Appellate Court and here have had to be confined to the portion of the plaintiff's claim not admitted.

Apart from this, the case is not one in which we should permit any issue as to limitation to be taken at this stage, as the appellant is not in a position to offer any explanation whatsoever why the question was not raised in the Courts below.

We accordingly dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar, and Mr. Justice Boddam.

NAWAB AJAJUDDIN ALLI KHAN (CLAIMANT), APPELLANT,

v.

SECRETARY OF STATE FOR INDIA (DEFENDANT), RESPONDENT.*

1904. August 12.

Forest lands—Claim for hills—Village and land made over to claimant's ancestor by Government—Hills situated within immemorial boundaries of village—Right of inamdar irrespective of evidence of actual enjoyment—Necessity for proving adverse possession against Government.

A jaghirdar preferred a claim to certain hills. It appeared that in 1842 the uncontrolled management of a certain village and pieces of land was made over to the ancestor of the present claimant. Prior to such handing over, Government officers had been in possession on behalf of the Inamdar. It was not alleged that, when such possession was handed over, the hills in question were excepted; and it was not disputed that the hills were within the immemorial boundaries of the village:

Held, that upon these facts, apart from any evidence of actual enjoyment by the Inamdar, he should be held entitled to the hills.

Held also, that it was not necessary for the claimant, in these circumstances, to prove adverse possession as against Government.

CLAIM for land. The acting District Judge set out the facts thus, in his judgment on appeal from the order of the Forest Settlement-officer, Cuddapah: "The dispute relates to 12 small hills in the Yellutla extension (*vide* north-western portion of

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* Second Appeal No. 1031 of 1901 presented against the decree of S. Gopalachariar, Esq., District Judge of Cuddapah, in Appeal Suit No. 112 of 1899 presented against the order of M.R.Ry. K. Ganapaya, Forest Settlement-officer, Cuddapah, in claim No. 1 of 1896.

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the map exhibit B), and 2 in Sanga Samudram block (*vide* south-western portion of the map exhibit B). These and certain lands were claimed by the Jaghirdar of Cherlopalli, &c., appellant, as appertaining to his village of Cherlopalli. The lands were allowed by the Forest Settlement-officer, but the said hills were disallowed and hence this appeal. 2,112 and odd acres were enfranchised in favour of the jaghirdar in 1868 (see exhibit R I). In the survey map of 1875 (exhibit B), 6,087 and odd acres are entered as the extent of the said agraharam. Hence the claimant contends that the entire extent is his."

He found that the claimant had not proved adverse possession as against Government. He upheld the decision of the Forest Settlement-officer and dismissed the appeal.

The claimant preferred this appeal.

Mr. *John Adam* and *T. P. Kothandaramier* for appellant.

The Government Pleader for respondent.

JUDGMENT.—Though this case comes up on second appeal, the decision of the question at issue rests upon undisputed documents and findings of both the Courts that possession was with the appellant.

Exhibit A (Proceedings of the Board of Revenue of 1842) shows that the uncontrolled management of the village and pieces of land mentioned therein was made over to the appellant's ancestor. Prior to such handing over, the Government officers had been in possession on behalf of the Inamdar. It is not alleged that, when such possession was handed over, the hills now claimed by Government were excepted. It is undisputed that the hills are within the immemorial boundaries of the village. Upon these facts, even apart from any evidence of actual enjoyment by the Inamdar, he should be held entitled to the hills. In addition to this evidence, there is, however, proof of actual enjoyment by him. It was not necessary to adduce any evidence that the enjoyment was of right, possession being *primâ facie* evidence of ownership. On behalf of Government, the sole ground on which the appellant's right is questioned is that, in the document prepared at the Inam settlement, no express reference is made to the hills. Exhibit A and the standing orders show that the hills and similar uncultivated poramboke were not taken into account in estimating the income of the village for the purpose of fixing the quit-rent; nor does the circumstance that the survey made in 1803 was

The position of persons acting under statutory authority discussed.

Held also, that the injury was a continuing one and that the suit was governed by section 24 of the Limitation Act and was not barred by limitation.

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SUIT for a mandatory injunction directing the removal of a calingula. The facts are fully set out in the judgments.

K. Srinivasa Ayyangar for appellants.

The Government Pleader for first respondent.

JUDGMENT—Sir ARNOLD WHITE, C.J.—In this suit the plaintiffs ask for a mandatory injunction directing the defendant (the Secretary of State) to block up a calingula or "bye-wash" in a certain channel known as the Korkai channel. The District Munsif dismissed the suit and the District Judge affirmed the Munsif's decree.

