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urged before us to-day that the learned Registrar did not on the 29th November consider the application for an extension of time which it is said was put before him verbally. However that may be the learned Registrar referred the matter to the Bench and when the matter came to the Bench it is said that a further verbal application, although there was no written application in the form of a petition, was made to the Bench to give further time to file the copies of the judgments. If that is so, and speaking for myself I have no recollection of what actually took place on that occasion, it is obvious that at that time the Bench considered that the application to file copies of the judgment out of time was not a *bonâ fide* one, or one which, if made, entitled the applicant to have any further time in the circumstances. The circumstances which are put forward to-day show absolutely nothing new which was not before the Court or which may not have been put before the Court on the previous occasion, and on this ground I think we ought not to entertain this application for review, but, however unfortunate it may be for the petitioner, we ought to reject his application. He has only himself to blame if he deliberately refuses to comply with the rules laid down.

COUTTS, J.—I agree.

Application rejected.

LETTERS PATENT.

Before Dawson Miller, C. J. and Mullick, J.J.

HILL AND COMPANY

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v.

SHEORAJ RAI.*

May, 31.

Fishery—acquisition of by adverse possession—Limitation Act, 1908 (*Act IX of* 1908), *sections* 2(5), 26, 28 *and Schedule I, Article* 144.

* Letters Patent Appeal No. 7 of 1921.

An exclusive right of fishery is an interest in immovable property and may be acquired by 12 years' adverse possession involving an ouster of the rightful owner. But a mere right to fish not excluding the rightful owner is a *profit a prendre* and falls within the definition of easement given in section 2(5) of the Limitation Act, 1908, and may be acquired only by 20 years' uninterrupted enjoyment under section 26.

Chundee Churn Roy v. *Shib Chunder Mundal*(1), *Bhundal Panda* v. *Pandol Pos Patel*(2), *Fadu Jhala* v. *Gour Mohan Jhala*(3), *Natabar Parine* v. *Kubir Parine*(4), *Lokenath Bidyadhar Mahapatra* v. *Jahania Bibi*(5) and *Syed Baher Husain* v. *Rani Ranjit Koer*(6), referred to.

Where a right is not only an easement but also an interest in immoveable property section 26 does not bar the operation of Article 144 and section 28.

A *profit a prendre* in the nature of an easement which can be acquired by 20 years' enjoyment must be a right which does not exclude the acquisition of similar rights by others or bar the enjoyment of such rights by the lawful owner of the land.

It may be either a personal right which is not transferable, or one attached to a dominent tenement which also is not transferable apart from the transfer of the dominent tenement.

An exclusive right to the fishing in a particular locality as in the case of a several fishery is both transferable and heritable and is an interest in immoveable property.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

P. Kennedy and *Baikuntha Nath Mitter*, for the appellants.

Kulwant Sahay and *S. Saran*, for the respondents.

DAWSON MILLER, C. J.—This is an appeal under the Letters Patent from a decision of Jwala Prasad, J.,

(1) (1880) I. L. R. 5 Cal. 945.
(2) (1888) I. L. R. 12 B. 221.
(3) (1892) I. L. R. 19 Cal. 544. F.B.
(4) (1891) I. L. R. 18 Cal. 80.
(5) (1911) 14 Cal. L. J. 572.
(6) (1917) 2 Pat. L. J. 289.

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which comes before us for final determination after remand to the first appellate court for certain findings of facts.

The plaintiffs first party are the tenure-holders of *mauza* Madhubani in Champaran under an *istimrari mukarari* lease granted by the proprietors, the Bettiah Raj. The plaintiff second party is the lessee of the *jalkar* rights in the *mauza* under a *thika* lease granted by the tenure-holders. The defendants who are the tenants in occupation of the land over which the plaintiffs claim the *jalkar* right have interfered with the exercise of that right by refusing to allow the plaintiffs to erect upon the land *bari* and *chilwan* for the purpose of catching fish. The plaintiffs accordingly instituted this suit claiming a declaration that they have *jalkar* rights over the property from which they have been excluded by the defendants. They claimed that by law and custom the *jalkar* rights with respect to the *chaur* lands in the village belong to them and that they are in enjoyment of the entire *zamindari* right appertaining to the *mauza* under their *istimrari mukarari* settlement, which rights did not pass to the tenants of the land. They further claim that in any case they have by long enjoyment acquired a prescriptive right to the fishery. The plaint is not very scientifically drawn. It alleges that the *jalkar* rights over the *chaur* lands of the *mauza* belong to the plaintiffs first party according to law and custom, and that they have "for a pretty long time" been in enjoyment of the said rights, and in the next paragraph it alleges that the *jalkar* right with respect to the water accumulated on the aforesaid lands has belonged to the plaintiffs first party for more than several 20 years, and that the *thikadars* under the plaintiffs first party have every year for a pretty long time been appropriating the *jalkar* produce of the aforesaid *jalkar* land by means of catching fishes, and, in order to prevent the escape of the fish from the water, every year *bari* and *chilwan* (wire) are put up north and south-east and west over the aforesaid lands, and

