land of another exists only in the case of water flowing in a defined stream, and cannot apply to surface water not flowing in such a stream, though it might ultimately, if not arrested, flow into a tank.

1872. *January* 26. *R. A. Nos.* 126 *of* 1870 *and* 2 *of* 1871.

As to the rights of landholders in the position of plaintiffs against the Government in a matter of this kind, they have been discussed in the judgments in a recent case, *R. A.* 26 *of* 1871, in which I took part, and it is unnecessary to say more upon this point in the present case, as there is no evidence of any decrease of water by the new arrangements, and as, independently of the relation of the plaintiffs to the Government, the water flow is not of a nature to give a right to an easement. The judgment of the Civil Judge must be reversed. *Appeal allowed.*

Appellate Jurisdiction. (a)

Regular Appeal No. 56 *of* 1871.

DURVASULA GANGADHARUDU.....*Appellant.*
DURVASULA NARASAMMAH and 2 others...*Respondents.*

Upon the question whether the professional earnings of a Vakíl were generally his self-acquisition and impartible.—*Held*, by KINDERSLEY, J., that the question must be upon the facts in each case, how far the common family means were instrumental in enabling the professional man to earn the property which is claimed as subject to partition. The fair presumption is that such attainments as are usually possessed by a Vakíl have been acquired with the assistance of the family means.

By HOLLOWAY, J., that the ordinary gains of science by one who has received a family maintenance are certainly partible. Moreover, within the meaning of the authorities, a Vakíl's business is not matter of science at all.

THIS was a Regular Appeal against the decision of F. C. Carr, the Acting Civil Judge of Vizagapatam, in Original Suit No. 22 of 1869.

1872. *January* 30. *R. A. No.* 56 *of* 1871.

The plaintiff, the undivided brother of the late husband of the 1st defendant, sued to recover a sum of Rupees 820-6-9 and Rupees 517-9-8, interest thereon, being half share of the amount collected by the 1st defendant under a certificate of heirship granted to her by the Civil Court. The husband of the 1st defendant had been a Vakíl, and the question arose whether property acquired by him by his

(a) Present: Holloway and Kindersley, JJ.

1872. *January* 30. *R. A. No.* 56 *of* 1871.

exertions as a Vakíl was divisible. The following is the judgment of the Civil Judge upon the point :—

"The next point to be considered is whether the other sum of Rupees 1,566-15-0 was part of the self-acquired property of Latsanna or not.

[Having considered at some length the evidence offered upon this point, the Civil Judge continued]

"It is unnecessary to go further into this matter: the above is quite sufficient to prove that the money was due to Latsanna for matters connected with his profession as a Vakíl. It is perfectly immaterial that some of the money passed through or was even raised by D. J. Subráyudu, the younger brother, who is no party to this suit, and who was acting in the matter, not as Latsanna's brother, but as the múktiár of Chinnam A'yyappa. The plaintiff has entirely failed to show that the money is in any way connected with family matters, or is anything except a professional transaction on the part of Latsanna.

It now only remains to consider whether, this being a debt due to Latsanna as a Vakíl, his undivided brother, the plaintiff, has any right to share it.

This is a point of Hindu Law upon which there has not been any authoritative ruling in the Courts.....

That necessity, however, is forced upon me in the present instance, and after perusing all the authorities quoted in the case above referred to(*a*), I am of opinion that in the present case the earnings of Latsanna as a Vakíl are to be considered unimpartible. It is easy to find isolated texts of Hindu Law, which will support either view :—As on the one side the quotation from Nárada at page 66 of the above Volume laying down the broad principle that "wealth gained by valour, property received with a wife, and *the gains of science*, these three are indivisible"—and on the other the quotation at page 68, taken from an opinion upon a suppositious case, that "according to Hindu Law any property acquired by an unseparated brother by means of science, which science he was unable to obtain by assistance from his father's

(*a*) *R. A. No.* 73 *of* 1863, 2, M. H. C. R. 56.

1872. *January* 30. *R. A. No.* 56 *of* 1871.

funds, will be participated by his brothers."—The principles, however, of Hindu Law which governed that case do not seem to necessitate this case following the same rule ; there the matters in dispute where the clothes and jewels of a dancing girl ; the plaintiff was shown to have adopted and trained up the defendant from infancy, expended money upon her education in singing and dancing, and started her in public life decked out in clothes and jewels which must necessarily have been her own. It might well be contended that under such circumstances the defendant was bound to share with the plaintiff, as head of their so-called family, the additions which were made by the individual exertions of the defendant to the stock in trade. Similarly it might well be argued that, following out these same principles, a member of an undivided Hindu family specially trained by the head of the family in some special manner, started in a scientific profession by the same means, and, for a time at all events, trusting for support to the family means, and leaving his wife and children to be maintained in the family house while he was pursuing his at first unremunerative profession, might be called upon to place in the general stock any income he might eventually derive from that profession.