The calingula was constructed by Government in 1882. It was put up for the purpose of reducing the flow of water into the Korkai tank through the Korkai channel. The necessary effect quantity of water to accumulate to cause the water diverted from defendants' railway embankment, to [illegible]nds. To obviate this certain the embankment. In order to protect their [illegible] and a small drainage defendants cut trenches in it by which the water flowed through and went ultimately on to the land of the plaintiff, which was on the opposite side of the embankment and at a lower level, and flooded and injured it to a greater extent than it would have done had the trenches not been cut. In an action for damages the Jury found that the cutting of the trenches was reasonably necessary for the protection of the defendants' property, aad that it was not done negligently. It was held that, though the defendants had not brought the water on their land, they had no right to protect their property by transferring the mischief from their own land to that of the plaintiff and that they were therefore liable. The case of *Nichols* v. *Marsland*(4), on which the Government Pleader relied is wholly different from the present case. In *Nichols* v. *Marsland*(4) it was held that the injury caused was entirely due to the act of God.

Putting the case at the highest and treating it as if Government had been empowered by statute to construct the calingula

(1) 7 M.H.C.R., 60.
(2) I.L.R., 16 Mad., 333.
(3) L.R., 13 Q.B.D., 131.
(4) L.R., 2 Ex.D., 1.

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This, no doubt, is true but the plaintiffs' claim is based on the fact that since 1895, as the result of the floods of that year, the level of their land has been permanently lowered and the water which now flows on to this land over the calingula and which would not flow on to the land at all if the calingula had not been built, remains and stagnates to a greater extent than had been the case prior to 1895. There is evidence of complaints by the ryots in 1883 and 1888, but the damage (if any) done to their lands up till 1895 does not appear to have been substantial. Since 1895, however, the case is different. The Munsif finds that since 1895 the plaintiffs' lands have been practically under water, and it would appear that, from 1895 to 1900, the assessment on the lands in question was remitted.

For the purpose of this appeal, I am prepared to assume that the averment in the written statement, that up to 1895 no material damage had been sustained by the plaintiffs, is true. The proposition advanced by the Government [illegible] has authorized, if second appeal, ment was that as, since 1895, t[illegible] that if by a reasonable exercise of to the plaintiffs' lands, [illegible]ner given by statute to the promoters, or which they have at common law, the damage could be prevented, it is, within this rule 'negligence' not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law."

In the case of *Canadian Pacific Ry. Co.* v. *Parke*(5), the defendants had a statutory right to irrigate their soil by compulsory diversion of water from adjacent streams by conveying it over lands which did not belong to them and to run the surplus water through adjacent lands by means of drains. They brought water upon their lands in such manner as to damage the plaintiffs' land by causing a slide. It was held by the House of Lords that, in the absence of provisions showing an intention on the part of the legislature to take away the plaintiffs' right to protect the property from invasion, the plaintiffs were entitled to an injunction to prevent the defendant's user of the water in disregard

(1) L.R., 4 H.L., 215.
(2) L.R., [1902], A.C., 220 at p. 230.
(3) I.L.R., 27 Bom., 344.
(4) L.R., 3 A.C., 430.
(5) L.R., [1899], A.C., 535.

such supply as is sufficient for his accustomed requirements. See *Kristna Ayyen* v. *Vencatachella Mudali*(1) and *Ramachandra* v. *Narayanasami*(2). But it cannot be said that the rights of Government in connection with the distribution of water include a right to flood a man's land because, in the opinion of Government, the erection of a work which has this effect is desirable in connection with the general distribution of water for the public benefit. That Government themselves did not take this view is shown by the fact that in 1882 at the time they constructed the calingula, they also constructed a drainage channel to counteract its effect as regards the flow of water over the plaintiffs' lands. The fact that the opening of the calingula was necessary for the protection of the tank and the fact that there was no negligence in the construction of the calingula—so far as the calingula was concerned—do not deprive the plaintiffs of their right to have their property protected. In the case of *Whalley* v. *The Lancashire and Yorkshire Railway Company*(3), an unprecedented rainfall had caused a quantity of against one of the sides of the such an extent as to endanger embankment, the

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in question, it would be for the Government to show that they could not exercise their statutory powers without injuring the plaintiffs' lands. See the judgment of Lord Cairns in *Hammersmith Ry. Co.* v. *Brand*(1) and the judgment of Lord Halsbury in *Canadian Pacific Ry. Co.* v. *Roy*(2).