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in this way the fish of the aforesaid *jalkar* has for several periods of 20 years continued to be appropriated and the right of fishery exercised on behalf of the plaintiffs first party and their *thikadars* and that the defendants and their ancestors have had full knowledge of the same. It then alleges that two weeks before the suit the defendants aforesaid prevented the plaintiff second party from putting up the *bari* and *chilwan*. It further alleges that the suit is based on the right of easement and prescription as also on the custom obtaining in the village. The plaintiffs claim (*1*) a declaration that the plaintiffs first party have the *jalkar* right over the land in question, (*2*) an injunction restraining the defendants from interfering with the exercise of their rights, and (*3*) damages.

The Munsif who tried the suit held that the fishery rights passed to the tenant, in whom the right of occupation of the land was vested, and found that no custom had been proved whereby the tenure-holder retained the right of fishery. He also found that the plaintiffs had not made out a prescriptive right by 20 years' uninterrupted enjoyment, and dismissed the suit.

The plaintiffs appealed from this decision to the District Judge who dismissed the appeal and affirmed the decree of the Munsif. It was contended before him that the right claimed was in fact an interest in immovable property, the adverse possession of which for 12 years would extinguish the right of the lawful owner under section 28 of the Limitation Act, and that it was not necessarily an easement which under section 26 of the Act could be acquired by 20 years' uninterrupted enjoyment. The plaintiffs also contended that by a custom of the village the *jalkar* rights remained in the tenure-holder. The learned District Judge held that the right of fishery could not, without an express grant, pass either to the tenure-holder or to the *raiyat* in actual occupation of the land but remained in the superior landlords, in this case the Bettiah Raj, and that, in the absence of the Bettiah Raj as parties, he was not competent to determine the question either

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as to adverse possession or custom as these were matters which could only be proved as against the superior landlord, there being no evidence of a grant of the fishery to the plaintiffs. The learned District Judge came to certain findings on the question of custom admitted by some of the defence witnesses whereby the tenure-holders let out the *jalkar* to *thikadars* but his findings on this question were inconclusive.

A second appeal to this Court was heard before Jwala Prasad, J., sitting singly. He held that the *jalkar* rights were in the occupier and not in the landlord, but agreed with the lower appellate Court that no declaration of the plaintiffs' rights could be granted in the absence of the Bettiah Raj. He further considered that on the findings 20 years' uninterrupted enjoyment had not been proved. He did not in terms deal with the question as to 12 years' adverse possession raised before the District Judge or with the question of custom.

From this decision an appeal was preferred under the Letters Patent and was heard by my learned Brother and Ross, J., who agreed with the opinion of the learned Judge in second appeal that the fishery rights belonged to the occupier and held that the superior landlords were not necessary parties to the suit. They also held that the right of fishery claimed was an interest in immoveable property within the meaning of Article 144 of the first schedule to the Limitation Act and that it was not necessary for the plaintiffs to prove enjoyment for 20 years as required by section 26 of the Act but that, under section 28, the right claimed might be acquired by adverse possession for 12 years. As in their opinion no proper findings had been come to by the learned District Judge in first appeal either as to adverse possession or as to custom they remanded the case to the court of the District Judge for findings on the following questions :—

(1) Whether the plaintiffs have acquired any right by adverse possession, and,

(2) whether they have acquired title by custom.

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The learned District Judge, on remand, found that it was proved that the *mukararidars* and their *thikadars* had since 1899, that is some 18 years before the suit, regularly exercised fishery rights over the land in question, but not so as to interfere with the crops, and that the fishery rights had been regularly leased to the *thikadar* by the *mukararidars*, but that the tenants and their labourers had at harvest time appropriated small fish such as could be caught by hand. He accordingly held that the plaintiffs had acquired the *jalkar* rights by 12 years' adverse possession but not so as to interfere with the cultivation of crops or so as to restrain the tenants from catching small fish by hand. He further found that the evidence did not go far enough back to establish a custom but that there was a local usage by which the rights of the parties were as stated above. The case now comes before us with the above findings for final disposal.

