APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sadasiva Ayyar.

1913. March 28 and April 10.

NARASAPPAYYA (PLAINTIFF), APPELLANT,

v.

S. GANAPATHI RAO AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Easement—User of easement for less than the prescriptive period—No right to sue for infringement.

Incorporeal rights such as easements are not capable in an exact sense of being possessed; and unless an easement had ripened into a prescriptive one, mere enjoyment of the easement for any length of time short of the full period of prescription gives no right for the enjoyer to maintain an action against any person infringing such a user.

Protection given in law to mere possession of corporeal things cannot be extended to such cases.

Acchanna v. *Venkamma* (1895) 5 M.L.J., 24 and *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana* (1911) I.L.R., 34 Mad., 173 distinguished.

English authorities reviewed.

SECOND APPEAL against the decree of V. VENUGOPAL CHETTI, the District Judge of South Canara, in Appeal No. 221 of 1910, preferred against the decree of B. KRISHNA RAO, the District Munsif of Mangalore, in Original Suit No. 335 of 1908.

The facts are fully given in the judgment of MILLER, J.

B. Sitarama Rao for the appellant.

K. Yagnyanarayana Adiga for the respondents.

MILLER, J. MILLER, J.—The plaintiff prays for an injunction to prevent the defendants from cutting a channel from a tank from which he waters some of his fields, so as to deprive him of the water. He alleged, *inter alia*, that the defendants were threatening to construct a dam to prevent the water from flowing to his fields, but this they denied.

The District Munsif, as I understand him, held that the plaintiff has a right to a supply of water from the pond in question, to the exclusion of the defendants and on that ground issued the injunction prayed for. The District Judge holds that the plaintiff has no right to the water of the pond, though he had

* Second Appeal No. 1061 of 1912.

been in the habit of taking it through a channel for sometime not exactly determined but less than twenty years. He dismissed the suit.

In Second Appeal it is contended that on the finding of the District Judge we ought to hold that the plaintiff, though he has not by prescription acquired a right to take the tank water through his channel, is nevertheless entitled, having been for sometime taking it in that way to prevent the defendants, who have also no right, to take the water, from taking it so as to deprive him of his supply and in support of this contention reliance is placed on *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana*(1). It is perhaps unfortunate that in that case the learned Judges have referred to the right for which protection was there claimed as "in the nature of an incorporeal right in process of acquisition." It seemed to me during the argument before us that reliance was sometimes placed on this observation as suggesting the existence in the eye of the law, of what I may call a partially acquired easement, as though the period required for the acquisition of an easement were a period of gestation, during which the easement gradually acquires form and life by a process of growth within the womb of prescription, and during which it is capable of suffering an injury.

It is perhaps hardly necessary to say that this is not the law. That is made clear by FARWELL, J., in *Greenhalgh* v. *Brindley*(2). You have your easement or you have nothing. You have nothing more for 19 years' enjoyment than for 19 months except possibly a greater prospect of success. What is growing and gradually ripening is not your easement, but your chance of success, and that is not a thing which the law protects. But I do not think that the learned Judges had in their minds anything in the nature of an inchoate or embryonic easement. Their decision was based on the view that in many cases incorporeal rights are as much capable of possession as rights to corporeal hereditaments. This means that you may have an enjoyment of a thing incorporeal without title, an enjoyment which may properly be called possession, and which will be protected in the same way that possession without title of corporeal things is protected. The question in each case will therefore be

(1) (1911) I.L.R., 34 Mad., 173. (2) (1901) 2 Ch., 324.

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not whether the plaintiff has been enjoying the benefit which he seeks to retain, but whether he has possession of it.