Statutory powers authorizing the construction of works are granted "on the condition sometimes expressed and sometimes understood . . . —but if not expressed always understood—that the undertakers shall do as little damage as possible in the exercise of their statutory powers." See the judgment of the Privy Council in the *Gaekwar Sarkar of Baroda* v. *Gandhi Kachrabhai*(3). In his judgment in *Geddis* v. *Proprietors of the Bann Reservoir*(4), Lord Blackburn observes (page 455). "I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the legislat
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the powers, ei

of their common law obligation to do no damage to the plaintiffs' land.

As regards the question of limitation I cannot agree with the view expressed by the District Judge, though he did not actually decide the point, that the case is governed by article 120. The injury is a continuing injury and section 24 of the Limitation Act applies. If authority for this were needed it is to be found in the judgment of the Privy Council in *Rajrup Koer* v. *Abul Hossein*(1), and in the cases of *Punja Kuvarji* v. *Bai Kuvar*(2), and *Subramaniya Ayyar* v. *Ramachandra Rau*(3).

To hold that article 120 applies would lead to the anomaly that Government would acquire a right by way of easement in six years.

In my judgment the plaintiffs are entitled to the relief which they claim. The decrees of the Lower Courts must be set aside and the appeal allowed. For the reasons stated by the Privy Council in *Gaekwar Sarkar of Baroda* v. *Gandhi Kachrabhai*(4), I think the injunction should be in general terms restraining the defendant from flooding the plaintiffs' lands by causing or permitting water to flow from the Korkai channel on to the plaintiffs' lands. The plaintiffs are entitled to their costs throughout.

SUBRAHMANIA AIYAR, J.—Notwithstanding that the judgments of both the Lower Courts proceed on a complete misconception of the real nature of the case, there is no difficulty in ascertaining the facts. The plaintiffs, who are the owners of certain lands held under the Government on ryotwary tenure, sue the Government on behalf of themselves and other persons holding similar lands, in respect of what causes common injury to them all, having obtained permission under section 30 of the Civil Procedure Code for such representative litigation. The lands of the plaintiffs lie on one side of a Government channel called the Korkai channel which, in addition to leading the water required for the supply of the Korkai irrigation tank, carries off the drainage from the Marudur anicut system. As about five times as much water flows down the channel as can be stored in the Korkai tank with safety to that reservoir, a bye-wash was constructed in the channel in 1882 by the

(1) I.L.R., 6 Calc., 394.
(2) I.L.R., 6 Bom., 20.
(3) I.L.R., 1 Mad., 335.
(4) I.L.R., 27 Bom., 344.

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Government, to drain off all the water over and above the maximum quantity to be led into the tank as fixed by the Public Works Department. At the same time a ditch also appears to have been made for conducting the water escaping through the bye-wash, into a water course called the Chillai Odai, so as to prevent the neighbouring lands being inundated and injured. But as the water has been running over the lands to a more or less extent ever since the construction of the bye-wash (see 5th paragraph of the Secretary of State's written statement) the ditch apparently did not fully answer the purpose intended. In this state of things a flood occurred in 1895 which breached the Tambrapurni river and the Korkai channel, as a result of which the lands were cut up and their condition altered, and since then they have been subject to much more inundation from the water sent by the bye-wash than had been the case previously. Consequently the cultivation of the lands has since ceased and the revenue assessed thereon had, as stated by the District Munsif, to be remitted from 1895 till the commencement of this litigation in 1900.

The questions in the case are (1) whether the plaintiffs have a cause of action, (2) if so, whether their right to relief is in any way barred and (3) if not barred, what relief should be granted to them.

The learned Government Pleader in the course of his argument, if I followed him correctly, contended with reference, on the one hand, to the position occupied by the Government in connection with public irrigation works and, on the other, to the tenure of ryotwary land-holders, that the throwing of water on to the plaintiffs' lands through the bye-wash to their detriment, did not render the Government liable to an action.

It is quite true that it is among the most important functions of the Government of this country to construct new works of irrigation and to maintain old ones according to means and circumstances. The position of the Government in regard to liability for damage caused to individuals by such irrigation works would, according to *The Madras Railway Company* v. *The Zamindar of Karvetnagaram*(1), be analogous to that of persons acting under statutory authority. The law with reference to the liability of such persons was considered in *Canadian Pacific Ry. Co.* v. *Parke*(2)

(1) L.R., 1 I.A., 364. (2) L.R., [1899], A.C., 535.

where the leading authorities on the point were referred to and explained by Lord Watson, who delivered the opinion of the Judicial Committee. The cardinal rules deducible from them may be formulated thus :—

(i) Wherever, according to the sound construction of a statute, the legislature has authorized a person to make a particular use of property and the authority given is in the strict sense of the law *permissive* merely and not *imperative*, the legislature must be held to have intended that the use sanctioned is not to be in prejudice of the common law right of others.

