APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1887. April 19. July 11.

PERUMAL AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

and

RAMASÁMI CHETTI AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Indian Easement Act—Act V of 1882, *ss.* 6, 7, 17—*Natural streams—Surface water—Rights of riparian owners.*

The owners of a tank fed by natural streams, which depended for their supply on natural rainfall and surface water, sued for an injunction to restrain superior riparian owners from damming the streams or interfering with the supply of water, over which the plaintiffs claimed a right of easement. The issue as to the ownership of the land on which the streams rose was undecided:

Held, (1) The Easement Act only declared the existing law as to easement over water;

(2) An easement can therefore be acquired in regard to the water of the rainfall. But surface water not flowing in a stream and not permanently collected in a pool, tank or otherwise is not a subject of easement by prescription, though it may be the subject of an express grant or contract;

(3) It is the natural right of every owner of land to collect or dispose of all water on the surface which does not pass in a defined channel;

(4) Riparian owners are entitled to use and consume the water of the stream for drinking and household purposes, for watering their cattle, for irrigating their land, and for purposes of manufacture, subject to the conditions (i) that the use is reasonable, (ii) that it is required for their purposes as owners of the land, and (iii) that it does not destroy or render useless or materially diminish or affect the application of the water by riparian owners below the stream in the exercise either of their natural right or their right of easement if any;

(5) It was therefore necessary to ascertain where the streams rose, and the course, source and length of their tributaries.

SECOND appeal against the decree of A. J. Mungalam Pillai, Subordinate Judge of Madura (West), in Appeal Suit No. 366 of 1885, modifying the decree of T. A. Krishnasami Ayyar, District Munsif of Sivaganga, in Original Suit No. 227 of 1883.

The plaintiffs are the trustees of a certain temple, and, as such, the owners of a tank fed by two natural streams, which are supplied

* Second Appeal No. 966 of 1885.

by the natural rainfall and surface water of the district. The plaint prayed for a decree directing the removal of an embankment erected across the streams by the defendants and for a perpetual injunction restraining the defendants from interfering with the flow of water to the plaintiffs' tank. Both the lower courts held that the plaintiffs had acquired a right of easement from immemorial user of the water in the streams and decreed as prayed.

The defendants preferred this second appeal.

Subramánia Ayyar and *Bháshyam Ayyangár* for appellants argued that the Indian Easements Act reproduced the English law on the subject and cited *Madras Railway Company* v. *Zemindár of Carvatenagarum*(1) and Angell on Water Courses, ed. 6th, p. 142.

Rámá Ráu for respondents argued that s. 6 of the Indian Easements Act created a departure from English law and relied on *Arni Jagirdár* v. *Secretary of State for India*(2), *Rayappan* v. *Virabhadra*(3), *Ramessur Persad Narain Sing* v. *Koonj Behari Pattuk*(4), *Khoorshed Hossein* v. *Teknarain Sing*(5).

The further arguments adduced on this appeal appear sufficiently, for the purpose of this report, from the judgment of the Court (Collins, C.J., and Muttusámi Ayyar, J.).

JUDGMENT.—The plaintiffs are the trustees of the Ariyakudi temple in the district of Madura and defendants Nos. 1 and 2 are the managers of another temple, called Iluppagudi temple, in the same district. The Dharmasanam village of Ariyakudi belongs to the former and the village of Kurichiyendal, which adjoins it on the north, belongs to the latter. The tank A of Ariyakudi in the Commissioner's plan is supplied by channels C and D, which take their rise in the tract of land lying between 1 and G2 and G3 and flow in a defined course, first, through Kurichiyendal, then through Ariyakudi, and, after uniting together, fall into the Ariyakudi tank, being fed on their way by small channels, C1, C2, D1 and D2, which rise also in the same tract of land. The rain annually falling on this tract flows into the tributaries and the main channels C and D and constitutes the source from which the Ariyakudi tank receives its supply. It is found by the courts below that these channels have existed for more than thirty years, in fact from time immemorial, and that they are natural streams,

(1) L.R., 1 I.A., 385. (2) I.L.R., 5 Mad., 226.
(3) I.L.R., 7 Mad., 530. (4) I.L.R., 4 Cal., 633.
(5) 2 Cal. L. Rep., 141.