In the opinion of Sir Frederick Pollock, no mean authority on question of possession, easements "are not capable in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession and gives no possessory right before the due time is fulfilled. The only possession that can come in question is the possession of the dominant tenement itself"—Pollock on Torts, 8th Edition, page 375; and in Holmes' Common Law it is pointed out that "where an easement has been actually created, whether by deed or prescription, although it is undoubtedly true that any possessor of the dominant estate would be protected in its enjoyment, it has not been so protected in the past on the ground that the easement was in itself an object of possession but by the survival of precedents" founded, as he elsewhere explains on ideas which permitted the acceptance of a theory that an easement is something belonging, attached, adhering, appurtenant, to the dominant estate itself and not to the owner thereof personally and the learned author expresses the opinion that a person using a way for some years without an easement would not be protected in its use against third persons (Holmes' Common Law, pages 240, 241). The same illustration is repeated elsewhere in the same work 'a way, until becomes a right of way, is just as little susceptible of being held by a possessory title as a contract" (page 354) and again "The Common Law does not recognize possession of a way; there must exist a right against the servient owner before there is a right against anybody else. At the same time it is clear that a way is no more capable of possession because some body else has a right to it than if no one had" (page 382).

In the Roman Law the enjoyment of a servitude (or of certain servitudes) was considered to be a quasi-possession, *i.e.*, I take it, not a true possession, but something like it.

I do not wish to suggest that on its facts *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana*(1) was wrongly decided, but I am not sure that any question of possession of an incorporeal thing really arose there, and I must confess that

(1) (1911) I.L.R., 34 Mad., 173.

I find it easier to accept generally Sir Frederick Pollock's view than the statement of the learned Judges in that case. I find difficulty in conceiving of any true possession of things incorporeal, though no doubt the enjoyment of some easements resembles in some ways the occupation and use of a corporeal thing, and it may be that there are cases in which the resemblance is so close as to warrant the extension to this quasi-possession of the protection which is given to true possession.

It is noticeable that Sir Frederick Pollock does not refer to *Jeffries* v. *Williams*(1) in the passage which I have extracted above, and that, I venture to think, is because he did not regard that case as bearing on the question; the actual decision turned on a question of pleading, and, though there are observations in the judgment which suggest that the protection of a possessory right was in the minds of the learned Judges, still as is pointed out in *Dhuman Khan* v. *Muhammad Khan*(2) the decision is based on the fact that the defendant was on the declaration to be taken to be a wrong-doer as he had negligently injured the plaintiff's house and was not alleged to be the owner of the adjacent close or to have the owner's rights of mining and digging therein.

But, if the case is to be taken as a decision on a question of possessory right, it does not follow that other easements are similarly capable of possession. When I by building on my own land obtain the support for my house of my neighbour's land it may perhaps be said without great inaccuracy that I have obtained something very like possession of the support. But can this be said of the plaintiff's claim in the present case?

In *Stockport Water Works Company* v. *Potter*(3) BRAMWELL, B., observed that the mere taking of water (from a river) by the plaintiffs did not give them a right of action; and referred to *Whaley* v. *Laing*(4) as deciding this point. In *Whaley* v. *Laing*(4), the plaintiff took water from a canal by license of the owner of the canal, into a cistern of his own and thence to the engines which worked his mines. The defendants polluted the water of the canal and the foul water entered the plaintiff's cistern. BRAMWELL, B., delivered the judgment of the Court of Exchequer holding that the plaintiff had a right of action but declining to

(1) (1855) Exch. R., 792.
(2) (1897) I.L.R., 19 All., 153.
(3) (1864) 3 H. & C., 300 at pp. 318 and 476.
(4) (1857) 2 H. & N., 476.

