no one has a right to obstruct, as the enjoyment of an easement over land in the possession of the claimant himself, is not adverse enjoyment, or enjoyment as of right.[5] Such enjoyment may be open to the further objection that it is not an enjoyment *as an easement*. Enjoyment which has been had *adversely* to the owner of the servient heritage, "as the exercise of a *right*," and not at the mere will and favor of such owner, is enjoyment *as of right*.[6] A tradesman, or a friend, who daily

[3] When the owner of a dwelling-house opens new windows, he does no injury or wrong in the eye of the law to his neighbour, who is at liberty to build up against them, so far as he possesses the right of building on his land. *Per* Lord Westbury in Tapling *v.* Jones, 11 H. L. C., 290. See Goddard, p. 308.

[4] Mathuradas *v.* Bai Amthi, I. L. R., 6 Bomb., 522.

[5] Modhoosoodun *v.* Bissonath, 15 B. L. R., 361.

[6] Askar *v.* Rammanick, 13 W. R., 344; Aukhoy *v.* Mollah Nobbee, 13 W. R., 449; Futteh Ali *v.* Asgur Ali, 17 W. R., 11.

"Adverse possession" should, however, be distinguished from possession (or user or enjoyment) "as of right." Chundi *v.* Shib, 6 C. L. R., 272. In the case of positive easements, possession or user as of right is partially analogous to adverse possession. The owner has a right of action for the adverse possession of the land or the adverse user of an easement over the land, but "user as of right" does not, as "adverse possession" does, oust the owner from his *occupation* of the

opens my gate and walks up to my door, under a tacit *permission*, which may be revoked at any moment, is not at all in *quasi*-possession or enjoyment of an easement. The grantee of a way for the term of twenty years may be in *quasi*-possession of it, but his enjoyment is derivative like that of a lessee for a term of years, and he cannot acquire an absolute and indefeasible right by prescription against his grantor.[7] If the servient owner or occupier has agreed to allow the user or enjoyment for an unlimited period and as an indefeasible easement, the enjoyment, though in one sense derivative, is valid

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land. In the case of the negative easement of light or air, the enjoyment is had *without trespass* on the neighbour's land, and the enjoyment is presumably as of right, if it is submitted to, or not obstructed by the neighbour. The difficulty of proving that the enjoyment of a negative easement has been an enjoyment *as of right*, is referred to in Markby's Elements of Law, secs. 378 and 379; and also in Bagram *v.* Khetternath, 3 B. L. R., O. C., 18; and Bhoobun *v.* Elliot, 6 B. L. R., 85. See the judgments of Justice Markby. Justice Markby, following Savigny, held, that the enjoyment of a negative easement was not enjoyment *as of right*, unless it appeared that there was *patientia* or submission on the part of the servient owner. But his opinion as to the necessity of shewing *patientia* on the part of the servient owner in the case of negative easements, does not appear to have been adopted or acted upon by other Judges. Actual uninterrupted enjoyment, unless affected by express agreement, has been considered to be practically sufficient for the purpose of raising the presumption of right. Proof of such enjoyment for twenty years is, in all cases, *primâ facie* evidence of a title which must be rebutted by the servient owner. The presumption is, that a party enjoying an easement acted under a claim of right until the contrary is shown: Gale, 201, 208; Campbell *v.* Wilson, 3 East, 294. Under Act V of 1882 it is not necessary, in the case of light, air or support, that the enjoyment should be *as of right*. "As a rule, it is not possible to prove, in the case of such easements, that the enjoyment is *as of right* in the sense in which these words are now understood." See Mr. Stokes' Speech in the Legislative Council, 16th February, 1882.

[7] Markby, secs. 377, 401. See also Hureedoss *v.* Jodoonath, 14 W. R., 79 (as to the presumption of the enjoyment being under a *license* when the two owners are near relatives), and expl. 1, sec. 15, Act V of 1882.

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quasi-possession. But enjoyment under a mere revocable license, or a permission granted for a limited period, or subject to a condition on the fulfilment of which it is to cease, is not such enjoyment as would ripen into an absolute and indefeasible right under sec. 15 of the Easements Act, or under sec. 26 of Act XV of 1877.[8]

Enjoyment *by* whom?

Enjoyment by any one in possession of the dominant heritage, whether as owner, tenant, or servant (and notwithstanding any personal disability of the possessor), may give the owner a prescriptive right. Enjoyment had by such possessor under a claim of right in respect of such heritage, is sufficient.[9]

What constitutes enjoyment?

The physical possibility of exercising or enjoying an easement, coupled with the determination to exercise and enjoy it on one's own behalf, constitutes *quasi*-possession or enjoyment.[10] Where an easement has once been enjoyed as of right, such enjoyment continues, if the physical possibility of enjoyment and the mental determination to enjoy are not wanting. To prove continuous *quasi*-possession, it is not necessary to prove continuous *actual* user, any more than it is necessary to prove continuous *bodily* contact in order to prove possession of a corporeal thing.[1] The enjoyment *continues* so long as the

[8] See expl. 1, sec. 15, Act V of 1882. This explanation, it is apprehended, is declaratory of the law as it stood before the passing of Act V of 1882.

[9] See Gale, 206; Tudor, 182; and sec. 12, Act V of 1882.

Enjoyment, by the owner of a house, "in the persons of his servants and the members of his family," may be sufficient. *Per* Phear, J., I. L. R., 1 Calc., 422, 425.

[10] Markby, sec. 377. See p. 421, *supra*.

[1] See Markby, sec. 377; p. 134, *supra*; Tudor's Leading Cases, p. 190; and Flight *v.* Thomas, 11 Ad. & Ell., 688.

claimant's right is not interfered with whenever he has occasion to use it.[2] (But see p. 445, *infra*.)

An easement must be *actually* enjoyed for the *full* period prescribed, before a prescriptive right to it may be acquired under the English Statute. The Indian law omits the words "actually" and "full" from its rule for the acquisition of easements by prescription. It is true that illus. (*b*) of sec. 26, Act XV of 1877, seems to make "enjoyment" equivalent to "actual user;" but it has been held that the Illustration cannot be allowed to control the ordinary sense of the word "enjoyment," which occurs in the section itself, and the Legislature appears to have adopted this interpretation in Act V of 1882.[3]

Proof of continuous enjoyment *for* the prescribed period.

Evidence of user, a little *before*, and again *after*, the prescriptive period had *begun*, may be ground for presuming user and enjoyment at the commencement of the prescriptive period.[4] How many times the right has been exercised during any part of the period is not material if the claimant exercised it as often as he chose.[5] The enjoyment of the right may continue to the *end* of the prescriptive period,—that is, till within two years before suit, although there has been no *actual* user or exercise of

[2] Koylas *v.* Puddo, 8 C. L. R., 281, 284; (S. C.), I. L. R., 7 Calc., 132.

[3] The objectionable Illustration does not appear under sec. 15 of Act V of 1882, which corresponds to sec. 26, Act XV of 1877. See 8 C. L. R., 281. Even in England, it has been held in some cases, that *actual* user for the *full* period is *not* necessary. Flight *v.* Thomas, Carr *v.* Foster, Lawson *v.* Langley, cited in Goddard on Easements, pp. 124, 130, 132.

[4] Lawson *v.* Langley, 4 A. and E., 890; Carr *v.* Foster, 3 Q. B., 581; and Goddard, 131, 132. It appears from these cases that there is authority for this proposition even in England.

[5] Carr *v.* Foster, 3 Q. B., 581, 587; Tudor's Leading Cases, p. 190.

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the right at the *end* of the period.[6] Some discontinuous easements, by their very nature, necessitate *long* intervals between the acts of actual user.[7] A's right of passage for boats over B's land when it becomes covered with water during the rainy season, can only be exercised during two or three months of the year, and if there be a lack of rain, it is probable that, even for twenty or twenty-one months, the right may not be exercised at all.[8] Again, as ponds are not cleared every year, there must be long intervals between the acts of exercising an easement, of putting the soil of one's pond on another's land when the pond is cleared.[7] So the right of carrying marriage and funeral processions over a neighbour's land cannot be exercised every year, unless marriages and deaths in the family of the claimant take place every year. It may, however, be doubted if a right which is capable of being exercised only once in ten or fifteen years, may be acquired by twenty years' enjoyment under the statutory rule.[9]

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[6] Koylas *v.* Puddo, 8 C. L. R., 281, 283. In England, the weight of authority is in favor of the proposition that there must be *actual*, *i. e.*, real, physical, positive enjoyment, in the first and the last year of the twenty years. See Hollins *v.* Verney, 11 Q. B. D., 715, 718.

[7] See Phear on Rights of Water, 97.

It may be here observed, that, in the opinion of Parke, B. (recently approved of by Lord Coleridge, C. J.), the English *Statute* cannot apply where the rights are used at intervals of two or three years, for in such cases a party could not acquiesce in an interruption *for one year*. (See Hollins *v.* Verney, 11 Q. B. D., 715, 718.) The words "*actual* enjoyment for the *full* period of twenty years" in the Statute, the form of plea under the Statute, and the explanation of "interruption" of enjoyment, induced Parke, B., to incline to the opinion that there must be actual user, at least once every year. The last only of the three reasons may apply to the Indian law on the subject. See Goddard, 130.

[8] 8 C. L. R., 281, 284.

[9] See Hollins *v.* Verney, 11 Q. B. D., 715.

What is or is not an interruption.

A cessation of user occasioned by the *accident* of a dry season or other causes over which the claimant has no control, is not an interruption of the enjoyment.[10] A cessation of user of an easement of grazing one's cattle on another's heritage, caused by the dominant owner not having any cattle for two or three years, is also not an interruption of the enjoyment of the right.[1]

Similarly, suspension of user, by contract between the dominant and servient owners, as for instance, the temporary substitution by agreement of another way for that to which the right is claimed, is not an interruption.[2]

Mere non-user, for a time, of an easement, which the claimant might, if he pleased, enjoy during that time, but which, for some good reason, he does not care to enjoy, is not an interruption of the enjoyment.[3] There must be an *adverse* obstruction *sub-*

[10] Hall *v.* Swift, 4 Bing. N. C., 381; Goddard, 158.

"In estimating the duration of user, it often is no easy matter to say, whether the acts have been such as, upon the whole, to constitute continuous user; whether, in fact, the absence of acts at any time probably arises from an interruption of the right, or merely from an interruption of the user, the right still existing. This must always be a question for the jury, and would depend upon whether the user were sufficiently frequent under the circumstances to be a natural exercise of the right claimed or seemed to have been rendered incomplete by some external interference." Phear, 97.