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which have had a continuous and defined course, until they terminated in the tank A. The District Múnsif found further that the land, in which the streams originate, is wholly included in the village of Kurichiyendal and does not belong, as alleged by the plaintiffs, partly to Ariyakudi and partly to Kurichiyendal. On this question, however, the Subordinate Judge considered it unnecessary to record a finding. Both courts concurred in the opinion that the plaintiffs had acquired a right of easement from immemorial enjoyment and decreed the claim. The decrees appealed against declared and directed (i) that channels C and D in the plan annexed belong to the plaintiffs; (ii) that defendants should in no way interfere with the said channels; (iii) that defendants Nos. 1 and 2 do remove the bund G2 and G3, which prevents water from flowing into channels C and D; (iv) that the portions of the said channels, which were filled up with earth by defendants, be dug again and restored to their former position; (v) that defendants Nos. 1 and 2 do pay the expenses, which may be incurred in removing the bund and digging the channel as aforesaid; (vi) that they be restrained from interfering either with the rain water that continues to flow into channels C and D or with the flow of water into the Ariyakudi tank by means of those channels; (vii) that they do pay to plaintiffs their costs; and (viii) that defendants do bear their own costs. From these decrees, defendants Nos. 1 and 2 have preferred this second appeal.

The first objection argued before us is that the supply of water, which the plaintiffs claim, is only casual, intermittent, and exclusively dependent upon the rainfall on the defendants' land and that the plaintiffs' claim cannot be supported. It is undoubtedly the natural right of every owner of land to collect and dispose of all water on the surface which does not pass in a defined channel. Assuming that an easement may be acquired in regard to such right (and we shall presently consider whether it may be acquired), we are of opinion that it is perfectly immaterial whether the supply is permanent or intermittent or dependent on springs which never fail, or on casual or periodical rainfall. It would be altogether unreasonable to hold in this country, many parts of which depend upon annual rainfall for their irrigation, that no right of easement can be acquired in relation to it, because there may be failure of rain in particular years or during the time of cultivation, and to that extent the supply may be precarious or casual.

It is explained in the Easement Act—Act V of 1882,—which only declared the law administered in this country on the subject, that a natural stream is a stream whether *permanent* or *intermittent*, tidal or tideless, on the surface of the land or underground, which flows by the operation of nature only and in a natural and known course. We must, therefore, overrule the objection that no easement can be acquired in regard to the water of the rainfall.

The next objection urged upon us is that the first, second, and third items of relief decreed to the plaintiffs are in excess of the right of easement, which is found to have been acquired by them. The accustomed user of that right is according to the finding confined to the uninterrupted flow of rain water that falls on the tract of land between HH and G2, G3 into channels C and D and their tributaries, and then through the former to the Ariyakudi tank A in their usual course. As an easement is a limiting right or a right in *alieno solo*, the relief awarded should certainly not be more extensive than what is necessary to its beneficial enjoyment. As riparian owners, defendants Nos. 1 and 2 are entitled to use and consume the water of the streams C and D for drinking and household purposes, for watering their cattle, and even for irrigating their land, or for purposes of manufacture, provided they exercise their right subject to the conditions, viz., (i) that the use is reasonable; (ii) that it is required for their purposes as owners of the land; and (iii) that it does not destroy or render useless or materially diminish or affect the application of the water by riparian owners below the stream in the exercise either of their natural right or right of easement, if any—*Embrey* v. *Owen*(1).—The first and second items of relief decreed to the plaintiffs should, therefore, be modified, so as to save the first and second defendants' natural rights as riparian owners. The direction that the embankment G2, G3 be removed, because it is new, goes likewise beyond the necessity of the case. All that the plaintiffs are entitled to claim is that so much of the embankment as prevents the flow of water in its accustomed course to the Ariyakudi tank across the bund should be removed. Any other direction is in excess of the plaintiffs' right and bad in law. In this respect also the decree must be modified.