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decide whether he had any possessory right in the water; the ground of their decision was that the defendant without right caused foul water to flow on to the plaintiff's premises. The case was like *Jeffries* v. *Williams*(1), based on questions as to the sufficiency of the plaintiff's declaration and the defendant's pleas and in the Exchequer Chamber the judgment was reversed by a majority of the judges *Laing* v. *Whaley*(2). WILLES, J., accepted the judgment of BRAMWELL, B., in the Court below and CROWDER, J., held that the permission of the land-owner gave the plaintiff a rightful enjoyment of the water and the defendant had wrongfully polluted the stream. But CROMPTON, J., thought the plaintiff was bound to aver a right to the water and construed the declaration as averring such a right, but held on the facts that no right existed and refusing to construe the declaration as the Court below had done as one complaining of foul water thrown on the plaintiffs premises, was of opinion that the judgment ought to be reversed. ERLE, J., agreed with him. WILLIAMS, J., held the declaration bad for want of any allegation that the plaintiffs were rightfully in enjoyment of the benefit of the water of the canal and WIGHTMAN, J., stated the facts to be that neither the plaintiffs nor the defendants had any right to do that which they did and held that, on the facts as upon the pleadings, the judgment ought to be reversed. On the pleadings he found nothing in the declaration to show that the defendant by fouling the water had injured any right of the plaintiffs or could as against them be considered a wrong-doer, and that no right of action was shown. MARTIN, B., in the lower Court and CROMPTON, J., in the Exchequer Chamber put the case of the poisoning of a pond by a man without right and consequent injury to the cattle of a man watering them at that pond by permission of the owner. And CROMPTON, J., thought that in that case an action against the poisoner of the water might be founded in some circumstances not on any right in the water but on the wilful injury to the plaintiffs' property. These cases are nearer the present case than the case of *Jeffries* v. *Williams*(1) and suggest that the enjoyment of the water of a river by taking it without right is not a possessory right which the Law of England will

(1) (1850) 5 Ex. R., 792. (2) (1858) 3 H. & N., 675.

protect. Possession seems to involve an appropriation to the exclusion of others and with the intention of maintaining such exclusion and it seems impossible to apply such a conception to the mere taking of water from a stream through a cut in the bank. There may be, no doubt, possession of the actual cut or channel, through which the water is taken, and possession of the water once it is appropriated, and that possession might be protected and this seems from the record of the case reported in *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana*(1) to have been the question there raised; the actual channel used exclusively by the plaintiff was obstructed by the defendant. *Acchanna* v. *Venkamma*(2) presents to my mind considerable difficulty, if it is to be regarded as a case in which the Court protected a possessory right. I find it difficut to conceive of the possession of the access of light to a house. But it may be that the learned Judges considered that the action would lie on account of injury to the plaintiff's property, as is suggested in *Dhuman Khan* v. *Muhammad Khan*(3) and by the observation of CROMPTON, J., in *Whaley* and *Laing*(4) and that the defendant would have to justify the *primâ facie* nuisance by showing some right in himself. Possibly this is what they mean when they say that against a wrong doer it was not necessary to show a prescriptive right. But even in this case we have the idea of exclusion which is essential to possession; the plaintiff's house alone was served by the light which was obstructed by the defendant's wall, and in this case therefore there may be some justification for protecting what may be regarded as a sort of possessory right.

In the present case, the plaintiff has no possession that I can see; he has not enclosed the pond; he has only cut a hole in one bank and that cannot give him possession of all the water in the pond; if I do not get possession of an unenclosed common by turning out my horse in one end of it to graze, I do not get possession of an unenclosed pond and its contents by making a cut in one end of it. The plaintiff has possession of the water when he gets it into his channel, but in no true sense has he possession of it before that. It is open to any one to go

(1) (1911) I.L.R., 34 Mad., 173.
(2) (1895) 5 M.L.J., 24.
(3) (1897) I.L.R., 19 All., 153.
(4) (1857) 2 H. & N., 476.

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to the pond and draw water therefrom, and the defendant is not a wrong doer as against the plaintiff; dishonesty apart, the case is parallel to one in which one man being in the habit of stealing manure for his field from a farm yard, finds one day that another thief has been beforehand with him and taken the manure which he intended to steal. There could be no right of action in such a case.

The appeal must be dismissed with costs.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff is the appellant. The facts found might shortly be stated thus. There is a small natural pond on Government land from which the plaintiff has been taking water to irrigate his lands which are evidently on a lower level than the tank bed. It is not clear from the evidence for how many years past he has been so using that water, but the District Judge finds that he has not been doing it for any length of time, and that he has acquired no right as against the Government to use the water of the pond for suggi cultivation. The plaintiff purchased the land only eleven or twelve years before the suit. The defendants shortly before the suit dug a trench in another corner of the tank and tried to take the water of the tank to their own lands situated in the direction of the other corner. They also had no right as against the Government to do so. The plaintiff sued for an injunction against the taking of the pond-water into the defendants' fields. The District Judge dismissed the plaintiff's suit because the plaintiff possesses no legal right to take water from the plaint's pond and the defendant by trying to take the water of the pond could not therefore infringe any legal right of the plaintiff. The contention of the learned vakil for the plaintiff, Mr. Sitarama Rao, is that, because the plainitff had been using the tank water for some years, though he had no right to do so, he was in possession of an incorporeal right to take such water and that the defendants as trespassers have no right to take such water and to interfere with the enjoyment by the plaintiff of such incorporeal right. Reliance has been placed on *Acchanna* v. *Venkamma*(1) and *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana*(2). Whether an incorporeal right of easement which is merely in process of acquisition