[1] Carr *v.* Foster, 3 Q. B., 581; Goddard, 131; Sham *v.* Tariny, I. L. R., 1 Calc., 422, 430. The owner of a house ceasing to use a way to it, because the house is for a time unoccupied, is another instance. But, under sec. 47 of Act V of 1882, the circumstance that the easement *could not be enjoyed* does not convert actual non-enjoyment (of a right *already* acquired) into a constructive enjoyment of the right.

[2] Explanation iii, sec. 15, Act V of 1882; Carr *v.* Foster, 3 Q. B., 581, 585; Goddard, 159. Under such circumstances the easement continues to be constructively enjoyed. Goddard, 159.

[3] I. L. R., 1 Calc., 422, 430.

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mitted to for *one year* after *notice*, before the enjoyment could be said to be "interrupted" within the meaning of the law on this subject. The cessation of actual user must be caused by an obstruction by the act of some person *other* than the claimant himself.[4] And the obstruction must be submitted to, or *acquiesced in*, for one year after the claimant has *notice thereof*, and of the *person* making or authorizing the same to be made.[5] The existence of the physical obstruction, of itself, is not sufficient notice, as it does not show by whom or by whose authority the obstruction is put up.[6] In order to negative submission or acquiescence, in a case where the obstruction cannot be summarily removed, it is enough if the claimant communicates, in a reasonable manner, to the party causing the obstruction that he does not really submit to or acquiesce in it.[7]

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[4] A mere *voluntary* act of the *claimant* not amounting to a "discontinuance" is not sufficient. I. L. R., 1 Calc., 422. The obstructive act must be committed by the *servient* owner or by a *stranger*. Davies *v.* Williams, 16 Q. B., 546; Goddard, 160.

[5] Sec. 26, Act XV of 1877; sec. 15, Act V of 1882. It has been held in England, that an interruption occurring after an enjoyment of nineteen years and a half, and lasting for six months, will not prevent the acquisition of a right at the end of twenty years. Thomas *v.* Flight, 8 Cl. and Fin., 231. This case is referred to in I. L. R., 6 Calc., pp. 399, 404. In British India, *after* the twenty years, the interruption may last for nearly two years without destroying the right.

[6] Siddon *v.* Bank of Bolton, 19 Ch. Div. (24th January 1882).

[7] Glover *v.* Coleman, 10 L. R., C. P., 108; Tudor, p. 186. The claimant must do something which shews that he is "not satisfied to submit." It is not *necessary* to take active steps to remove the obstruction or bring an action within the year. The fact whether the claimant has submitted to or acquiesced in the obstruction must be determined with reference to the circumstances of each case. The claimant cannot, by mere fruitless protests, defer the bringing of an action for several years. Resistance of the interruption by *some* of a body of persons claiming the right is sufficient. See Gale, 176 (note); Goddard, 160; I. L. R., 1 Mad., 339.

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Effect of repeated adverse obstructions, and voluntary discontinuances.

Repeated interruptions *in fact*, or adverse obstructions, though not continued, and submitted to, for one year, are good evidence to show that the enjoyment was not peaceable.[8] A voluntary *discontinuance* of the enjoyment of a right, which is in *course* of acquisition by user, operates in the same way as an *abandonment* or permanent relinquishment of a right *already* acquired. After the discontinuance or abandonment, the right cannot be constructively enjoyed.[9] The want of the determination to exercise or enjoy the easement puts the enjoyment which would otherwise have continued to an end. If the dominant owner bricks up a doorway, or substitutes a blank wall for a wall in which there is a window, he renders it physically impossible to exercise his right of way or his right to light through the door or window ; and if the obstruction is allowed to continue for a considerable period, the enjoyment, in the absence of other evidence, may be presumed to have been discontinued or abandoned. Such voluntary discontinuance of user, though not an *interruption* within the meaning of sec. 26 of Act XV of 1877, or sec. 15 of Act V of 1882, prevents the acquisition of the easement. A person who incapacitates himself by his own act from any possible use or enjoyment of the easement, cannot be said to enjoy the easement openly claiming a right thereto.[10] He cannot, for this reason, acquire a right by pres-

[8] Eaton *v.* Swansea Waterworks Company, 17 Q. B., 267 ; Goddard, 154.

[9] See I. L. R., 1 Calc., 422, 429. The *continuity of user*, which is to establish a right by prescription, is broken by *discontinuance*. See p. 427, *ibid*. As to the three kinds of *interruptions*, see p. 404, note, *supra*.

[10] See Sham *v.* Tariny, I. L. R., 1 Calc., 422, 430.

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cription, unless, indeed, he *resumes* the enjoyment, and continues to enjoy for a *fresh* period of twenty years.

Effect of interruptions in enjoyment as *an easement* and *as of right.*

Interruptions in the enjoyment of an easement *as such*, by reason of unity of possession, at any time during the twenty years, though *technically* not *interruptions*, break the continuity of the requisite enjoyment, and destroy altogether the effect of the previous user.[1] Interruptions in the enjoyment of an easement *as of right* (except in the case of light, air or support under Act V of 1882), by reason of the claimant asking the leave or permission of the servient owner during the twenty years, also break the continuity of the requisite enjoyment.[2] In these cases, although there is no interruption in the enjoyment *in fact* by an adverse obstruction, the claimant cannot be said to have enjoyed the right *as an easement* or *as of right*, for the period of *twenty years* ending within two years *next* before the suit.

Computation of the prescriptive period.

An enjoyment next before *some* action or suit, in which the claim is brought into question, confers a right (under 2 and 3 Will. IV, c. 71), which may, in England and Ireland, be set up in every subsequent action and suit.[3] But, in British India, in *every*

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[1] Onley *v.* Gardiner ; Gale, 215, 216. In one case of a right to *light* (Ladyman *v.* Grave, 6 L. R., Ch. App., 763), two different periods of enjoyment, disconnected by unity of possession in the interval, were allowed to be added together to make up the twenty years required by the law; see Gale, 172; Goddard, 155. According to the Indian law, in every case, the period of twenty years must *end* within two years *next* before the suit, and an easement of light, like any other easement, must be enjoyed *as an easement* for such period.

[2] See Goddard, 156, 157.

[3] Cooper *v.* Hubbuck (12 C. B., N. S., 456, Williams, J., diss.); Gale, 174 ; Goddard, 128.

suit wherein the claim is contested, the period of enjoyment is to be computed with reference to that *particular* suit, except, of course, where the servient owner is *estopped*, by a former judgment, from effectually contesting the claim.

The prescriptive period of twenty years may begin with the *first act* of enjoyment, except in the case of an easement to *pollute the water* of a private river, tank, &c. The enjoyment of such an easement, so long as the servient heritage is not *perceptibly* prejudiced by it, is not to be taken into account. The period begins to run when the pollution first becomes perceptibly prejudicial to the riparian or other servient owner.[4]

In computing the period of twenty years, the time during which the servient owner has been under a disability is not excluded.[5]

Conditional exclusion in favor of reversioner of servient heritage.

But, under sec. 27, Act XV of 1877, and sec. 16, Act V of 1882, if the servient heritage has not been in the possession of the full owner, but has been under a lease for a term exceeding three years, or has been subject to an interest for life, the time during which such lease or interest has continued, is *conditionally* excluded from the computation of the period, —that is, *provided* the person entitled to the servient

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[4] Pollution of water, at first slight and imperceptible, often gradually increases by reason of the increase of the dominant manufactory, or town, which pours its sewage or other foul matter into the nearest brook or river. See Goldsmid *v.* Tunbridge Commissioners; Goddard, 210, 243; and Expl. iv, sec. 15, Act V of 1882.

There can be no prescription to make a common nuisance which is a prejudice to all people. There can be no prescription to send sewage into a *public* river. Gale, 484 (note).

[5] See Arzan *v.* Rakhal, I. L. R., 10 Calc., 214.

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heritage on the determination of such term or interest resists the claim within three years next after such determination. It is only under this provision that two periods of valid enjoyment, separated by a period of invalid enjoyment, may be *tacked together* to make up the required enjoyment for twenty years. The period of continuous enjoyment, partly valid and partly invalid, may, in this case, extend back to a time which is *more* than (20 + 2) twenty-two years before the suit. And here the *express* provision of the law introduces an exception to the rule which requires a valid enjoyment for twenty years ending within two years *next* before the institution of the suit.[6]

Effect of the exclusion.

The effect of this provision is not to *unite* two *discontinuous* periods of valid enjoyment, but to *extend* the period of *continuous* enjoyment by so long a time as the term or life-interest continues.[7] Where the lessor or reversioner of the servient heritage resists the claim within the time allowed, the claimant must show twenty years' valid enjoyment either *wholly before* the beginning of the term or life-interest, if such term or interest subsisted at the *commencement* of the two years next before the suit; or *partly before and partly after*, if such term or interest ended *more* than two years before the suit.[8] Evidence of user for fifteen years before the commencement of the term or life-estate, user during the term or life-estate, and user for five years after the term or life-estate, continuously down to within two years of the suit, would be sufficient to establish the

[6] Gale, 184; Tudor, 191; Goddard, 134, 135.

[7] *Per* Parke, B., in Onley *v.* Gardiner, 4 M. & W., 500.

[8] See Goddard, 134, 135.

right. But non-enjoyment during the term or life-estate would prevent the two periods of valid enjoyment from being tacked together. The time excluded from the computation is excluded for the benefit of the lessor or reversioner, and not for the benefit of the claimant. The latter must show valid enjoyment for twenty years, besides uninterrupted enjoyment during the time which has to be excluded.[9]

The rule of prescription how far binding on Government.

Before the enactment of a law of prescription proper in British India, it was held by the Madras High Court (in *Ponnusawmy* v. *The Collector of Madura*, 5 Mad., 6), that the right to an easement was as valid against the Government as it was against a private owner of land. There can be no doubt that the *presumption* of a right arising from long enjoyment arises against the Government in the same way as it does against private individuals.[10]

But the question whether an easement may be acquired *against* the Government in respect of property belonging to the Government, under a rule of *statutory* prescription, when such rule does not expressly embrace the Government, has not been directly answered in any reported Indian case that I know of. In the English Statute of Prescription (2 & 3 Will. IV, c. 71), the Crown is named in secs. 1 and 2 (which relate to the acquisition of profits and easements in general), but is not named in sec. 3 (which relates to the particular easement of light),

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[9] See Clayton *v.* Corby, 2 Q. B., 813; Pye *v.* Mumford, 11 Q. B., 675; Gale, 185. Interruption by the termor or life-tenant, or any other person, even during the time which has to be *excluded* from the computation of the prescriptive period, prevents the acquisition of the right.

[10] See p. 199 (note 4), *supra*.