But, in the present instance, it may be presumed from the proceedings in this suit and in Original Suit No. 8 of 1864 that Latsanna received nothing further than an ordinary general education from his parents ; that he was not indebted in any other way to the family means for his position, but on the contrary that by his management of the family affairs he had been able in reality to increase the common stock, and had in no way been a burden upon it. It cannot, in any way, here be said that here are the ordinary gains of learning and science which have been gained at the expense of the family. Under these circumstances, I do not think that the rest of the family have any right to declare that the professional earnings of Latsanna are divisible among the undivided members of his family."

The suit was, accordingly, dismissed with costs.

The plaintiff appealed on the ground that he had a right to sue for the money in question.

1872. *January* 30. *R. A. No.* 56 *of* 1871.

Sloan, for the appellant, the plaintiff.

J. H. S. Branson, for the respondents, the defendants.

The Court delivered the following judgments :—

KINDERSLEY, J.—When this appeal came on for hearing I was inclined to accede to the proposition that the professional earnings of a Vakíl were generally his self-acquisition, not liable to partition among his co-parceners. There is a natural inclination in favour of such an interpretation of the law as would secure the fruits of a man's professional earnings for his own branch of the family. But it is impossible to read the authorities without concluding that the question must be upon the facts in each case, how far the common family means were instrumental in enabling the professional man to earn the property which is claimed as subject to partition.

It has been found that the deceased received from his father nothing more than a general education. It does not appear that he was distinguished by his professional learning ; and it would be difficult to presume that a Vakíl would probably be possessed of much learning or skill.

The fair presumption would be that such attainments as the Vakíl possessed had been acquired with the assistance of the family means, and this presumption does not seem to be rebutted in this case by evidence of the acquisition of such attainments without such assistance.

I am, therefore, of opinion that the professional earnings of the Vakíl in the present case would be subject to partition. But before finally disposing of the appeal, it will be necessary to require a finding upon the 4th and 6th issues recorded by the Civil Court.(*a*)

MR. JUSTICE HOLLOWAY :—I entertain no doubt that the fund is partible property, and I agree to the order pro-

(*a*) The 4th issue was whether, if plaintiff recovered the money claimed by him, he was proportionately responsible for the debts of the deceased Latsanna. The 6th issue was as to how much the widow had expended in paying the debts of her husband, her own maintenance and costs of legal proceedings.

posed. I fully adhere to the judgment of the High Court for which I am responsible(*b*), and especially to the statement that the ordinary gains of science by one who has received a family maintenance are certainly partible. I do not believe, moreover, that within the meaning of the authorities the Vakíl's business is matter of science at all.

1872. *January* 30. *R. A. No.* 56 *of* 1871.

(*b*) Reported at 2, M. H. C. R., 75.

Appellate Jurisdiction. (*a*)

Special Appeal No. 367 *of* 1870.

PERIYANA'YAGAM PILLAI.....*Special Appellant.*
VI'RAPPA NAIKAN.....*Special Respondent.*

Plaintiff sued for certain arrears of rent. The suit was dismissed as to Faslis 1271, 1272 and 1275 on the ground that no pattahs had been tendered for those Faslis. On Special Appeal it was contended that no tender was necessary, because a suit which had been brought before Fasli 1271 for the determination of the proper rate of rent was pending during those Faslis. *Held*, that the pendency of that suit did not render the tender of pattahs unnecessary, and that the present suit was rightly dismissed.

1872. *February* 3. *S. A. No.* 367 *of* 1870.

THIS was a Special Appeal against the decision of A. P. Srínivása, the Principal Sadr Amín of Tinnevelly, in Regular Appeal No. 223 of 1868, modifying the decree of the Court of the District Munsif of Srivaikuntam in Original Suit No. 934 of 1866.

The suit was brought by the Dharmakarta of the temple at Raméswaram to recover arrears of rent due by defendant for certain land held by him as a tenant of that institution. The arrear claimed was for Faslis 1265 to 1272, and for 1275. The defence was that the claim was barred by the Act of Limitation, and that, under Section 7, Madras Act VIII of 1865, the plaintiff could not come into Court without tendering such a pattah as the defendant was bound to accept.

The Court of First Instance pronounced no opinion on the second plea, but found on the first that plaintiff's demand for Faslis 1265 to 1270 was barred, and decreed to him rent for Faslis 1271, 1272 and 1275. The plaintiff appealed against this decision, and the defendant, under Section 348 of

(*a*) Present : Innes and Kindersley, JJ.