(1) (1895) 5 M.L.J., 24. (2) (1911) I.L.R., 34 Mad., 173.

can be held to be capable of legal possession at all till the process of acquisition is complete is a very doubtful question. Pollock in his book on Torts at page 375 says as follows:—"Easements and other incorporeal rights in property, rather a fringe to property than property itself" as they have been ingeniously called, are not capable in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession, and gives no possessory right before the due time is fulfilled: "a man who has used a way ten years without title cannot sue even a stranger for stopping it." In *Bonner* v. *Great Western Railway Co.*(1), BAGGALLAY, L.J., says, differing from BACON, V.C., in the Court below "I am unable to take the same view of the case as was taken by the Vice-Chancellor . . . In the present case the person complaining has no rights at all. It is admitted that the windows through which the plaintiff has derived light and air for a certain number of years past, have not been enjoyed for a sufficient length of time to give him a right to that light. It appears that for sixteen years he has had the joyment of these windows, and the view taken by the Vice-Chancellor was apparently this, that he had an accruing right to the enjoyment of this light which, supposing there was no interruption on the part of the Railway Company, he might enjoy until the whole twenty years had expired, and that the defendants ought to be restrained from interfering with the acquisition of the easement by the plaintiff. But it seems to me to be contrary to every principle on which the Court acts in cases of this kind that a person who has no right should obtain an injunction to restrain a Railway Company or *anybody else* from doing that which will interfere with his acquiring a right, by reason of his being unmolested for a certain length of time." LINDLEY, L.J., said in the same case "the plaintiff comes here asking an injunction to restrain the defendants from interfering with certain lights which he admits he has no title to. That appears to me to be the simple answer to the case quite apart from anything else." FRY, L.J., concurred on the same ground, namely, "that the plaintiff had not enjoyed the lights which were interfered with by the defendants hoarding for twenty years and that he therefore had no *primâ facie* title whatever to the access

(1) (1883) 24 Ch. D., 1.

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of light to that building." As regards the case in *Jeffries* v. *Williams*(1), as far as I could understand it, it was decided on the highly technical ground that the defendant's plea of "not guilty" did not properly raise the question of the plaintiff's title to lateral support from the adjacent sub-soil to his buildings and hence the defendant's plea must fail on that question. Anyhow I should be prepared, on principle, if necessary to differ from the dicta in *Acchanna* v. *Venkamma*(2), *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana*(3), to the effect that incorporeal *rights* in process of acquisition can be the subject of such legal possession as should be protected against the acts of another trespasser.

Assuming, however, that incorporeal rights in process of acquisition can be the subject of legal possession, what is the nature of the incorporeal right capable of such possession even while in process of acquisition? I am clear that the incorporeal right should be a right which, by its very nature, is presumably one enjoyed to the exclusion of others, or there must be clear evidence that one who is acquiring the incorporeal right by the enjoyment of it has been in enjoyment with the distinct animus or intention of excluding other persons from like enjoyment with himself. In *Acchanna* v. *Venkamma*(2) the plaintiff was enjoying access to light across a poramboke land to his windows. The right he was so enjoying was clearly enjoyed exclusively and the defendant, a trespasser, was interfering with plaintiff's said exclusive enjoyment by building a wall upon that poramboke land. In *Kondapa Rajam Naidu* v. *Devarakonda Suryanarayana* (3) also, I found on a perusal of the records that the plaintiff in that case had collected Government water flowing from certain hills into a channel and had been taking *the whole* of that water through that channel which was under his control for about eighteen years *into a tank belonging to him.* The defendant in that case put up a dam *in that channel which had been so under the plaintiff's exclusive control* and diverted the water through a new channel which the defendant dug branching from the channel under the plaintiff's control. The circumstances of that case, therefore, clearly indicated that the plaintiff had a clear intention to exclude