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and it has been laid down, that the Statute being of the nature of a law of limitations, the Crown is not *prejudicially affected* by the provisions of sec. 3 of the Statute.[1]

According to the rule of construction mentioned at page 199, *supra*, sec. 26 of Act XV of 1877 would seem not to be applicable to the acquisition of easements in or upon or in respect of property belonging to Government. But the Calcutta High Court, in *Arzan* v. *Rakhal*,[2] assumes that the section does apply to such acquisition against the Government.[3] It is very likely that the framers of Act IX of 1871 and Act XV of 1877 took the same view of the matter. But now, the last paragraph of sec. 15, Act V of 1882, expressly provides, that the *twenty* years' rule shall not apply where the *servient* heritage belongs to Government. In analogy to the law of limitation applicable to suits by Government, it is provided that the enjoyment of an easement must continue for *sixty* years before a right to it can be acquired *against* Government, by positive prescription under the Act.[4]

Prescription in British India does *not* imply a grant.

A right acquired under the positive enactments referred to above (like the right to light under 2 and 3 Will. IV, c. 71) is matter *juris positivi*, and does not require any presumption of a grant.[5] The theory

[1] Brown, 243; *Doe d* The Queen *v.* The Archbishop of York, 11 Q. B., 81. The Crown, however, may take *advantage* of the provisions of the law against a subject.

[2] I. L. R., 10 Calc., 214, 219.

[3] See p. 199, *supra*.

[4] But there is no express provision in Act V of 1882 which precludes the Courts from *presuming* a grant from twenty, thirty or fifty years' user of an easement against the Government. See Banning, 252; 11 East, 488.

[5] See Tapling *v.* Jones; Goddard, 125, 126, 172.

of presumed grants is not recognized by either Act XV of 1877 or Act V of 1882.[6] The objection that the easement in a particular case was not or is not capable of being *granted*, cannot, *per se*, prevent the acquisition of such easement by statutory prescription in British India. Property belonging to a person who cannot alienate it or impose an easement upon it, may be subjected to an easement by prescription under the Acts.[7]

The rule applies to negative as well as to affirmative easements.

Section 26 of Act XV is (expressly) applicable to affirmative, as well as to *negative*, easements, and there is nothing in sec. 15, Act V of 1882 which restricts its application to affirmative easements only. There is, therefore, no valid objection to the acquisition of a *negative*[8] easement by prescription under these Acts. Whether the inchoate enjoyment of such an easement, before it has matured into a right, is an actionable wrong, or not, does not affect the question, if it is capable of being physically interrupted by some erection, excavation, or other act done upon the servient heritage.

Interruption of enjoyment of easement need not be conveniently practicable.

It is not necessary that resistance to, or interruption of, the enjoyment of an easement, should (as suggested by certain English cases) be *conveniently* practicable. The policy of the law in favor of possessory titles would be defeated, if the greater or less facility or difficulty, convenience or inconvenience, of practically interrupting a particular easement, affected the question of its acquisition by prescription.[9] When the right

[6] See Report of the Select Committee, dated 6th July 1881, India Gazette, Part V, p. 1017; Arzan *v.* Rakhal, I. L. R., 10 Calc., 214.

[7] See Lemaitre *v.* Davis, 19 Ch. D., 211.

[8] The English *Statute* does not apply to negative easements other than the right to light, see Gale, 169; 3 Exch., 557.

[9] See Lord Selborne's judgment, 6 App. Cas., 796—799.

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claimed is too large and indefinite in its nature, and incapable of definite enjoyment, it may not be expedient to hold that such right may be acquired by prescription ;[10] but the language of the Acts does not prevent its acquisition, so long as it is capable of *open* enjoyment by the dominant owner, and the user is capable of being, *anyhow*, *interrupted*. It may be *contended* that the user of a right which is *incapable* of being interrupted by any physical obstruction on the servient heritage, and which is also incapable of being prevented by action, is, *practically*, user or enjoyment *without interruption*. But the interpretation which has been put upon the words "enjoyed without interruption" in the English Statute, is, that a thing which is *incapable* of interruption cannot be said to be "enjoyed without interruption."[1] The enjoyment of light and air may be easily interrupted by hoardings, &c. The enjoyment of lateral support is also capable of being physically interrupted, and is, at least theoretically, actionable. The enjoyment of a

But enjoyment must be *capable* of interruption.

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[10] See 6 App. Cas., 759, 798, 824.

The following are some of the cases in which it has been held, in England, that certain rights cannot be acquired by prescription :

Webb *v.* Bird, 10 C. B. (N. S.), 282 ; 13 *ibid*, 841 (claim to have free access for all the winds of heaven to the sails of a windmill) ;

Attorney-General *v.* Doughty, 2 Ves., Sen., 453 (claim to unobstructed prospect) ;

Chasemore *v.* Richard, 7 H. L. C., 349 (claim to percolating water not passing in a definite channel) ;

Bryant *v.* Lefever, 4 C. P. D., 172 (claim to free access of wind to and from a chimney for the egress of smoke) ;

Sturges *v.* Bridgeman, 11 Ch. D., 852 (claim to make a noise in one's own house, and to set the air or ether in motion, when such noise did not cause annoyance to any neighbouring proprietor at the beginning of the prescriptive period).

[1] See Webb *v.* Bird, 10 C. B. (N. S.), 282 ; Goddard, 119, 120 ; Sturges *v.* Bridgeman, 11 Ch. D., 852.

right of way is both physically and legally preventible. If a man, by working certain machines in his *own* house, makes a noise, and sets the air or ether in motion, so as to interfere with the physical comfort of his neighbour, such neighbour cannot prevent the noise except by suing out an injunction. If the adjoining lands are unoccupied, and no damage is caused to anybody by the noise, it is not preventible either physically or legally. If such adjoining lands are subsequently occupied, the previous enjoyment of the owner of the machines does not prevent the new occupiers from suing him for the nuisance. But supposing the *occupiers* of the adjoining lands *neglect* to prevent the making of the noise for twenty years, the owner of the machines may acquire by prescription an easement of setting the ether in motion over the adjoining lands, to the discomfort of their owners and occupiers.[2]

What easements cannot be acquired by prescription.

The only easements which cannot be acquired by prescription under Act V of 1882, and presumably under Act XV of 1877, are the four classes of rights which are mentioned below:[3]

1. Right destructive of servient heritage or of subject.

1. Rights which would *tend* to the *total destruction* of the servient heritages, or of the subjects of the rights. In *Dyce* v. *Lady James Hay*,[4] the Lord Chancellor said, that "Neither by the law of Scotland, nor of England, can there be a prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands

[2] See Sturges *v.* Bridgeman ; Goddard, 121, note (d).

[3] See sec. 17, Act V of 1882.

[4] 1 Macq. H. L. Cas., 305.

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affected."[5] The learned editors of Gale's work on Easements are of opinion, that this rule applies *only* to cases where a large and *indefinite number* of persons claims a right in the nature of an easement.[6] A claim of a profit *in alieno so*, in order to be valid, must, according to English law, be made with some limitation or restriction.[7] An indefinite claim to destroy the subject-matter (*e. g.*, by taking away minerals which are part of the soil, or destroying a fishery) cannot be supported in law.[8] The rule laid down in Act V of 1882 applies to *all* prescriptive easements and profits which *tend* to the *destruction* of the servient heritage or of the subject of the right. In *Joy Doorga* v. *Juggernath*,[9] Macpherson and Mookerjee, JJ., held, that no length of time can give a party such a right as destroys all the ordinary uses of the servient property,—*e. g.*, a straggling right to the promiscuous use of a whole property for the purpose of driving cattle over it. And, according to Act V of 1882, if the exercise of the right is likely to be *destructive* of the servient property or its usufruct, it cannot be acquired by prescription. If the servient owner has actually *granted* such a right, he is, of course, bound by his grant.

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[5] Goddard, 224. [6] Gale, 4 & 20. [7] Tudor, 135; p. 353, *supra*.

[8] See 7 App. Cas., 646; and Phear, 81, 83.

[9] 15 W. R., 295. See also M. Zumur *v.* M. Doorgaben, 1 W. R., 230, where Kemp and Glover, JJ., held, that the right claimed by prescription must not be so large as to extinguish or destroy all the ordinary uses or profits of the property. In Durgachurn *v.* Kalikumar, 8 C. L. R., 375, Sir Richard Garth, C. J., held, that a right of way in *every* direction over the defendant's land or water cannot be claimed by prescription. In order to acquire a right by prescription, the claimant must prove the exercise of the right of way in a *particular* direction.

2. Right to free passage of light or air to open space.

2. Under para. 1 of sec. 26 of Act XV, and under para. 1 of sec. 15 of Act V, a right to unobstructed light or air can only be acquired for the benefit or in respect of *buildings;* and sec. 17 of Act V declares that a right to the free passage of light or air to an *open space of ground* cannot be acquired by prescription in any case. It has been held in England, that such a right cannot be so acquired in respect of a timberyard and sawpit.[10]

3 Right to surface-water not flowing in a stream, and not permanently collected. 4. Right to underground water not passing in defined channel.

3 and 4. Every owner of land has a *natural* right to collect and dispose, within his own limits, of all water on or under its surface, which does *not* pass in a *defined* channel.[1] Clauses (*c*) and (*d*) of sec. 17 of Act V enact, in accordance with the principle of the ruling in *Kena Mahomed* v. *Bohatoo Sircar*,[2] that a right to the uninterrupted flow of such waters cannot be acquired by a neighbouring proprietor by prescription. If surface water reaches and flows in some *definite* channel, or if it is *permanently collected* in a pool, tank or otherwise, then, and then only, may a right to such water be acquired by a neighbour by prescription. Similarly, a right to underground water, which does not pass in a defined channel, but merely *percolates* through the strata in unknown channels, cannot be acquired by prescription. The owner of the land may divert such underground water, even if it had been allowed to percolate the soil, and to pass into the claimant's land for twenty years and upwards.[3] But the owner of land has no

[10] Goddard, 176; see also Potts *v.* Smith, L. R., 6 Eq., 311.

[1] See Illus. (*g*), sec. 7, Act V of 1882. [2] Marshall's Report, 506.

[3] See Chasemore *v.* Richards, 2 H. and N., 168; 7 H. L. Cas., 349; Goddard, 199; Tudor, 196. One of the reasons given for the decision

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such right to percolating water under the surface of his land, as would prevent his neighbour from draining away the water by lawful operations on his own soil.[4]

Rights acquired by prescription are absolute and permanent.

The right to an easement acquired by prescription under Act XV of 1877, or Act V of 1882, whether acquired by an occupier or owner of the dominant heritage, becomes permanently appurtenant to such heritage as an absolute and indefeasible right.[5] If acquired by an occupier of such heritage, it is acquired on behalf of the owner,[6] and continues until it is abandoned or released by such owner or extinguished by operation of law.[7] Prescription under

in Chasemore *v.* Richards, was that the owner could *not prevent or stop* the percolation of water. But as percolating water *may* be diverted and appropriated by the owner, the use of it by another is *capable* of interruption. Under Act V, sec. 17, the question whether such user is *preventible* or not does not arise.

