Appellate Jurisdiction. (*a*)

Regular Appeals, Nos. 126 *of* 1870 *and* 2 *of* 1871.

J. D. ROBINSON, ESQ., Collector of North Arcot..... } *Appellant in No.* 126.

MANIYAM NARASIMMA GAUNDAN and 2 others..... } *Appellants in No.* 2.

versus

A'YYA KRISHNAMA CHA'RIYA'R and 16 others..... } *Respondents.*

The tank used for the irrigation of the plaintiffs' village was supplied in part by rain water falling on the lands of the village occupied by defendants 9 to 17, and the bund of the tank used formerly to throw back the waters so flowing into the tank on to the lands of defendants, were it remained till gradually drawn off into the area of the tank. Defendants 9 to 17, through the agency of the Government, relieved themselves of this inconvenience by making a work for draining off the water so periodically thrown back upon their land. A channel was also constructed for conducting a supply of water to the plaintiffs' tank. Plaintiffs, however, claimed to have the former state of things restored, on the ground that they had a prescriptive right to throw back the water on to defendants' lands and to keep it there till required for use. *Held* that there was here no object over which a right could be acquired.

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THESE were Regular Appeals against the decision of C. G. Plumer, the Acting Civil Judge of Chittúr, in Original Suit No. 26 of 1868.

The suit was brought to establish plaintiffs' right to retain on certain lands, attached to Sidhanti village, a supply of water for the use of their tank of Avalur, to cause the removal of a bund and tunnel recently erected by orders of the 1st defendant, and to recover from defendants a sum of Rupees 600 on account of the loss of produce sustained by plaintiffs in 1867, in consequence of defendants' acts.

The plaint alleged that the plaintiffs' lands were irrigated by a tank to the west of the village; that the defendants 9—17 who lived at Sidhanti possessed 30 kánis of nanjah lands in front of the bed of the said tank; that according to long prevailing usage these lands were only to be cultivated when the said tank was dry; that when the tank was full the said 30 kánis of nanjah land retained water to a depth varying from 1 to 1½ yards; that surplus water from the

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

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villages of Karevedu and Sidhanti, lying west of the said tank, flowed to the said tank and to plaintiffs' channel and contributed to the irrigation of plaintiffs' nanjah lands; that defendants 9—17 by permission of defendants 1—4, and with the assistance of defendants 5—8, raised a bund east and north of their nanjah lands, and also built on the north a tunnel about 3 feet × 3 feet, thereby causing the water obstructed by the bund to empty itself into the channel of another tunnel instead of flowing as usual into the plaintiffs' tank:

That these acts on the part of defendants were opposed to long prevailing usage and prejudicial to plaintiffs' right:

That the execution of the said works was commenced in October and finished in December 1867:

That the defendants by their acts caused a decrease of two months' supply in the usual quantity of water retained by the tank, and that serious damage and loss had accrued to plaintiffs:

That the plaintiffs' objections to the said works were disregarded by defendants 1—4 who assisted the defendants 9—17 in depriving plaintiffs of their rights:—

And the plaintiffs prayed that a decree might be passed directing the removal of the said bund and tunnel, establishing plaintiffs' right to retain in the said 30 kánis of nanjah, in front of the bed of their tank, a supply of water varying from 1 to 1½ yards height, and their right to receive into the said tank and into their channel the surplus water flowing as usual from the villages of Sidhanti and Karevedu through the said nanjah lands; and adjudging defendants to pay plaintiffs a sum of Rupees 600 with costs and further interest.

The 1st defendant (the Collector of the District) put in a written statement to the following effect;—1st, He denied that the plaintiffs had suffered or would suffer any damage by the embankments and sluice of which they complained; 2nd, he asserted that these works were necessary for the pro-

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tection of lands in Sidhanti; 3rd, that even if any loss of water were caused to plaintiffs by these works (which the 1st defendant denied) a full equivalent would be given by a channel which had recently been made to the Avalur tank from the Palar anicut through lands belonging to villagers of Sidhanti; and, 4th, that the Government, as owner of sources and works of irrigation, had a right to exercise their control for the benefit of the public, and in this case they had done so without causing damage to the plaintiffs, and he therefore prayed that the suit might be dismissed with costs.

The 2nd defendant prayed to be released from the suit, pleading that he had acted throughout under the orders of 1st defendant, his superior officer.