The next objection which is urged in support of this appeal

(1) 6 Exch., 353.

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refers to the principle that no easement can be acquired, unless the user is of *right* and *not in pursuance of an agreement* with or by permission of the dominant owner, express or implied, which negatives the existence of a right or subjects it to a condition on the fulfilment of which it ceases.

In the case before us there was no express agreement between the dominant and the servient owners, but it is suggested that a conditional agreement may and ought to be implied from the facts found, viz., that, from time immemorial, there had been no wet cultivation at all in Kurichiyendal, until a few years ago, that, though during the last few years, there has been some wet cultivation, it has not been considerable, and that defendants Nos. 1 and 2 now desire to extend such cultivation by running up the bund G2, G3, and thereby diverting the streams C and D into the Kurichiyendal tank. The user which the plaintiffs and their predecessors have had from time immemorial, under these circumstances, must, it is contended, be treated as limited to the period during which the defendants and their predecessors did not choose to extend their wet cultivation. It is also said that the owners of Kurichiyendal could never have intended not to extend their wet cultivation for all time to come, and that it is reasonable to infer that the user was originally permitted only so long as they did not convert their dry land into wet cultivation; but it is conceded that, if the channels C and D took their rise beyond the land of defendants Nos. 1 and 2 and then flowed through it to the Ariyakudi tank, no such inference can be drawn, because appropriation of the water by a riparian owner lower down from time immemorial would deprive a riparian owner who holds land higher up of the natural advantages arising from the situation of his land. This is inconsistent with the contention that immemorial enjoyment may be presumed to be permissive; for, if the user must be taken to be not of right in the one case, because the owner of the upper land recently desired to irrigate it for the first time, it must be equally so in the other. The appellants' pleader overlooks the fact that, in order that such inference may be drawn, there must be some evidence, apart from a recent desire to extend wet cultivation, indicating a mutual understanding, when the user originated, and during its continuance that it was only permissive and not of right. It must be borne in mind that the enjoyment for purposes of irrigation of water flowing in a natural stream by a riparian

owner of lower land from time immemorial stands upon a different footing from the enjoyment of water flowing in an artificial stream originating in the mode of occupation or cultivation of a person's property and from the very nature of the case presumably of a temporary character and liable to variation. On this point we may refer to *Arkwright* v. *Gell*(1), in which the stream in dispute was an artificial water-course, which was made with the sole object of getting rid of a nuisance to certain mines and enabling their owners to get at the ore, which lay within the mineral field drained by it. It was pointed out in that case that the flow of water through that water-course was, from the very nature of the case, of a temporary character, having its continuance only whilst the convenience of the mine owners required it; that, in the ordinary course, it would most probably cease when the mineral ore above its level should have been reached; and that the right of user was, therefore, intended to endure only so long as the water-course continued there. In *Mason* v. *Hill*(2) on the other hand, in which the water-course in dispute was a natural stream, it was observed that the first title to water was a gift from nature, and that it was to be tried by ascertaining in the first place where, by the laws of nature, the water would flow, and, if a secondary title to it be claimed, whether there has been such a user of it from which grant may be presumed. The user must no doubt have been by a party claiming a right thereto not by stealth nor by permission nor in any other way which would negative a grant. Upon the facts found in this case, the user cannot be said to have been otherwise than under a claim of right. With reference to the contention that the right to flowing water is *publici juris*, and that the first person who can get possession of the stream and apply it to a useful purpose has a good title against all the world, it was held in *Mason* v. *Hill*(2) that it was true only in the sense that neither the owner of the land below can pen back the water nor the owner of the land above divert it to his prejudice. As it is found in the case before us that channels C and D are natural streams and that the plaintiffs have used them from time immemorial for irrigating their land, there can be no doubt that defendants can neither prevent nor diminish the flow of such water as enters the channel in its accustomed course.