[4] Acton *v.* Blundell, 12 Mees. and W., 324; Tudor, 196. There are streams which sink underground, pursue for a short space a subterraneous course, and then emerge again. Such underground water flows in a known and *defined* channel, and the rule as to percolating water does not apply to it. Tudor, 197.

[5] Sec. 26 of Act XV expressly says, that the right acquired shall be absolute *and indefeasible*. Sec. 15, Act V, says, that the right shall be *absolute*. It is apprehended that the Legislature did not intend to alter the law by the omission of the words "and indefeasible" from sec. 15. It is possible, however, that as sec. 43 of Act V renders the right *defeasible* by certain attempts to *extend* the user, the term "indefeasible" is omitted with the object of meeting Lord Westbury's argument in Tapling *v.* Jones. See Goddard, 307, 308; p. 443 (note), *infra*.

[6] See Goddard, 89; sec. 12, Act V of 1882.

[7] Even a sale of the servient estate or tenure (free from encumbrances) for arrears of revenue or rent, does not, it is apprehended, extinguish a *prescriptive* easement. But the acquisition of land (absolutely and free from encumbrances) under the Land Acquisition Act, does, it has been held, extinguish incorporeal rights of the nature of easements. (See Collector *v.* Nobin, 3 W. R., 27; *In re* Fenwick, 14 W. R., Cr., 72.) As to the implied grant of easements necessary *for* the land so acquired, see p. 395 (note), *supra*. Easements expressly *imposed* by the servient owner *are* extinguished by a sale for arrears of revenue or rent. See illus. (*e*), sec. 37, Act V of 1882.

these Acts gives a good title against all persons, including the owner of the servient heritage, even where such heritage was in the possession of a temporary tenant at the time of the acquisition, provided the owner did not avail himself of the special proviso in sec. 27 of Act XV, or sec. 16 of Act V.[8] A right acquired under these Acts being absolute, is not subject to any condition or qualification.[9] Enjoyment of an easement for the prescribed period under a grant imposing an easement, but subject to an express or implied condition, does not confer an indefeasible right, and is therefore not vaild under sec. 26 of Act XV, or sec. 15 of Act V. But where a right *is* acquired under these sections by a valid enjoyment for the prescribed period, the right is absolute and indefeasible.

Prescription legalizes previous user.

The inchoate enjoyment of an affirmative easement, before it ripens into an absolute right by prescription, gives the servient owner a right to sue for a series of trespasses; but as soon as the prescriptive right is acquired, the whole of the previous user is legalized from its commencement.[10]

Extent and mode of enjoyment of prescriptive rights.

When an easement has been acquired by prescription, questions as to the *extent* of the easement frequently arise. The general rule on the subject is, that the *extent* of the easement and the *mode* of its enjoyment must be determined by the accustomed user of

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[8] Tenants holding permanent and transferable tenures even under the *same* zemindar may acquire easements against each other. See Large *v.* Pitt, and Statement of Objects and Reasons, Ind. Gaz., 13th Nov. 1880.

[9] See Lord Westbury's judgment in Tapling *v.* Jones, 11 H. Lds., 290; Gale, 607.

[10] Wright *v.* Williams; Goddard, 126.

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the right.[1] The Court, however, is not bound to found its judgment entirely upon the actual user proved. It may, and should, take into consideration the surrounding circumstances connected with the actual user. If a way was used for the several purposes for which it was *wanted* during the prescriptive period, there may be a ground for inferring that there was a right of way for *all* purposes; but if the user was confined to one purpose, or to particular purposes only, the Court would not be justified in finding that the right extended to all purposes.[2] Though a carriageway may include a horseway, it does not necessarily include a drift way, the general rule being that, in the absence of evidence of the purpose for which the right was acquired, a right of way of any one kind does not include a right of way of any other kind.[3] Where a right of way to and from a certain house has been acquired, it may be used not only by the dominant owner, but by the members of his family, his guests, lodgers, servants, workmen, visitors and customers, for such user is necessary for the beneficial enjoyment of the house to which the right is appurtenant. So, if the house is let to a tenant, the tenant may use the way, and the owner also may use it for the purpose of collecting the rent and seeing that the house is kept in repair.[4]

How far mode and place of enjoyment may be altered.

When the exercise of an easement can, without prejudice to the dominant owner, be confined to a

[1] Goddard, 221, 247; cl. (*d*). sec. 28, Act V of 1882; 13 C. L. R., 152.

[2] Cowling *v.* Higginson; Goddard, 248.

[3] Ballard *v.* Dyson; Goddard. 249; sec. 28, Act V of 1882.

[4] Illus. (*b*), sec. 21, Act V of 1882. Where an easement is appurtenant to a house, the right is not affected by the owner of the house letting the house to a tenant. M. Amjadee *v.* Syed Ahmed, 6 W. R., 314.

determinate part of the servient heritage, such exercise must, at the request of the servient owner, be so confined.[5]

Subject to this rule, the dominant owner may alter the mode and place of enjoying the easement, provided he does not thereby impose any additional burden on the servient heritage.[6] But the dominant owner of a right of *way* cannot vary his line of passage at pleasure, even though he does not thereby impose any additional burden on the servient heritage.[7]

It has been held, that a prescriptive right of passage for boats over another man's channel is like a prescriptive right of way over another man's private road, and that the servient owner may decrease the width of the channel or the road, if, by so doing, he does not render the exercise of the right less easy than it was before.[8]

Extent of prescriptive right to receive light or air, or to pollute air or water.

The extent and mode of enjoyment of a *prescriptive* easement is generally determined by the accustomed user of the right; but two *special* rules are laid down by sec. 28, Act V of 1882, in respect of (*a*) the right to the *passage of light or air* to an opening; and (*b*) the right to *pollute air or water:* 1. The extent of the first right is, that *quantum* of light or

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[5] Sec. 22, Act V of 1882.

[6] An easement is not lost by a slight variation in the enjoyment of it. *Per* Phear, J., I. L. R., 1 Calc., 422, 427.

[7] Sec. 23, Act V of 1882; see also Goluck *v.* Tarini, 4 W. R., 49. In Syud Hamid *v.* Gervain, 15 W. R., 496, Norman, J., held, that a person having a prescriptive right of way from one place to another, over a particular line, cannot be compelled to use a different and substituted way. It is otherwise with a right to use another's pathway. The *servient* owner *may* slightly alter the direction of the pathway.

[8] Durga Churn *v.* Kali Kumar, 8 C. L. R., 375.

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air which has been accustomed to enter the opening during the *whole* of the prescriptive period, irrespectively of the *purposes* for which it has been *actually* used.[9] 2. The measure of the second right is the extent of the pollution at the *commencement* of the prescriptive period.[10]

Implied acquisition of accessory or secondary easements.

When an easement has been acquired by prescription or otherwise, *accessory* rights to do acts necessary to secure the full enjoyment of the easement are also acquired. A's easement to draw water from B's well gives A a right of way, over B's land, to and from the well. Where a right of way has been acquired, if the

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[9] But it does not follow that the *purposes* for which the *light* has been *actually* used by the dominant owner should not be considered in finding whether an alleged disturbance is *actionable* or not. If the disturbance does not prevent the dominant owner from carrying on his *accustomed business* as beneficially as he had done previous to instituting the suit, he suffers no *substantial* damage, and cannot sue for compensation or for an injunction. See secs. 33 and 35, Act V of 1882. As to whether an *injunction* may be sued for when a *threatened* act of disturbance is not likely to cause *substantial* damage in this sense, see cl. (*b*), sec. 35. It has been held that, under *ordinary* circumstances, the fact that 45 degrees of sky are left unobstructed by a building opposite to the light is *primâ facie* evidence that there is not likely to be *material* injury. If the building is not higher than the distance between the window and the building, *i. e.*, if the angle of incidence of light over the building to the window is not more than 45 degrees, the Court will not interfere by injunction, unless it is proved that, under the circumstances of the particular case, the building is likely to cause material injury to the plaintiff. See 9 L. R., Ch. Div., App., 220; Goddard, 316; Gale, 639; Tudor, 225; Cathrine Clement *v.* J. Melamy, decided by Wilson, J., on the 12th August 1884, and reported in the "Englishman" of the 18th August 1884. Cf. Parker *v.* First A. H. Co., 24 Ch. D., 282.

Light prevented falling at an angle of 45 degrees.

As to the extent of the easement of light, see Moore *v.* Hall, 3 Q. B. D., 178; Ecclesiastical Commissioners *v.* Kino, 14 Ch. D., 213; Radhamohun *v.* Rajchunder, 2 C. L. R., 377. On this subject Mr. Gibbons, in his preface to the 5th edition of Gale's Work, remarks, that "there are cases to meet every taste." See also Ratanji *v.* Edalji, 8 Bomb., 181.

[10] The prescriptive period, in the case of pollution of *water*, does not *begin* until the pollution *perceptibly* prejudices the servient heritage.

way is out of repair, or a tree is blown down and falls across it, the dominant owner may enter the servient heritage, and repair the way or remove the tree from it. If the *servient* owner renders the way impassable, the dominant owner may deviate from the way and pass over the adjoining land of the servient owner. Where A has an easement of support from B's wall, and the wall gives way, A may enter upon B's land and repair the wall.[1]

Extinction of prescriptive right: 1. When released. 2. When they become useless. 3. When there is increase of burden by permanent change in dominant heritage. 4. When there is permanent alteration of servient heritage by *superior force*. 5. When either heritage is completely destroyed. 6. When there is unity of title.

A prescriptive easement, like other easements, is extinguished when the dominant owner expressly, or impliedly, releases it to the servient owner.[2] It is also extinguished when it becomes incapable of being at any time, and under any circumstances, beneficial to the dominant owner.[3] Except in the case of an easement of support, where by any *permanent change in the dominant heritage*, the burden on the servient heritage is *materially* increased (*e. g.*, by enlarging windows and increasing their number for the increased access of light and air), and such increase *cannot* be reduced by the servient owner without interfering with the accustomed and *lawful* enjoyment of the easement, the easement is (under Act V of 1882) entirely extinguished.[4] Where an excessive user of an easement may be obstructed by the servient owner by something done on the *servient* heritage (as, where

[1] See sec. 24, Act V of 1882. As to the right to go *extra viam* in the case of *highways*, see Gale, 547.

[2] Sec. 38, Act V of 1882. [3] Sec. 42, Act V of 1882.