(ii) But where the authority given is *imperative* the person so authorized incurs no responsibility however much injury he may cause to another, so long as he is not convicted of negligence.

(iii) The burden lies on those who seek to establish that the legislature intended to take away the private right of individuals to show that by express words or necessary implication such an intention appears.

The task of arriving at a conclusion as to the permissive or imperative character of an authority in a given case being by no means free from difficulty even where it depends solely on the words of a statute, that must obviously be the more so where the conclusion has to be arrived at with reference to unrecorded custom and practice very rarely brought up for discussion and decision before Courts and with reference to which only the rights and obligations of the State in this country in regard to public irrigation have to be postulated. Having regard to all the considerations bearing on the question, the only correct conclusion would seem to be that so far as the construction of new works is concerned the authority is but *permissive*, while as regards the maintenance of works once completed so as not to interfere with the existing rights of other persons, the authority of the Government is *imperative*. The latter part of this conclusion results directly from the Karvetnagaram case, it having been there held that the Zamindar to whom the duty of the maintenance of the tank was transferred from Government could be made responsible for the damage done to the railway by the breach of the tank only if negligence on his part could be proved. Nor need this be taken to involve any real anomaly, for, it is not difficult to conceive similar cases even under a statute ; for instance, an authority to establish a hospital of the kind in question in *Metropolitan Asylum*

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District Board v. *Hill*(1) only under conditions and circumstances which prevent it from being a nuisance to anybody at the time of its establishment might well be coupled with the proviso that persons choosing to come in the neighbourhood subsequently shall not be entitled to complain of it as injurious to them. Be this as it may, it is clear that the imperativeness ascribable to the maintenance of irrigation works once lawfully brought into existence must be confined strictly to the conservation of the work as originally designed and executed, and cannot be extended to any material alterations and additions made in, or to, any existing old work. Such alterations and additions should, in reason, be held to stand on the same footing as that of perfectly new works and thus subject to the restriction applicable to the case of new works, viz., there should be no invasion thereby of the rights of others. In this view it is clear that the bye-wash in question here was essentially a new work and that so long as such work is made the instrument of throwing water on the plaint mentioned lands without the consent of the owners, they have a ground of complaint, unless it be that a different conclusion has to be arrived at with reference to the character of the tenure under which those lands are held by them.

But clearly there is absolutely nothing in the nature of the ryotwari tenure which affords in the remotest degree any support to the contention under consideration. For none of the special features of this tenure—(1) liability to periodical revision of assessment, (2) power to relinquish the whole or part of the holding, (3) power of the Government to alter the sources, means, works, etc., from or by which water for irrigation is supplied to ryots entitled thereto so long as their water right is not prejudicially affected so as to cause real damage—none of these have the slightest bearing upon the question whether in maintaining or constructing a work of irrigation, the Government can throw the waters thereof on the lands of the ryotwari holders against their will. It is therefore idle to say that, in this respect, there is any difference whatsoever between ryotwari land and land held on other tenures such as zamindari, inam and the like.

In passing I think it right to say that the case of *Chinnappa Mudaliar* v. *Sikka Naikan*(2), referred to by the Government Pleader in the course of his argument with reference to the last

(1) L.R., 6 A.C., 193.

(2) I.L.R., 24 Mad., 36.

of the abovementioned incidents of the ryotwari tenure, goes too far in treating of the irrigation rights of ryotwari holders in general as mere rights *in personam*, and that, having regard to the true character, they should on principle and authority be held to partake of the nature of rights *in rem*. (See *Wyatt* v. *Larimer Weld Irrigation Co.*(1).)

Reverting now to the point under consideration, it is scarcely necessary to add that to throw water on another man's land against his will, especially when it is claimed to do this as of right amounts to a trespass, and the party affected has a right of action even if no substantial damage is shown. Consequently the plaintiffs are entitled to object to their lands being inundated by water through the bye-wash even supposing they could make a profitable use of the lands in spite of the overflow, and to ask that such overflow be interdicted lest by lapse of time the Government acquire a right to flood the lands by way of easement (see *McCartney* v. *Londonderry and Lough Swilly Railway Co.*(2)).