(1) (1850) 5 Ex. R., 792. (2) (1895) 5 M.L.J., 24.
(3) (1911) I.L.R., 34 Mad., 173.

others from using the water flowing through the channel which supplied the plaintiff's tank. In the present case, the facts proved do not establish any such intention on the plaintiff's part. He had nothing to do with the collection of the water which fell into the Government pond, and the mere fact that the Government Revenue officers have not prevented the plaintiff from drawing the water (naturally stored in that pond) to irrigate the plaintiff's lands for a few years before suit cannot raise any presumption that the plaintiff intended to exclude every other ryot from taking the water to their lands like the plaintiff or even that the plaintiff when drawing the water began an enjoyment which he intended after sixty years (see article 149 of the Limitation Act) to mature into a right against the Government to take such water against the wishes of the Government.

As I said above, even if a person could be said to be in legal possession of an incorporeal right *which he is merely in process of acquiring*, and even if it be held in consequence that he could sue others for infringement of that so-called possession, such a possession must at least be "exclusive" in the sense in which it is used by Lightwood in his book on Possession. He says at page 14 "Not only must the alleged possessor exercise the acts of ownership over the land, but other persons must be excluded. In English Law, however, the rule only requires that there should be no other person exercising acts of ownership or claiming possession adversely to the possessor. Two persons may jointly exercise acts of ownership, and they may thus gain a possession which vests in them an estate as joint tenants (*Ward* v. *Ward* (1) ; *cf.* Litt., S. 311) but in such a case there is really one possession, and the possessors enjoy together the rights which flow from it. It is different where there are two persons on land, each claiming possession independently of the other, and then neither can acquire actual possession without excluding the other" (*cf.* Holmes' Common Law, 235, referring to *McGabey* v. *Moore* ; *Barnstable* v. *Thacker* ; Bigelow's Leading Cases on Torts, 353).

"The question whether foreign interference is to be deemed to be in fact excluded is somewhat more difficult in the case of

(1) (1871) L.R., 6 Ch., 789.

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land than of goods. In the case of goods, as a rule, both the original act of appropriation and the existing custody are such as obviously to exclude others, but with land it is different. The possessor may be absent from the land, and other persons may be upon it. The practical rule appears to be that the area of the alleged possession must be marked out, and that there must be an habitual observance of its limits by the world at large (*cf.* Pollock and Wright on Possession, 13). Ordinarily, as just stated, the area of possession is marked out by means of fences or other actual barriers which are themselves likely to keep away intruders. Inclosure is the strongest possible evidence of adverse possession [*Seddon* v. *Smith*(1)]. "If," said BRAMWELL, L.J., in *Coverdale* v. *Charlton*(2), "there were an inclosed field, and a man had turned his cattle into it, and had locked the gate, he might well claim to have a *de facto* possession of the whole field; but if there were an uninclosed common of a mile in length, and he turned one horse on one end of the common he could not be said to have a *de facto* possession of the whole length of the common." If, as regards possession of a land itself, the difficulty of establishing exclusive possession is a serious one in many cases, the difficulty is much greater in the case of several incorporeal rights (like the right to irrigate the plaintiff's land from the water of a tank belonging to another) and the difficulty is still further increased in the case of an incorporeal right which is still in process of acquisition.

In the present case, the plaintiff having taken for some years water stored in a Government pond cannot be held to constitute exclusive possession in the plaintiff of right to take such water or a possession even intended to exclude others from doing a similar act, no more than the fact of a ryot having watered his cattle in the water of a Government pond for some years would, by itself, show a right or intention to exclude another ryot from watering his cattle also, when the latter subsequently finds it convenient to do so, though he had not done so before. In the result I would dismiss the second appeal with costs.

(1) (1877) 36 L.J., 168. (2) (1878) 4 Q.B.D. 104 at p. 118.