[4] Sec. 43, Act V; Cf. Gale, 609, 615, 616; Goddard, 360, 383. But rights to light under the Prescription Act in England, and Acts IX of 1871 and XV of 1877 in India, are *not* extinguished by excessive user. See Goddard, 384, and Provabutty *v.* Mohendro, I. L. R., 7 Calc., 453. Where rights are declared to be *indefeasible*, they cannot be defeated in this way except under an express law. See note 5, p. 438, *supra*.

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7. When the right has not been enjoyed for 20 years.

100 buckets of water, instead of 50, are taken from the servient owner's well) he may obstruct the user, provided such obstruction does not interfere with the *lawful* enjoyment of the easement.[5] Where the excessive user is due to a *permanent change in the dominant heritage*, and the excess or encroachment *cannot* be *lawfully* obstructed (as in almost all cases of excessive user of a *negative* easement), the whole easement is extinguished, except where the injury caused by the excess is so slight that no reasonable person would complain of it. A prescriptive right, as well as other easements, may also be extinguished by a *permanent alteration* of the *servient* heritage by superior force, or by the *complete destruction* of *either* the dominant or servient heritage, or by unity of ownership (with or without unity of possession) of the *whole* of *both* the heritages.[6] If the *destroyed* tenement is re-formed or re-built before twenty years have expired, an easement extinguished by destruction of either heritage may *revive*.[7] Lastly,[8] easements acquired by long enjoyment, like easements otherwise acquired, may be

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[5] Sec. 31, Act V of 1882.

[6] As to the destruction of the dominant heritage causing extinction, see 1 Hunooman Pershad's Rep., 196. See also secs. 44, 45 & 46 of Act V of 1882. Goddard, 360, 367. As to unity, see p. 417, *supra*.

Easements are liable to be extinguished by *estoppel* also. Extinguishment by revocation and some other modes are not applicable to prescriptive rights. See note 7, p. 438, *supra*.

[7] See sec. 51, Act V of 1882.

[8] In America, this mode of extinction is confined to *prescriptive* rights only. In England, non-user of an easement is regarded merely as *evidence*, from which a *release may* be *implied*. As in the case of acquisition by prescription, Act V of 1882 does not assume that a fictitious *grant* has been made by the servient owner, so, in the case of extinction by prescription, the Act rejects the English doctrine that non-user is only evidence of a presumed non-existing release. See Statement of Objects

extinguished by non-enjoyment. Under Act V of 1882, the same period (twenty years) is fixed for the extinction of an easement by non-enjoyment, as for the acquisition of an easement by enjoyment. No *special* rule has been laid down for the extinction of an easement acquired by or against Government. The following rules have been enacted by sec. 47 of the Act:

Rules of extinctive prescription under Act V of 1882.

1. A continuous easement (as an easement of light) is extinguished when it totally ceases to be enjoyed as an easement for an unbroken period of twenty years. The period of twenty years is, in this case, to be reckoned from the day on which the enjoyment of the right is *obstructed* by the *servient* owner, or *rendered impossible* (as by bricking up a window) by the *dominant* owner.[9] If the dominant owner does not, by his own act, render it impossible to enjoy the easement, or if it is not obstructed by the servient owner, mere non-user of the right for any period does not extinguish a continuous easement. A cessation of enjoyment in pursuance of a contract between the dominant and servient owners does not extinguish the right. Enjoyment by one of several co-owners prevents extinction.

2. A discontinuous easement (as a right of way) is

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and Reasons, India Gazette, 13th November 1880, Part V. p 470. As to the English law on the subject of non-user, see Moore *v.* Rawson, 3 B. and C., 322; Brown, 227 *et seq*; Goddard, 367 *et seq*.

[9] If the act of the dominant owner manifests an *intention* on his part to abandon the easement permanently, the dominant heritage being also *permanently* altered for the purpose, the easement will be at once extinguished by an implied release. See sec. 38, Act V. Justice Phear, in Shamachurn's case (I. L. R., 1 Calc., 422, 426), was inclined to hold that abandonment *qua* abandonment could not be materially operative unless something had been done by the servient owner on the faith of the abandonment so as to be a cause of *estoppel* against the dominant owner. See also The Queen *v.* Chorley, 12 Q. B., 515; Tudor, 232.

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extinguished when it has not been enjoyed as an easement for an unbroken period of twenty years—such period being reckoned from the day on which it was *last enjoyed* by any person as owner or occupier of the dominant heritage. But if, before the expiry of the twenty years, the dominant owner registers (under the Indian Registration Act, 1877) a declaration of his intention to retain such easement, it shall not be extinguished under this rule, until a period of twenty years has elapsed from the date of registration. A cessation of enjoyment in pursuance of a contract between the dominant and servient owners, or a cessation of enjoyment by only *some* of several co-owners, does not extinguish the right. Where several heritages are respectively subject to rights of way for the benefit of a single heritage, and the ways are continuous, enjoyment of any of the ways (being virtually an enjoyment of a *part* of a whole) will prevent the extinction of the easement.

3. Enjoyment or exercise of a right by the owner or occupier of the dominant heritage in *ignorance* of his *right* to do so, or the exercise of a right accessory to the easement, is not such enjoyment of the easement as would prevent its extinction under sec. 47. And where an easement is exercisable only at a *certain place* or at *certain times*, or between certain hours, or for a *particular purpose*, its exercise during the twenty years at *another* place, or at *other* times, or between *other* hours, or for *another* purpose, is not such enjoyment as is necessary to keep alive the easement.

4. The circumstance that, during the twenty years, no one was in possession of the servient heritage, or

that the easement could not (by reason of an accident or otherwise) be exercised, or that the dominant owner was not aware of its existence, does not exempt the dominant owner from the penalty of *extinction* under this law.

Where the dominant owner exercises for twenty years a right less extensive than that to which he is entitled, some systems of law lay down that his easement shall be *reduced* to the right *actually* exercised. Act V of 1882 *omits* all provisions on this head.[10]

The extinction of the primary easement, necessarily extinguishes accessory or secondary easements.

It should be observed that the positive rules of extinctive prescription laid down by sec. 47 of Act V of 1882 are *not declaratory* of the law as it existed before their enactment, and that such rules are not of any force, except in provinces to which the Act has been extended.

Analogous rules under the English and the old Indian law.

The English law does not require the same amount of proof of the *extinction* as of the original *establishment* of the right.[1] But the *mere* cessation of enjoyment is not sufficient to extinguish an easement.[2] An easement is abandoned or extinguished by non-user, (*a*) if the surrounding circumstances clearly shew that the dominant owner *intends* to relinquish it permanently;[3] or (*b*) if the circumstances are such as are calculated to mislead the servient owner and cause

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[10] See Statement of Objects and Reasons, India Gazette, 13th November 1880.

[1] Gale, 386.

[2] Crossley *v.* Lightowler, L. R., 3 Eq., 279; L. R., 2 Ch., 482; Goddard, 368.

[3] *Ibid.*

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him to incur expense or loss on the reasonable belief that the right has been permanently relinquished ;[4] or (*c*) if the cessation of user has been caused by an *adverse* act *acquiesced* in by the dominant owner.[5] If there are *no* circumstances to aid the presumption of an abandonment or the reverse, no presumption of an abandonment ought to be made until non-user has continued for twenty years, but there are cases in which even this would not be sufficient. The duration of the non-user must always be considered in conjunction with the nature of the easement, and the surrounding circumstances if any.[6] Non-user for 106 years of a right of access to mines, has not, by itself, been considered sufficient.[7]

Although the mere suspension of the exercise of an easement is not sufficient to prove an intention to abandon it, in the case of a long continued suspension the *onus* lies upon the dominant owner of shewing that some indication was given, during the time, of his intention to preserve it, or that he intended to resume it within a reasonable period.[8] The effect of long continued non-user may be *explained away* by showing that the dominant owner had no occasion to use the easement, or that the cessation occurred in consequence of an agreement whereby he gave up his right temporarily, or that the non-user was a consequence of the temporary substitution of another

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[4] Stokoe *v.* Singers, 8 E. & B., 31 ; Gale, 594 ; Regina *v.* Chorley, 12 Q. B., 515 ; Gale, 596.

[5] Regina *v.* Chorley. See also Banee *v.* Ram, 10 W. R., 316.

[6] Goddard, 371.

[7] Goddard, 368, 370.

[8] Crossley *v.* Lightowler ; Weston *v.* Arnold, 8 L. R., Ch. App., 1084 ; Tudor, 232.

and a more convenient mode of enjoying the easement.[9]

In England, a right of way was held not to have been extinguished by mere non-user for a period much longer than twenty years, the effect of the non-user being explained away by the fact that the dominant owner had a more convenient mode of access through his own land.[10] On the other hand, it has been held by a Division Bench of the Calcutta High Court, that a right of passing freely over another's land requires to be kept up by constant use, and that if the use of such right is discontinued for the space of six years, it cannot be re-established by suit.[1] In *Khetternath* v. *Prosunno* (7 W. R., 498), Justice Markby laid down, that the abandonment of an easement, as well as of a natural right, may be implied from a long and continuous *interruption* on the part of the servient owner *submitted to* by the dominant owner.[2]

It has been already pointed out that, under Act XV of 1877 or Act V of 1882, an easement cannot be acquired by *prescription* until there has been a suit between the contending parties. If there has been no such suit, and consequently no *acquisition* of an easement, no question of *abandonment* or *extinguishment* can arise.[3]

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[9] Goddard, 368, 373.

[10] Ward *v.* Ward, 7 Exch., 838; Gale, 625.

[1] Hurree Dass *v.* Jodoonath, 14 W. R., 79; 5 B. L. R., App., 66. But see note 7, p. 413, *supra*.

[2] On this subject, see also Marshall, 506; Juggutbundhoo *v.* Juggutchunder, 12 W. R., 519; and pp. 412, 413, *supra*.

[3] See Goddard, 372.

Appendix.

ACT No. XIV of 1859.

PASSED BY THE LEGISLATIVE COUNCIL OF INDIA.

(Received the assent of the Governor-General on the 5th May 1859.)

An Act to provide for the Limitation of Suits.

WHEREAS it is expedient to amend and consolidate the laws relating to the limitation of suits; It is enacted as follows:— Preamble.

I. No suit shall be maintained in any Court of Judicature within any part of the British territories in India in which this Act shall be in force unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any Law or Regulation to the contrary notwithstanding; and the periods of limitation, and the suits to which the same respectively shall be applicable, shall be the following, that is to say:— Limitation of suits.

1. To suits to enforce the right of pre-emption, whether the same is founded on law or general usage or on special contract, the period of one year to be computed from the time at which the purchaser shall have taken possession under the sale impeached. Limitation of one year. Pre-emption suits.