The defendants 5—7 in their joint written statement supported the plaintiffs' claim.

The defendants 9—17 put in a written statement in which they alleged that the plaintiffs had no right to sue for the removal of the tank and bund referred to in the plaint; that when the tank in Avalur was supplied by only one spring-channel and had a scanty supply of water, some of the cultivable lands of these defendants lying in front of the bed of the tank were immersed in water to the depth of half a yard, but that the water used to run off through the Vettu Madei of the said tank; that there was no obstruction to the cultivation of 60 and odd cawnies in front of the bed of the said tank; that about 10 years ago Government, in order to give a full supply of water to the said tank, and at the request of the people of Avalur, newly constructed a channel along the north side of the cultivable lands of Sidhanti and filled up the Vettu Madei of the said tank; that as no bank was raised to this channel the water overflowed the lands of these defendants, left sandy deposits, and greatly injured the crops; that the said channel abundantly and quickly supplied the said tank with water; that in consequence of the increased supply of water thus afforded the water overflowed the tank and flooded the lands of these defendants thereby causing them considerable loss; that the people of Sidhanti made many complaints to the revenue authorities; that they inspected the spot and passed

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orders, in pursuance of which and of the deposition given by defendants 5—8, the principal ryots of Avalur, the Engineer Officers constructed the tunnel and bank referred to in the plaint; that these works caused no decrease in the supply of water in the Avalur tank, nor any loss of cultivation; that the amount of damages claimed by plaintiffs was excessive.

The following issues were settled

I. Whether the plaintiffs are possessed of the right to retain water in the nanjah land of defendants situated in front of the bed of plaintiffs' tank at Avalur and to receive into the said tank and into plaintiffs' channel the surplus water flowing from the villages of Sidhanti and Karevedu through defendants' nanjah lands.

II. Whether the erection of the bank and the construction of the sluice referred to in the plaint have created a disturbance of the said rights.

III. Whether the 1st defendant as the representative of Government was legally entitled to erect the said bank and to construct the said sluice.

IV. Whether the plaintiffs in consequence of the erection of the said bank and the construction of the said sluice have sustained any loss, and if so, what amount of damages are they entitled to recover from the defendants.

The judgment of the Civil Judge contained the following:—

"Upon the 1st Issue.—During the argument it was admitted by defendants' vakil that the plaintiffs were possessed of the rights claimed by them, and indeed the evidence oral and documentary on both sides abundantly proves that from time immemorial the plaintiffs have been possessed of and enjoyed those rights.

The Exhibit A, which is a document executed by the inhabitants of Sidhanti, defendants' village, in 1815, showing the then existing usage which regulated the distribution of water to the lands in their village, proves that at that time the inhabitants of plaintiffs' village were in possession of the rights which they now seek to establish by a decree of this Court.

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It is clear, then, that at some time previous to 1815 the plaintiffs or their ancestors, the owners of the taluq of Avalur, had acquired over a certain portion of the lands of Sidhanti the right to compel the owners thereof to allow the surplus water to remain on those lands and to flow uninterruptedly thence into the tank of Avalur.

It is equally clear that from 1815 up to 1866 the plaintiffs uninterruptedly enjoyed the right which they had previously acquired. I find, therefore, the first issue in favor of the plaintiffs....."

"It is clear from the report made by the Head Assistant Collector that the whole of the 30 kánis of land of Sidhanti will be most effectively drained by the newly constructed tunnel, and it is also clear from the evidence that the water so drained instead of flowing into the plaintiff's tank will make its way into the tank of Perumbulipakam.

I am of opinion, therefore, that the tunnel and so much of the newly erected bank complained of as is marked in the plan "C," "B" have caused a substantial injury to the plaintiffs, and on the second issue I find in their favor."....

The 3rd Issue.

Here I find myself face to face with a most difficult question. I can find no judicial decision to govern the case, and I am not referred to any Legislative enactment conferring on the Collector, as the representative of Government, the powers for which 1st defendant contends in the 4th para. of his written statement.