The strictness of the law in a matter like the present will be seen from what Lords Justices James, Brett and Cotton took care to say in *West Cumberland Iron and Steel Co.* v. *Kenyon*(3) and which imply that where water has been passing say from A's land to that of B under circumstances which do not entitle the latter to object to such passage, yet where the former makes a change in the means by which, and the circumstances under which, the passage of water into B's land takes place, so as to make it flow while on B's land differently from how it did before such change, can be objected to even where there is no increase in the quantity of water sent on to his land. The parts which I have italicised in the following quotations from the judgment of Lord Justice James in that case are enough to bear out the above statement. "I have always understood that everybody has a right on his own land to do anything with regard to the diversion of water or storage of water or with regard to usage of water in any way he chooses, *provided* that when he ceases dealing with it on his own land, when

(1) 36 A.m. S.R., p. 280, Kinney on 'Irrigation', pp. 359, 430 and 739; and Mead on 'Irrigation Institutions,' pp. 22, 82, 83 and 364 to 367. Compare also Captain Baird-Smith's 'Report to the Court of Directors' in 1853 published under the title of 'Italian Irrigation,' Vol. II, ch. I, section I, particularly at pp. 138 and 139, and ch. 11, sec. 11, particularly at pp. 259 to 262.

(2) L.R., [1904], A.C., 301 at p. 313. (3) L.R., 11 Ch.D., 782.

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he has made such use of it as he is minded to make, *he is not to allow or cause that water to go upon his neighbour's land in some other way than the way in which it had been affected before.* That is the common use of water. A man receives the rain water from his roof, he does not allow it to settle upon the surface but he receives it on his roof and collects it into the pipes and then lets it to go down upon his own land and from his own land it gets into his neighbour's land. *But unless his neighbour receives that water in some different way or quantity from what he had done before, there is no legal right of action.* If a man chooses to make any quantity of fish ponds or mill ponds or artificial lakes or pleasure waters or fountains or anything of that kind on his own land he is at liberty to do so *provided that when he has finished doing so, he does not increase the burden upon his neighbour* . . . . If there is a lake on my property into which I drain my field and there is a passage from that lake into my neighbour's land, how can it signify whether I drain my field into the lake by one or two or three openings *provided the same overflow as before goes through the same outlet into my neighbour's land.*" This being the law in respect of property liable to an overflow, it is manifest that the throwing of water through the bye-wash on the plaint lands, which were never subject to any such burden before, is *a fortiori*, wrongful.

The next point is whether the plaintiffs' right to relief is barred. No question of limitation arises, since the overflow complained of is periodical and makes the wrong a continuing one. And certainly there has been nothing in the conduct of the owners of the lands disentitling them to relief. It is clear that from the very first complaints were made by some at least of the ryots with reference to water escaping through the bye-wash being allowed to come upon their lands. And when in consequence of nothing being done with reference to such complaints, a few of them tried to protect themseves by temporary bunds put up across the bye-wash, the only response they got was criminal prosecution against them followed by imprisonment. It is not surprising that persons in the position of these ryots are by no means anxious to embark on litigation against the Government until they find such a course unavoidable. And it may be that the ryots would have continued to submit, though quite unwillingly, to the infringement of their right which began when the water was allowed to overflow their

lands, but for the flood of 1895 and the consequent aggravation of the injury.

Stress was laid on behalf of Government on the fact that the ryots have not restored the lands to the condition in which they were before the flood, and that, had they done so, the overflow on their lands would be much smaller. But whether the overflow on their lands is only to a small depth as before the flood or to a greater depth as has been the case subsequently is not material, since what is complained of is, as already pointed out, actionable irrespective of the extent of damage inflicted. And surely the abstention on the part of the ryots from spending money upon the improvement of the lands pending their efforts to obtain redress against the invasion complained of, prudent as such a course obviously is, can neither better the position of the wrong-doer nor render that of the party wronged worse.

Lastly, as to the remedy, the blocking up of the bye-wash is not necessary. Of course in the circumstances of the present case, the construction of the bye-wash is not what the plaintiffs are entitled to complain of. The wrong is in the water passing through the bye-wash being allowed to overflow their lands. And as that could be prevented otherwise than by the blocking up of the bye-wash, as by the cutting of proper trenches or the construction of other works, a general injunction that the defendants shall not throw the waters of the channel on the plaint mentioned lands would meet all the requirements of the case. I accordingly concur in the order proposed in the judgment of the learned Chief Justice.