2. To suits for pecuniary penalties or forfeitures for the breach of any law or regulation; to suits for damages for injury to the person and personal property, or to the reputation; to suits for damages for the infringement of copyright or of any Limitation of one year. Suits for damages, summary suits, &c.

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exclusive privilege; to suits to recover the wages of servants, artizans, or laborers, the amount of tavern bills or bills for board and lodging or lodging only; and to summary suits before the Revenue Authorities under Regulation V, 1822, of the Madras Code—the period of one year from the time the cause of action arose.

Limitation of one year.
Suits to set aside sales under decrees or for arrears of Government revenue, &c.

3. To suits to set aside the sale of any property, moveable or immoveable, sold under an execution of a decree of any Civil Court not established by Royal Charter, when such suit is maintainable; to suits to set aside the sale of any property, moveable or immoveable, for arrears of Government Revenue or other demand recoverable in like manner; to suits by a Putneedar or the proprietor of any other intermediate tenure saleable for current arrears of rent, or other person claiming under him, to set aside the sale of any putnee talook or such other tenure sold for current arrears of rent; to suits to set aside the sale of any property, moveable or immoveable, sold in pursuance of any decree or order of a Collector or other Officer of Revenue—the period of one year from the date at which such sale was confirmed or would otherwise have become final and conclusive if no such suit had been brought.

Limitation of one year.
Suits to set aside attachments, &c., by Revenue Authorities for arrears of Government revenue.

4. To suits to set aside any attachment, lease, or transfer of any land or interest in land by the Revenue Authorities for arrears of Government revenue, or to recover any money paid under protest in satisfaction of any claim made by the Revenue Authorities, on account of arrears of revenue or demands recoverable as arrears of revenue—one year from the date of such attachment, lease, or transfer, or of such payment as the case may be.

Limitation of one year.
Suits to set aside summary decisions, &c.

5. To suits to alter or set aside summary decisions and orders of any of the Civil Courts not established by Royal Charter, when such suit is maintainable—the period of one year from the date of the final decision, award, or order in the case.

6. To suits brought by any person to contest the justice of an award which shall have been made under Regulation VII, 1822, Regulation IX, 1825, and Regulation IX, 1833, of the Bengal Code, or to recover any property comprised in such award—the period of three years from the date of the final award or order in the case. Act XIV of 1859.

Limitation of three years.
Suits to contest certain awards.

7. To suits by any party bound by any order respecting the possession of property made under cl. 2, section 1, Act XVI of 1838, or Act IV of 1840, or any person claiming under such party, for the recovery of the property comprised in such order—the period of three years from the date of the final order in the case.

Limitation of three years.
Suits to recover property comprised in an order made under cl. 2, sec. 1, Act XVI of 1838, or Act IV of 1840.

*8. To suits to recover the hire of animals, vehicles, boats, or household furniture; or the amount of bills for any articles sold by retail; and to all suits for the rents of any buildings or lands (other than summary suits before the Revenue Authorities under Regulation V, 1822, of the Madras Code)—the period of three years from the time the cause of action arose.

Limitation of three years.
Suits for goods sold by retail, suits for rent of buildings or lands, &c.

9. To suits brought to recover money lent, or interest, or for the breach of any contract—the period of three years from the time when the debt became due, or when the breach of contract in respect of which the suit is brought first took place, unless there is a written engagement to pay the money lent or interest or a contract in writing signed by the party to be bound thereby or by his duly authorized agent.

Limitation of three years.
Suits for money lent or interest or for breach of contract where no written contract exists.

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* That portion of clause 8 which relates to suits for the price of articles sold by retail, was postponed in its operation by Act XXXII of 1861, to the first July, 1862, and again by Act XIV of 1862, to the first January, 1865.

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10. To suits brought to recover money lent, or interest, or for the breach of any contract in cases in which there is a written engagement or contract and in which such engagement or contract could have been registered by virtue of any law or regulation in force at the time and place of the execution thereof—

Limitation of three years.

Suits for the same where there is a written contract which has not been registered within six months.

the period of three years from the time when the debt became due or when the breach of contract in respect of which the action is brought first took place, unless such engagement or contract shall have been registered within six months from the date thereof.

11. To suits in cases governed by English law upon all debts and obligations of record and specialties; and to suits for the recovery of any legacy—the period of twelve years from the time the cause of action arose.

Limitation of twelve years.

Suits for specialty-debts and legacies.

12. To suits for the recovery of immoveable property or of any interest in immoveable property to which no other provision of this Act applies—the period of twelve years from the time the cause of action arose.

Limitation of twelve years.

Suits for immoveable property.

13. To suits to enforce the right to share in any property, moveable or immoveable, on the ground that it is joint family property; and to suits for the recovery of maintenance, where the right to receive such maintenance is a charge on the inheritance of any estate—the period of twelve years from the death of the persons from whom the property alleged to be joint is said to have descended, or on whose estate the maintenance is alleged to be a charge; or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in the possession or management of such property or estate on account of such alleged share, or on account of such maintenance as the case may be.

Limitation of twelve years.

Suits for shares in joint family property and for maintenance.

14. To suits by the proprietor of any land or by any person claiming under him, for the resumption or assessment of any lakheraj, or rent-free land—the period of twelve years from the time when the title of the person

Limitation of twelve years.

Suits by proprietor of land to resume or assess lakheraj, or rent-free land.

claiming the right to resume and assess such lands, or of some person under whom he claims, first accrued. Provided that, in estates permanently settled, no such suit, although brought within twelve years from the time when the title of such person first accrued, shall be maintained if it is shown that the land has been held lakheraj, or rent-free, from the period of the Permanent Settlement.

Proviso, if the land has been held rent-free from the time of the Permanent Settlement.

15. To suits against a depositary, pawnee or mortgagee of any property, moveable or immoveable, for the recovery of the same—a period of thirty years if the property be moveable, and sixty years if it be immoveable, from the time of the deposit, pawn, or mortgage; or if in the meantime an acknowledgment of the title of the depositor, pawner, or mortgagor, or of his right of redemption, shall have been given in writing signed by the depositary, pawnee or mortgagee or some person claiming under him, from the date of such acknowledgment in writing.

Limitation of thirty and sixty years. Suits against depositaries, pawnees, or mortgagees.

16. To all suits for which no other limitation is hereby expressly provided—the period of six years from the time the cause of action arose.

Limitation of six years applicable to all suits not especially provided for.

II. No suit against a trustee in his lifetime, and no suits against his representatives for the purpose of following in their hands the specific property which is the subject of the trust, shall be barred by any length of time; but no suit to make good the loss occasioned by a breach of trust out of the general estate of a deceased trustee shall be maintained in any of the said Courts unless the same is instituted within the proper period of limitation according to the last preceding section, to be computed from the decease of such trustee: Provided that nothing herein contained shall prevent a co-trustee from enforcing, against the estate of a deceased trustee, any claim for contribution, if he shall institute a suit for that purpose within six years after such right of contribution shall have arisen.

Suits against trustees and their representatives for breach of trust, &c.

Proviso.

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III. When, by any law now or hereafter to be in force, a shorter period of limitation than that prescribed by this Act is specially prescribed for the institution of a particular suit, such shorter limitation shall be applied notwithstanding this Act.

Shorter periods of limitation, if prescribed by particular Acts, to prevail.

IV. If, in respect of any legacy or debt, the person who, but for the law of limitation, would be liable to pay the same shall have admitted that such debt or legacy, or any part thereof, is due by an acknowledgment in writing signed by him, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission: Provided that, if more than one person be liable, none of them shall become chargeable by reason only of a written acknowledgment signed by another of them.

Revival of right to sue by admission in writing.

Proviso.

V. In suits for the recovery from the purchaser or any person claiming under him of any property purchased *bonâ fide* and for valuable consideration from a trustee, depositary, pawnee, or mortgagee, the cause of action shall be deemed to have arisen at the date of the purchase: Provided that, in the case of purchase from a depositary, pawnee, or mortgagee, no such suit shall be maintained unless brought within the time limited by clause 15, section 1.

Computation of period of limitation in suits to recover property purchased from depositaries, pawnees, or mortgagees.

Proviso.

VI. In suits in the Courts established by Royal Charter by a mortgagee to recover from the mortgagor the possession of the immoveable property mortgaged, the cause of action shall be deemed to have arisen from the latest date at which any portion of principal money or interest was paid on account of such mortgage debt.

Computation of period of limitation in suits in Supreme Courts by mortgagee to recover immoveable property mortgaged.

VII. In suits to avoid incumbrances or under-tenures in an estate sold for arrears of Government revenue due from such estate, or in a putnee talook or other saleable tenure sold for arrears of rent, which, by virtue of such sale, becomes freed from incum-

Computation of period of limitation in suits to avoid incumbrances or under-tenures in estates sold for arrears of Government revenue.

brances and under-tenures, the cause of action shall be deemed to have arisen at the time when the sale of the estate, talook, or tenure became final and conclusive. ACT XIV OF 1859.

VIII. In suits for balances of accounts current between merchants and traders who have had mutual dealings, the cause of action shall be deemed to have arisen at, and the period of limitation shall be computed from, the close of the year in the accounts of which there is the last item admitted or proved indicating the continuance of mutual dealings; such year to be reckoned as the same is reckoned in the accounts.

Computation of period of limitation in suits between merchants for balances of accounts current.

IX. If any person entitled to a right of action shall, by means of fraud, have been kept from the knowledge of his having such right or of the title upon which it is founded, or if any document necessary for establishing such right shall have been fraudulently concealed, the time limited for commencing the action against the person guilty of the fraud or accessory thereto, or against any person claiming through him otherwise than in good faith and for a valuable consideration, shall be reckoned from the time when the fraud first became known to the person injuriously affected by it, or when he first had the means of producing or compelling the production of the concealed document.

Computation of period of limitation in case of concealed fraud.

X. In suits in which the cause of action is founded on fraud, the cause of action shall be deemed to have first arisen at the time at which such fraud shall have been first known by the party wronged.

Computation of period of limitation in suits where the cause of action is founded on fraud.

XI. If, at the time when the right to bring an action first accrues, the person to whom the right accrues is under a legal disability, the action may be brought by such person or his representative within the same time after the disability shall have ceased as would otherwise have been allowed from the time when the cause of action accrued, unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time when the disability ceased; but if, at the time when the cause of action accrues to

Computation of period of limitation in case of legal disability.

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any person, he is not under a legal disability, no time shall be allowed on account of any subsequent disability of such person or of the legal disability of any person claiming through him.

What persons to be deemed to be under legal disability.

XII. The following persons shall be deemed to be under legal disability within the meaning of the last preceding section—married women in cases to be decided by English law, minors, idiots, and lunatics.

Computation of period of limitation in case of absence of defendant.