In a case recently decided by the High Court (*Regular Appeal* 122 *of* 1868, 5, M. H. C. R., 6), the Chief Justice in his judgment remarked "however lawful the exercise of such a power (the power which 1st defendant seeks now to establish) may be in regulating the distribution of water amongst Ryotwári villages held immediately of the Government, or to the lands of proprietors or their tenants whose enjoyment of it is simply permissive," &c., &c., and Mr. Justice Innes in his judgment in the same case makes somewhat

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similar remarks, though he restricts the exercise of this power to cases in which rights have not as yet been acquired. These are "obiter dicta," but with the restriction imposed by Mr. Justice Innes, I believe they are most valuable guides to enable me to arrive at a correct decision on this "vexata quæstio."

No doubt, where existing rights are not disturbed, Government has the power to regulate the distribution of water amongst Ryotwári villages, but in my opinion they have not the right, when so distributing it, to interfere with and destroy existing rights.

Special legislation was considered necessary to confer on Collectors the power to take up land even though wanted for public purposes. If the Government has not the power to interfere with or determine existing rights in land without a special enactment, I think it may fairly be reasoned that without such special enactment Government could not prejudicially interfere with or destroy existing rights to the use of water.

In the present case the 1st defendant has by the erection of the bund B to C, and the construction of the tunnel, wholly extinguished an easement which plaintiffs had acquired on the lands of defendants 9—17, simply because those defendants said to him "the burthen imposed on us by the easement is heavy, remove it, we pray, from us," and without any consideration for the plaintiff's rights he did remove it.

It may be that it would be advisable to invest Collectors with the absolute power claimed by 1st defendant, but in the present state of the law I am of opinion that they have no such power, and that in this case the 1st defendant by the erection of the bund and construction of the sluice to the prejudice of the existing rights of plaintiffs acted "ultra vires." On the 3rd issue, therefore, I find for the plaintiffs.

The 4th issue.

I am of opinion that the plaintiffs have failed to make out their case. I don't think that they have satisfactorily

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proved that the decrease in cultivation which from the account "G" undoubtedly occurred in 1867, was owing to the construction of the works complained of.

That year was, undoubtedly, a most unfavorable one for cultivation everywhere owing to the diminished rain-fall, and I believe that the decrease of cultivation may well be attributed to causes over which the defendants had no control.

The result of the case is that a decree is passed declaring that the plaintiffs are entitled to the rights claimed in the plaint and directing the removal of the tunnel and so much of the bank complained of as is marked in the plan B to C. The plaintiffs' claim for damages is dismissed. The proportionate costs incurred by plaintiffs will be borne by defendants 9—17.

The 1st defendant will bear his own costs."

The 1st defendant appealed in R. A. No. 126 of 1870, and the 9th, 10th and 11th defendants in R. A. No. 2 of 1871.

The Government Pleader and *Ananda Charlu*, for the appellants, the 1st, 9th, 10th and 11th defendants.

Sanjiva Rau, for the respondents, the plaintiffs.

The Court delivered the following judgments :—

HOLLOWAY, J.—In the present case the Civil Judge has decided, upon evidence of the existence of the state of things for a lengthened period, that the defendants are prohibited from draining their own land of the water falling upon it and naturally accumulating there.

There is no pretence of a contract. The two documents of 1815 are a statement, in answer apparently to an enquiry of some public officer, as to the manner in which the water was at that time accustomed to flow. That the vague statement, that they were willing that it should continue, made to another person, will not create an obligation, requires no lengthened statement, and accordingly the claim was put in the Court below upon prescription, and these documents produced as evidence of user long continued.

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There are certain principles of the Roman law on this matter at the basis of all the English cases which it may be useful shortly to state. Even as to water flowing from a spring in a definite course the *ius aquae* cannot be acquired by the continuance of such flow for any length of time. '*Solus aquae decursus per se nullam praescriptionem inducit.*' The passage of the Code quoted in Gale on *Easements* (237, n. b.) was probably the foundation of Lord Ellenborough's decision (1, Camp., 463), and that decision is only one among many instances of the extreme danger of applying texts torn from their context. It is explained by Savigny, IV, 110. It pre-supposes an existent *ius aquae* (See also Holtzschuher, II, 110). In Dig. III, 1, 21, Ulpian puts the question whether, as an action lies if I am hurt by the artificially increased flow of rain water, an action *e contrario* will lie if it is artificially cut off when it is my interest that it should continue, and Labes and Ofilius say no, for the action lies *si aqua pluvia noceat non si non prosit.* In Section 22 of the same title he shows that the upper proprietor has a right to remove a structure by which the natural flow was restrained, and because naturally there was a right that it should flow. *Chasemore* v. *Richards,* (7, H. L., 349,) overruling a batch of cases, emphasizes the necessity of a definite surface flow. The doubts of the dissenting Judge were merely as to the extraordinary use made of the water, and it is a disputed point of law how far the use of flowing water may be carried where the landowner below is entitled to its continued flow. According to the decision of the majority the question did not arise, because the water was regarded as *extra commercium.* It is abundantly clear that the right here claimed could not in any system of law be acquired by prescription. I carefully avoid discussing the extent of the right of use which the upper proprietors would have had, even if there had been a definite stream of which they had not for a long course of years availed themselves. It must by no means be assumed, however, that the plaintiffs would then have been entitled to prevent the reasonable use of the stream for agricultural purposes. (See Cod. Civ., 641 & 642., Sax. Cod., 355 & 556). It is sufficient to say in this case that the object upon which the right is