The appellants contend that on these findings they are entitled to a decree declaring their right to the fishery. The respondents on the other hand say that the right claimed is an easement which can only be acquired by 20 years' uninterrupted enjoyment.

By section 26 of the Limitation Act easements can be acquired by peaceable and open enjoyment as of right and without interruption for 20 years. A right of fishery of whatever nature is not strictly an easement. It is either an interest in immoveable property or a *profit á prendre* which may be either in gross or appurtenant to a dominant tenement, but by section 2 (5) of the Limitation Act easement includes a right not arising from contract by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing on or attached to or subsisting upon the land of another. In so far, therefore, as a right of fishery is a mere *profit á prendre* which is not an exclusive right to the fishing it would, I think, clearly come within the provisions of the definition section. If, however, it is an exclusive right to the fishing, as in the case of

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a several fishery, it would in my opinion amount to an interest in immoveable property within Article 144 of the first schedule of the Limitation Act, and adverse possession of such a right for 12 years would by the operation of section 28 of the Act extinguish the rights of the lawful owners, in this case the tenants.

Much ingenuity has been expended in determining whether a right of fishery is an easement within the meaning of that word as used in the Limitation Act, or whether it is an interest in immovable property as contemplated by Article 144 of the first schedule of the Act. In *Chundee Churn Roy* v. *Shib Chunder Mundal* (1), decided in 1880, it was held that a prescriptive right of fishery was an easement within the meaning of section 3 of the Limitation Act, and could be acquired by 20 years' uninterrupted enjoyment. The difference between an uninterrupted enjoyment referred to in section 26 and adverse possession in Article 144 was pointed out in that case, and, although the case as reported does not definitely show whether the right claimed was an exclusive right to the fishing or merely a right which might be shared with others, there is no reason to suppose that an exclusive right was there claimed. The distinction just mentioned is an important one. A *profit á prendre* in the nature of an easement which can be acquired by 20 years' enjoyment must, I think, be a right which does not exclude the acquisition of similar rights by others or bar the enjoyment of such rights by the lawful owners of the land. It may, I think, be either a personal right which is not transferable or one attached to a dominant tenement, as in the case of an easement properly so called, which also cannot be transferred apart from the transfer of the dominant tenement. An exclusive right to the fishing in a particular locality, as in the case of a several fishery, is both transferable and heritable and is in my opinion an interest in immoveable property and one which can be acquired by 12 years' adverse possession as against the lawful owner. The question has frequently arisen in

(1) (1880) I. L. R. 5 Cal. 945.

connexion with section 9 of the Specific Relief Act. The High Court at Bombay in *Bhundal Panda* v. *Pandol Pos Patel* (1), in 1887, held that a right of fishery came within the denomination of immoveable property within the Specific Relief Act. The right there claimed was the exclusive right of fishing in certain tidal waters, between high and low watermarks, the plaintiffs being the fishermen of the village of Naoghar claiming what in legal phraseology is known as a common of fishery. On the other hand a majority of a full bench of the Calcutta High Court in *Fadu Jhala* v. *Gour Mohan Jhala* (2), in 1892, held that a suit for possession of a right to fish in a *khal* the soil of which did not belong to the plaintiff did not come within the provisions of section 9 of the Specific Relief Act. That decision followed an earlier case decided by a bench of the same court in *Natabar Parine* v. *Kubir Parine* (3). That case also does not indicate clearly whether the subject of the suit was a several fishery, that is an exclusive right to the fishing, or merely a right to fish which would not exclude the owner of the land or others claiming similar rights. In the later case of *Lokenath Bidyadhar Mahapatra* v. *Jahania Bibi* (4), decided by the Calcutta High Court in 1911, the plaintiffs and defendants were respectively proprietors of adjoining properties. The plaintiffs as proprietors of Gopinathpur claimed the exclusive right during certain seasons of the year to the fishery in the waters of the neighbouring estate of Bara Benakula belonging to the defendants. The suit was one in ejectment on the ground that the defendants had prevented the plaintiffs from exercising their rights for some years before the suit. It was contended by the defendants that the right claimed was a prescriptive right to a *profit á prendre* falling under the description of easement in the Limitation Act and that it had not been proved that the right had been exercised within two years of the suit. They also objected that

(1) (1888) I. L. R. 12 Bom. 221.
(2) (1892) I. L. R. 19 Cal. 544, F.B.
(3) (1891) I. L. R. 18 Cal. 80.
(4) (1911) 14 Cal. L. J. 572.