XIII. In computing any period of limitation prescribed by this Act, the time during which the defendant shall have been absent out of the British territories in India shall be excluded from such computation, unless service of a summons to appear and answer in the suit can, during the absence of such defendant, be made in any mode prescribed by law.

Computation of period of limitation in case of suit prosecuted *bonâ fide*, but in wrong Court.

XIV. In computing any period of limitation prescribed by this Act, the time during which the claimant, or any person under whom he claims, shall have been engaged in prosecuting a suit upon the same cause of action against the same defendant, or some person whom he represents, *bonâ fide* and with due diligence, in any Court of Judicature which, from defect of jurisdiction or other cause, shall have been unable to decide upon it, or shall have passed a decision which, on appeal, shall have been annulled for any such cause, including the time during which such appeal if any has been pending, shall be excluded from such computation.

Person dispossessed of immoveable property otherwise than by due course of law, may recover possession notwithstanding any title that may be set up.

* XV. If any person shall, without his consent, have been dispossessed of any immoveable property otherwise than by due course of law, such person, or any person claiming through him, shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof notwith-

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* So much of section 15 as does not relate to the limitation of suits was left unrepealed by Act IX of 1871. This unrepealed portion was repealed and re-enacted by Act I of 1877.

standing any other title that may be set up in such suit, provided that the suit be commenced within six months from the time of such dispossession. But nothing in this section shall bar the person from whom such possession shall have been so recovered, or any other person, instituting a suit to establish his title to such property and to recover possession thereof within the period limited by this Act. ACT XIV OF 1859.

Suit for dispossession to be brought within six months.

Suits to establish title not to be affected.

XVI. Nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of any Court established by Royal Charter in refusing equitable relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this Act.

Act not to interfere with equitable jurisdiction of Supreme Courts.

*XVII. This Act shall not extend to any public property or right, nor to any suits for the recovery of the public revenue or for any public claim whatever, but such suits shall continue to be governed by the laws or rules of limitation now in force.

Act not to extend to public property, nor to suits for the recovery of public claims.

†XVIII. All suits that may be now pending, or that shall be instituted within the period of two years from the date of the passing of this Act, shall be tried and determined as if this Act had not been passed; but all suits to which the provisions of this Act are applicable that shall be instituted after the expiration of the said period shall be governed by this Act and no other law of limitation, any Statute, Act or Regulation now in force notwithstanding.

Act not to apply to suits now pending or to suits instituted within two years.

Suits afterwards instituted to be governed by this Act.

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* Bengal Regulation II of 1805, which applied to public claims, was repealed by Act VIII of 1868, without any reference to the terms of section 17, Act XIV of 1859.

† The operation of Act XIV of 1859 was further suspended by Act XI of 1861, until the first of January 1862.

ACT XIV OF 1859.

Proceedings for enforcing judgments, &c., of Supreme Courts to be taken within twelve years.

XIX. No proceeding shall be taken to enforce any judgment, decree, or order of any Court established by Royal Charter, but within twelve years next after a present right to enforce the same shall have accrued to some persons capable of releasing the same, unless in the meantime such judgment, decree, or order shall have been duly revived, or some part of the principal money secured by such judgment, decree, or order, or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in any such case no proceeding shall be brought to enforce the said judgment, decree, or order, but within twelve years after such revivor, payment, or acknowledgment, or the latest of such revivors, payments, or acknowledgments, as the case may be: Provided that, for three years next after the passing of this Act, every judgment, decree, and order which may be in force at the date of the passing of this Act shall be governed by the law now in force, anything therein contained notwithstanding.

Proviso as to judgments now in force.

Time for enforcing execution of judgment, &c., of a Civil Court not established by Royal Charter.

XX. No process of execution shall issue from any Court not established by Royal Charter to enforce any judgment, decree, or order of such Court, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force, within three years next preceding the application for such execution.

Preceding section not to apply to judgments, &c., in force at the time of the passing of this Act.

XXI. Nothing in the preceding section shall apply to any judgment, decree, or order in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon or within three years next after the passing of this Act, whichever shall first expire.

Time for execution of a summary award of Civil Court or Revenue Authority.

XXII. No process of execution shall issue to enforce any summary decision or award of any of the Civil Courts not established by Royal Charter or of any Revenue Authority

unless some proceeding shall have been taken to enforce such decision or award or to keep the same in force within one year next preceding the application for such execution. ACT XIV OF 1859.

Preceding section not to apply to summary awards in force at the passing of this Act.

XXIII.* Nothing in the preceding section shall apply to any summary decision or award in force at the time of the passing of this Act, but process of execution may be issued either within the time now limited by law for issuing process of execution thereon or within two years next after the passing of this Act, whichever shall first expire.

Operation of Act.

XXIV. This Act shall take effect throughout the Presidencies of Bengal, Madras, and Bombay, including the Presidency Towns and the Straits' Settlement; but shall not take effect in any Non-Regulation Province† or place until the same shall be extended thereto by public notification by the Governor-General in Council or by the Local Government to which such Province or place is subordinate. Whenever this Act shall be extended to any Non-Regulation Province or place by the Governor-General in Council, or by the Local Government to which such Province or place is subordinate, all suits which, within such Province or place, shall be pending at the date of such notification, or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if this Act had not been passed; but all suits to which the provisions of this Act are applicable that shall be instituted within

Trial of pending suits, &c., in any Non-Regulation Province or place to which the Act is extended.

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* This section was repealed by Act XIV of 1870. The whole Act, except a portion of section 15, was repealed by Act IX of 1871. This last repeal did not affect suits instituted before the first day of April 1873, nor applications before or after decree in *such* suits. (11 C. L. R. 113, P. C.)

† Act XIV of 1859 was extended to Assam by a notification dated the 11th July 1860; to the districts of Cachar, Hazareebagh, Lohardugga and Beerbhoom, by a notification dated the 20th February 1861; to the Sonthal Pergunnahs, by a notification dated the 8th December 1862; to the Central Provinces, by a notification dated the 1st May 1863; and to the Punjab, by a notification dated the 26th December 1866. (Thompson, pp. 365, 366, second edition.)

ACT XIV OF 1859. such Province or place after the expiration of the said period, shall be governed by this Act and by no other law of limitation, any Statute, Act or Regulation now in force notwithstanding.

ACT No. IX OF 1871.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor General on the 24th March* 1871.)

An Act for the Limitation of Suits and for other purposes.

WHEREAS it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts; And whereas it is also expedient to provide rules for acquiring ownership by possession; It is hereby enacted as follows:—

Preamble.

PART I.

PRELIMINARY.

Short title.

1. This Act may be called 'The Indian Limitation Act, 1871.'

Extent of Act.

It extends to the whole of British India; but nothing contained in sections two and three or in Parts II and III applies—

(*a*) to suits* instituted before the first day of April, 1873.

(*b*) to suits under the Indian Divorce Act.

(*c*) to suits under Madras Regulation VI of 1831.

Commencement.

This Act shall come into force on the first day of July 1871.

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* An application for the execution of a decree is an application in the suit in which the decree was obtained, and, as regards suits instituted before the 1st April 1873, all applications therein are excluded from the operation of the Act. Nothing in sec. 2, sec. 4 or sched. ii extends to an application for execution of a decree in a suit instituted before the 1st April 1873. *Mungul Pershad Dichit* v. *Grija Kant Lahiri*, 11 C. L. R., 113, P. C.

2. On and from that day the enactments mentioned in the first schedule hereto annexed shall be repealed to the extent specified in the third column of the same schedule. ACT IX OF 1871.

Repeal of enactments.

3. In this Act, unless there be something repugnant in the subject or context—

Interpretation-clause.

'minor' means a person who has not completed his age of eighteen years:

'plaintiff' includes also any person through whom a plaintiff claims:

'nuisance' means any thing done to the hurt or annoyance of another's immoveable property and not amounting to a trespass:

'bill of exchange' includes also a hundi:

'trustee' does not include a benámídár, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title:

'registered' means duly registered under the law for the registration of documents in force at the time and place of executing the document referred to in the context:

'foreign country' means any country other than British India;

and nothing shall be deemed to be done in 'good faith' which is not done with due care and attention.

PART II.

LIMITATION OF SUITS, APPEALS AND APPLICATIONS.

4. Subject to the provisions contained in sections five to twenty-six (inclusive), every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence.

Dismissal of suits, &c., instituted, &c., after period of limitation.

Explanation.—A suit is instituted in ordinary cases when the plaint is presented to the proper officer: in the case of a pauper, when his application for leave to sue as a pauper is filed; and in

ACT IX OF 1871.

the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

Illustrations.

(*a.*) A suit is instituted after the prescribed period of limitation. Limitation is not set up as a defence, and judgment is given for the plaintiff. The defendant appeals. The Appellate Court must dismiss the suit.

(*b.*) An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed.

Proviso where Court is closed when period expires.

5. (*a.*) If the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, presented or made on the day that the Court re-opens :

Proviso as to appeals and applications for review.

(*b.*) Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period :

Different periods of limitation prescribed by local laws.

6. When, by any law not mentioned in the schedule hereto annexed, and now or hereafter to be in force in any part of British India, a period of limitation differing from that prescribed by this Act is especially prescribed for any suits, appeals or applications, nothing herein contained shall affect such law.

Appeals from decrees of High Courts on original side.

And nothing herein contained shall affect the periods of limitation prescribed for appeals from, or applications to review, any decree, order or judgment of a High Court in the exercise of its original jurisdiction.

Legal Disability.

Legal disability.

7. If a person entitled to sue be, at the time the right to sue accrued, a minor, or insane, or an idiot,

he may institute the suit within the same period after the disability has ceased, or (when he is at the time of the accrual

affected by two disabilities) after both disabilities have ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.

When his disability continues up to his death, his representative in interest may institute the suit within the same period after the death as would otherwise have been allowed from the time prescribed therefor in the third column of the same schedule.

Nothing in this section shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which the suit must be brought.

Illustrations.

(*a.*) The right to sue for the hire of a boat accrues to A during his minority. He comes of age four years after the accrual of the right. He may institute his suit at any time within three years from the date of his coming of age.

(*b.*) A, to whom a right to sue for a legacy has accrued during his minority, attains full age eleven years after such right accrued. A has, under the ordinary law, only one year remaining within which to sue. But under this section an extension of two years will be allowed him, making in all a period of three years from the date of his majority, within which he may bring his suit.

(*c.*) A right to sue for an hereditary office accrues to A, who at the time is insane. Six years after the accrual of the right, A recovers his reason. A has six years, under the ordinary law, from the date when his insanity ceased, within which to institute a suit. No extension of time will be given him under this section.