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claimed is not one fitted for the arising of a right. I carefully abstain from saying more. I trust that both decision and legislation will deal very carefully with this most important matter. There is none which needs a more careful recurrence to principles both jural and economical, based upon a most careful consideration of the special circumstances of the country to which they are to be applied. We are in accord both with Roman and English law, and with legal principle higher than either, in determining that there is no object here over which a right can be acquired.

The decree must be reversed, and with costs.

INNES, J.—The tank used for the irrigation of the village in which the plaintiffs hold their lands is supplied in part by rain water falling on the lands of the village occupied by defendants 9 to 17, and the bund of the tank used formerly to throw back the waters so flowing into the tank on to the lands of defendants, where it remained till gradually drawn off into the area of the tank. Defendants 9 to 17, through the agency of the Government, relieved themselves of this inconvenience by making a work for draining off the water so periodically thrown back upon their land. A channel has been also constructed for conducting a supply of water to plaintiffs' tank. The plaintiffs, however, claim to have the former state of things restored, on the ground that they have a prescriptive right to throw back the water on to defendants' lands, and to keep it there till required for use.

It was contended for defendants in the Court below that the plaintiffs had suffered no diminution of water by the changes made, and that they were not entitled to claim an easement to retain on the lands of the defendants' water so collecting upon it.

The Civil Judge decided that plaintiffs were entitled to the right claimed, which they had enjoyed for a long period prior to the alterations of which they complained.

In appeal the case came on first before the late Chief Justice and myself, and it was contended by Mr. Handley, for appellants, that plaintiffs could have no right of easement

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of keeping on other people's lands surface water not flowing in a defined stream. Sanjiva Rau, for plaintiffs, said that the Avalur tank, when full, spread over 30 kánis of the village of Sidhanti. That the Sidhanti villagers could not cultivate them till the water went down, and that, practically, the plaintiffs claimed this land for part of the year as part of their tank. Mr. Handley also contended that the plaintiffs were not in a position to claim the easement, as they were all ryotwári tenants under Government, with whom rested the right to control the arrangements for the supply of water to their ryotwári villages.

When the case finally came to be heard before Mr. Justice Holloway and myself, it was not thought necessary to hear Mr. Handley again. Sanjiva Rau acknowledged that he could not contend for a right to prescribe for rain water falling on the defendants' ground and not flowing in a defined channel. He relied on the undisputed document A, dated in the year 1815. This document, he contended, showed that the right claimed was submitted to at a very early date and was evidence of the consent of those interested in getting rid of it, to its continuance, as they had not then or since objected to it, until the circumstances occurred which gave rise to this suit. The document A is merely a report made by an official to the Collector, founded on the statements of the villagers, of the practice obtaining in the two villages in regard to this water. It is no evidence of a valid contract, and cannot in any way bind the defendants to continue to submit to the periodical submergence of their land for the advantage of plaintiffs. With respect to the other points—Water not running in a defined stream is the absolute property of the owner of the land of which it forms part, and before it has reached a defined stream he may drain it off or put it to what purpose he pleases. *Rawstron* v. *Taylor*, (25, L. J. Ex., 33,) and *Broadbent v. Ramsbotham*, (25, L. J. Ex., 115.) So that it is quite competent to the landholders of Sidhanti village, as representatives of their common landlord, the Government, to drain off or otherwise dispose of this water so soon as it lodges on the land. Again, a prescriptive right to throw back water and keep it standing on the

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.

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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.*

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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.

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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.