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(1) 5 M. & W., 203, 231. (2) 5 B and Ad., 17.

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It is then urged that the defendants are entitled to use the rain water falling upon the surface of their land for any purpose useful to them, and that any right which the plaintiffs have acquired by prescription must be taken to have been acquired subject to such right. It is contended on the other hand that the plaintiffs' right extends to all the rain water which falls on the defendants' land mentioned above and percolates into or otherwise enters the channels C and D. It is provided by s. 17, cl. c of the Indian Easements Act V of 1882 that no easement can be acquired by prescription to surface water not flowing in a stream and not permanently collected in a pool, tank, or otherwise. In *Rawstron* v. *Taylor*(1) it was held that the plaintiff, who claimed a right of easement by prescription, had no right to surface water which had no defined course, for the plaintiff had no right to water in *alieno solo*, and natural water-courses were like ways of necessity, and the right to have a stream running in its natural direction did not depend on a supposed grant, but was *jure naturæ*. *Broadbent* v. *Ramsbotham*(2) was decided on the same ground. *Chasemore* v. *Richards*(3) decided that in the case of rain water sinking into the ground to various depths and then flowing and percolating through underground strata in courses which were not defined but continually varied was not the subject of an easement by prescription. In *Robinson* v. *Krishnama Chárlyár*(4), decided in 1870, this court considered the principles laid down in the English cases were applicable to this country and the Easement Act has adopted them. According, therefore, both to decision and legislation it is clear that surface water not flowing in a stream and not permanently collected in a pool, tank, or otherwise is not a subject of easement by prescription.

It may, however, be a subject of express grant or other contract as mentioned in s. 7, illustration (*g*). The reason why underground water not running in a defined stream is not a subject of prescription is that there is no visible means of knowing to what extent, if any at all, the supply to the plaintiffs' tank would be affected by water percolating in and out of defendants' land, and the reason why surface water not running in a stream or collected in a pool tank, or otherwise is not a subject of prescriptive right is that there is no right of water in *alieno solo*, except to the extent that the right

(1) 11 Exch., 382.
(2) 11 Exch., 602.
(3) 7 H. and Cas., 349.
(4) 7 M.H.C.R., 44.

to the uninterrupted flow of a natural stream in its usual defined course is *jure naturae*. While it is clear, therefore, on the one hand, that this right would extend to all the minor channels which run into the main channels C and D in defined courses forming their feeders or tributaries, it is equally clear, on the other that it will extend no further. The declaration that the defendants Nos. 1 and 2 are not entitled at all to the rain water falling on the surface of their land between HH and G2, G3 before it enters or percolates into the channels C and D or their feeders and becomes thereby part of them cannot be supported. In the view, however, which we take of the case, it is necessary to direct the Subordinate Judge to return a finding on the fifth issue, and also to show on the plan annexed to the decree the name, if any, of the source, the course, and the lengths of each of the several tributaries or minor channels, which are visible and flow into the channels C and D across the land of defendants Nos. 1 and 2.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muttusámi Ayyar.

1887. April 19.

NÁGARAJA (PLAINTIFF), APPELLANT,

and

KÁSIMSA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Rent Recovery Act—Madras Act VIII of 1865, *ss.* 9, 10, 11.

A summary suit by a landlord to enforce the acceptance of a pattá under the Madras Rent Recovery Act should not be dismissed on a finding by the Appellate Court that the pattá tendered was not a proper pattá. The Appellate Court ought to pass the decree which the Court of First Instance should have passed.

SECOND appeal against the decree of J. A. Davies, Acting District Judge of Tanjore, in Appeal Suit No. 499 of 1884, reversing the decree of P. W. Moore, Acting Sub-Collector of Tanjore, in Summary Suit No. 51 of 1884.

This was a summary suit under s. 9 of the Madras Rent Recovery Act to enforce the acceptance of a pattá by the defendant from the plaintiff. The defence to the suit was that the

* Second Appeals Nos. 384 to 386 of 1886.