(*d.*) A right to sue as landlord to recover possession from a tenant accrues to A, who is an idiot. A dies three years after the accrual of the right, his idiocy continuing up to the date of his death. A's representative in interest has, under the ordinary law, nine years from the date of A's death within which to bring a suit. This section does not extend that time.

Disability of one joint creditor.

8. When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all: but where no such discharge can be given, time will not run as against any of them until they all are free from disability.

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Continuous running of time.

9. When once time has begun to run, no subsequent disability or inability to sue stops it:

Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.

Suits against express trustees and their representatives.

10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his representatives, for the purpose of following in his or their hands such property, shall be barred by any length of time.

Explanation.—A purchaser in good faith for value from a trustee is not his representative within the meaning of this section.

Suits on foreign contracts.

11. Suits in British India on contracts entered into in a foreign country are subject to the rules prescribed by this Act.

Foreign limitation law.

12. No foreign rule of limitations shall be a defence to a suit in British India on a contract entered into in a foreign country, unless the rule has extinguished the contract, and the parties were domiciled in such country during the period prescribed by such rule.

PART III.

COMPUTATION OF PERIOD OF LIMITATION.

Exclusion of day on which right to sue accrues.

13. In computing the period of limitation prescribed for any suit, the day on which the right to sue accrued shall be excluded.

In computing the period of limitation prescribed for an appeal, an application for leave to appeal as a pauper, an application to the High Court for the admission of a special appeal, and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite

Exclusions in case of appeals and certain applications.

for obtaining a copy of the decree, sentence or order appealed against or sought to be reviewed, shall be excluded.

In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

Exclusion of time of defendant's absence from British India.

14. In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded, unless service of a summons to appear and answer in the suit can, during such absence, be made under the Code of Civil Procedure, section sixty.

Exclusion of time of suing *bonâ fide* in Court without jurisdiction.

15. In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another suit, whether in a Court of first instance or in a Court of appeal, against the same defendant or some person whom he represents, shall be excluded, where the last-mentioned suit is founded upon the same right to sue, and is instituted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to try it.

Explanation 1.—In excluding the time during which a former suit was pending, the day on which that suit was instituted, and the day on which the proceedings therein ended, shall both be counted.

Explanation 2.—A plaintiff resisting an appeal presented on the ground of want of jurisdiction, shall be deemed to be prosecuting a suit within the meaning of this section.

Exclusion of time during which commencement of suit is stayed by injunction.

16. In computing the period of limitation prescribed for any suit, the commencement of which has been stayed by injunction, the time of the continuance of the injunction shall be excluded.

Exclusion of time during which judgment-debtor sues to set aside execution sale.

17. In computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which the judgment-debtor has been prosecuting a suit to set aside the sale shall be excluded.

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Effect of death before right to sue accrues.

18. When a person who would, if he were living, have a right to sue, dies before the right accrues, the period of limitation shall be computed from the time when there is a representative in interest of the deceased capable of suing.

When a person against whom, if he were living, a right to sue would have accrued, dies before the right accrues, the period of limitation shall be computed from the time when there is a representative whom the plaintiff may sue.

Nothing in the former part of this section applies to suits for the possession of land or of an hereditary office.

Effect of fraud.

19. When any person having a right to sue has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, and where any document necessary to establish such right has been fraudulently concealed,

the time limited for commencing a suit,

(*a*) against the person guilty of the fraud or accessory thereto, or

(*b*) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

Effect of acknowledgment in writing.

20. (*a.*) No promise or acknowledgment in respect of a debt or legacy shall take the case out of the operation of this Act, unless such promise or acknowledgment is contained in some writing signed, before the expiration of the prescribed period, by the party to be charged therewith or by his agent generally or specially authorized in this behalf.

(*b.*) When such writing exists, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the promise or acknowledgment was signed.

(*c.*) When the writing containing the promise or acknowledgment is undated, oral evidence may be given of the time when it was signed. But when it is alleged to have been destroyed or lost, oral evidence of its contents shall not be received.

Explanation 1.—For the purposes of this section, a promise or acknowledgment may be sufficient, though it omits to specify the exact amount of the debt or legacy, or avers that the time for payment or delivery has not yet come, or is accompanied by a refusal to pay or deliver, or is coupled with a claim to a set-off, or is addressed to any person other than the creditor or legatee;

but it must amount to an express undertaking to pay or deliver the debt or legacy or to an unqualified admission of the liability as subsisting.

Explanation 2.—Nothing in this section renders one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them.

Illustrations.

Z, a bond-debtor, himself writes a letter promising to pay the debt to his creditor A. Z affixes his seal, but does not sign the letter:

Z pays part of the debt and promises orally to pay the rest:

Z publishes an advertisement, requesting his creditors to bring in their claims for examination:

In none of these cases is the debt taken out of the operation of this Act.

Effect of payment of interest as such.

21. When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent generally or specially authorized in this behalf,

Effect of part-payment of principal.

or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent generally or specially authorized in this behalf,

a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made:

Provided that, in the case of part-payment of principal, the debt has arisen from a contract in writing, and the fact of the payment appears in the handwriting of the person making the same, on the instrument, or in his own books, or in the books of the creditor.

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Effect of substituting or adding new plaintiff or defendant.

22. When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have commenced when he was so made a party;

Proviso where original plaintiff dies.

Provided that, when a plaintiff dies, and the suit is continued by his representatives in interest, it shall, as regards them, be deemed to have commenced when it was instituted by the deceased plaintiff:

Proviso where original defendant dies.

Provided also, that, when a defendant dies, and the suit is continued against his representatives in interest, it shall, as regards them, be deemed to have been commenced when it was instituted against the deceased defendant.

Computation where there are successive breaches of contract.

Computation where the breach is continuing.

23. In the case of a suit for the breach of a contract, where there are successive breaches, a fresh right to sue arises, and a fresh period of limitation begins to run, upon every fresh breach; and where the breach is a continuing breach, a fresh right to sue arises, and a fresh period of limitation begins to run, at every moment of the time during which the breach continues.

Nothing in the former part of this section applies to suits for the breach of contracts for the payment of money by instalments, where, on default made in payment of one instalment, the whole becomes due.

Illustrations.

(*a.*) A contracts to pay an annuity to B for his life by quarterly instalments. A fails to pay any of the instalments. Here, upon every fresh failure, a fresh right to sue arises and a fresh period of limitation begins to run; and this Act may bar the remedy on the earlier breaches without affecting the remedy on the later breaches.

(*b.*) A, a tenant, covenants with B, his landlord, to keep certain buildings in repair. At every moment of the time during which the buildings continue out of repair and B retains his right of entry, a fresh right to sue arises and a fresh period of limitation begins to run.

Continuing nusance.

24. In the case of a continuing nusance a fresh right to sue arises, and a fresh period of limitation begins to run at every moment of the time during which the nusance continues.

Illustration.

A diverts B's watercourse. At every moment of the time during which the diversion continues and B retains his right of entry, a fresh right to sue arises and a fresh period of limitation begins to run.

Suit for compensation for act becoming unlawful.

25. In the case of a suit for compensation for an act lawful in itself, which becomes unlawful in case it causes damage, the period of limitation shall be computed from the time when damage accrues.

Illustration.

A owns the surface of a field. B owns the subsoil. B digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation runs from the time of the subsidence.

Computation of time mentioned in instruments.

26. All instruments shall, for the purposes of this Act, be deemed to be made with reference to the Gregorian calendar.

Illustrations.

(*a.*) A Hindu makes a promissory note bearing a native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiry of four months after date computed according to the Gregorian calendar.

(*b.*) A Hindu makes a bond, bearing a native date only, for the repayment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiry of one year after date computed according to the Gregorian calendar.

PART IV.

ACQUISITION OF OWNERSHIP BY POSSESSION.

Acquisition of right to easement.

27. Where the access and use of light or air to and for any building has been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years, and where any way or watercourse, or the use of any water, or any other easement, whether affirmative or negative, has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years,

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the right to such access and use of light or air, way, water-course, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Illustrations.

(*a.*) A suit is brought in 1871 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him claiming title thereto as an easement and as of right, without interruption, from 1st January 1850 to 1st January 1870. The plaintiff is entitled to judgment.

(*b.*) In a like suit also brought in 1871 the plaintiff merely proves that he enjoyed the right in manner aforesaid from 1848 to 1868. The suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit.

(*c.*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.

Exclusion in favour of reversioner of servient tenement.

28. Provided that, when any land or water upon, over or from which any easement (other than the access and use of light and air) has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof,

the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last mentioned period of twenty years, in case the claim is, within three years next after the determination

of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that, during ten of these years, C, a deceased Hindu widow, had a life-interest in the land; that, on C's death, B became entitled to the land; and that, within two years after C's death, he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

Extinguishment of right to land or hereditary office.

29. At the determination of the period hereby limited to any person for instituting a suit for possession of any land or hereditary office, his right to such land or office shall be extinguished.

FIRST SCHEDULE.

(*See section* 2.)

Number and year.	Subject or title.	Extent of repeal.
21 Jac. I, cap. sixteen.	An Act for limitation of actions and for avoiding of suits in law.	The whole Statute, so far as it applies to British India.
4 Ann., cap. sixteen.	An Act for the amendment of the law and the better advancement of justice.	Sections seventeen, eighteen and nineteen, so far as they apply to British India.
33 Geo. III, cap. fifty-two.	An Act for continuing in the East India Company, for a further term, the possession of the British territories in India, together with their exclusive trade, under certain limitation; for establishing further regulations for the government of the said territories, and the better administration of justice within the	So much of section one hundred and sixty-two as relates to the limitation of civil suits in British India.

Number and year.	Subject or title.	Extent of repeal.
	same; for appropriating to certain uses the revenues and profits of the said Company; and for making provision for the good order and government of the towns of Calcutta, Madras and Bombay.	
53 Geo. III, cap. one hundred and fifty-five.	An Act for continuing in the East India Company, for a further term, the possession of the British territories in India, together with certain exclusive privileges; for establishing further regulations for the government of the said territories, and the better administration of justice within the same; and for regulating the trade to and from the places within the limits of the said Company.	Section one hundred and twenty-four, so far as it applies to British India.
9 Geo. IV, cap. seventy-four.	Administration of criminal justice.	So much of section fifty-one as relates to civil suits.
6 & 7 Vic., cap. ninety-four.	Foreign Jurisdiction Act ...	Section seven, so far as it applies to British India.
Act No. XIV of 1840.	An Act for rendering a written memorandum necessary to the validity of certain promises and engagements, by extending to the territories of the East India Company, in cases governed by English law, the provisions of the Statute 9 Geo. IV, cap. 14.	From and including the words "Whereas by an Act" down to and including the words "Defendants against the Plaintiff."
Act No. XI of 1841.	Military Courts of Requests.	The proviso in section nine.