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a suit in ejectment would not lie, and further contended that the claim was barred by limitation under Article 120 of the schedule of the Limitation Act, the period of which was six years. Each of these points was determined in favour of the plaintiffs. It was held that a claim to an extra-territorial fishery, annexed to the plaintiffs' estate and exercised over the waters of the defendant's land, was not a claim to an easement within the Limitation Act but was an interest in immoveable property, and that a suit in ejectment would lie in such a case. It was also held that the period of limitation was not six years under Article 120 but twelve years under Article 144 of the Limitation Act, and a possessory action would be maintained at any time within 12 years of the date when the defendant's possession became adverse, the claim being one for possession of an interest in immoveable property. In that case the right set up was claimed as being appurtenant to the plaintiffs' land and it was undoubtedly an exclusive right, but I can see no reason why such a right should not be acquired altogether apart from the ownership of property by 12 years' adverse possession against the lawful owner so as to extinguish his title by the operation of section 28 of the Limitation Act. It has been held in this Court that where an owner of land has been completely ousted from the right to fish in the waters of his own land by definite acts of aggression by another this constitutes in fact dispossession from immoveable property [*Syed Baher Husain* v. *Rani Ranjit Koer*(1)]. From the proposition so stated I see no reason to differ. It was urged before us that the right claimed in the plaint was dependent upon prescription and that the proof should be limited to such rights as might be so obtained. It is true that in England, under the common law, rights in gross which are unassignable and unappurtenant cannot be acquired by prescription but require evidence of a grant. Under the Limitation Act, however, rights of this description can be acquired by long

(1) (1917) 2 Pat. L. J. 289.

enjoyment and if, as in the present case, they amount to an interest in immoveable property, they can be acquired by adverse possession without proof of a grant. There is therefore in my opinion no reason why a right claimed as arising by prescription should not aptly describe a right arising by 12 years' adverse possession under the Indian Limitation Act. All the facts necessary to determine this question were before the court and although the point may not have been definitely raised until the case came before the District Judge in first appeal it is not a case in which the parties were taken by surprise. I agree that isolated acts of trespass even if extending over a number of years would not be sufficient to found a claim by adverse possession. The present case however is one where the plaintiffs have openly and as of right claimed the fishing as theirs alone and have leased out the rights to *thikadars* who have exercised those rights continuously and openly and without opposition for more than 12 years.

In my opinion the question in all such cases must be determined by reference to the nature of the right claimed and proved to have been exercised. If it is a mere right to fish not excluding the lawful owner it would appear to be an easement within the description of the word in the Limitation Act and can be acquired by 20 years' uninterrupted enjoyment. If it is an exclusive right of fishery it is in my opinion an interest in immoveable property and can be acquired by 12 years' adverse possession involving an ouster of the rightful owner. Such a right contains all the essential elements of property and even if it may properly be described as a *profit á prendre* it has also the distinctive features of an interest in immoveable property. In my opinion even if section 26 of the Act should be applicable this would not bar the operation of Article 144 and section 28 if the right came under both descriptions.

It was contended, however, that in the present case there was no complete ouster of the defendants

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as it is found that they have the right of catching small fish by hand at harvest time. This is a matter of such trifling importance that it does not in my opinion alter the nature of the right acquired by the plaintiffs. I would admit the appeal, set aside the decree of the trial court and the lower appellate courts and decree the plaintiffs' suit granting them a declaration of their rights in accordance with the findings of the learned District Judge on remand and issue an injunction upon the defendants restraining them from interfering with the plaintiffs in the exercise of these rights. The appellants are entitled to their costs here and in each of the lower courts.

MULLICK, J.—I agree.

REFERENCE UNDER THE LEGAL PRACTITIONERS ACT.

Before Dawson Miller, C. J. and Mullick, J.

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May, 31.

MATHURA PRASAD,

In the matter of.

Legal Practitioner—application for re-instatement after dismissal from profession—Court's inherent power to grant—Procedure.

The High Court has inherent power to re-instate a legal practitioner who has been dismissed from his profession.

Before exercising such power the court must be convinced not by mere protestations of repentance or regret, but by actual facts, that the delinquent has reformed his character and has for a sufficiently long period acted in such a way that he can be trusted to act in future as a worthy member of his profession.

Abir-ud-din Ahmed, In re(1) and *Hara Kumar Chatterji, In re*(2), referred to.

The proper procedure for the applicant to adopt is to apply to the Bench presided over by the Chief Justice for a rule.

(1) (1910) 12 Cal. L. J. 625. (2) (1911) 14 Cal. L. J. 113.