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Tuck v. *Priester* (1), decided on another Act. And it was expressly so held in *Gouband* v. *Wallace* (2).

Lastly, reliance was placed on section 26 of the Act, which, it was suggested, prescribed one year as the period of limitation for such a suit as the present. But, assuming that a rule of limitation in the Act would be applicable in this country, the decision in *Hogg* v. *Scott* (3) negatives the contention.

There will be a perpetual injunction restraining the printing or sale of the defendant's book as being an infringement of the plaintiff's copyright, with costs on scale 2.

Decree for plaintiffs.

Attorneys for the plaintiffs: Messrs. *Harris & Simmons.*

Attorney for the defendant: Baboo *G. C. Chunder.*

H. T. H.

APPELLATE CIVIL.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

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May 19th.

TARINI CHURN SINHA AND ANOTHER (PLAINTIFFS) *v.* WATSON AND CO. (DEFENDANTS).*

Fishery, Right of—Jalkar—Navigable river—Change in course of the river.

The jalkar, or right of fishing, in a navigable river is not affected by reason of the river having merely changed its course.

Gray v. *Anund Mohun Moitra* (4) followed.

Sibessury Dabea v. *Lukhy Dabea* (5) distinguished.

THIS was a suit for the recovery of possession of 68 bighas of reformed chur land and of the jalkar, or right of fishing, over a portion of the river Howlia, a public navigable river, and for mesne profits of the land and the jalkar from the year 1291 (1884) until the institution of the suit on the 22nd Bysack 1294 (20th May 1887).

The plaintiffs, Tarini Churn Sinha and Gopi Sundari Dasi, were joint-proprietors of the entire 16 annas of mouzah Bowat, pergunnah Bhandordaha, in the district of Nuddea. Their case was

* Appeal from appellate decree No. 879 of 1889, against the decree of F. F. Handley, Esq., Judge of Nuddea, dated the 24th of January 1889, modifying the decree of Baboo Gonesh Chunder Chowdhry, Subordinate Judge of Nuddea, dated the 28th of April 1888.

(1) L. R. 19 Q. B. D. 629.
(2) 25 W. R. Eng. 604, W. N. 1877, 130.
(3) L. R. 18 Eq. 444.
(4) W. R. 1864, 108.
(5) 1 W. R., 88.

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that the land in suit was a re-formation on the original site of land appertaining to their zemindari of mouzah Bowat; that it had submerged into the bed of the Howlia in 1283 (1876) when that river, which at the time of the thak and survey measurements in 1854 and prior to 1283, used to flow towards the north and west of the mouzah, suddenly changed its course and, taking a south-easterly direction, flowed through it; that upon the land re-forming on the opposite side of the river the plaintiffs in Bysack 1290 (April 1883) proceeded to take possession of the land as well as the jalkar over the portion of the river which flowed through their property, but were resisted by the defendants, Watson and Company.

The defendants alleged that more than 12 years previous to the institution of the suit the land in dispute had submerged in the bed of the river Howlia, and denied that it was a re-formation on the site of any portion of mouzah Bowat. They pleaded that the suit was barred by limitation, inasmuch as they had been in adverse possession of both the land and the jalkar for upwards of 12 years: they further pleaded that the jalkar right of the Howlia from Kadipur to Gazadia khal and Boalia was included in the istemrari settlement of taraf Srirampur, which constituted their zemindari; that the jalkar had been in the possession of the maliks of the said zemindari since the time of the decennial settlement; that they had regularly paid the rent fixed for the jalkar and were in possession.

The Subordinate Judge found that the greater portion of the land was submerged in 1283, and that the re-formation on the original site took place subsequently and within 12 years of the suit and accordingly held that the suit was not barred. But in coming to the conclusion that the plaintiffs were entitled to the jalkar of the portion of the river which flowed through their land, the Subordinate Judge remarked:—

"It has already been found that the portion of the jalkar lying on the south and south-east of the black dotted line, marked in the ameen's map is situate within the boundary of plaintiffs' zemindari, mouzah Bowat. The jalkar being so situate, the question to be decided is whether it is the property of the plaintiffs. It appears from the evidence of the witnesses on both sides that the encroachment of the river on plaintiffs' mouzah was not gradual. According to the statement of the witnesses for the

plaintiffs, the greater portion of the land was diluviated in one year, *i.e.*, during the rainy season of 1283, and the remaining portion was washed away in subsequent years. The witnesses for the defendants state that the diluviation was completed in one year, *i.e.*, during the rains of 1278. It also appears from the evidence of some of the witnesses for the defendants that the river Howlia has since become more narrow and shallow in consequence of the silting up of its source at Matabhanga. Under these circumstances, I am of opinion that the right in this portion of the jalkar has become vested in the plaintiffs, they being owners of the bed of this portion of the river. It is undoubtedly proved by documents produced by the defendants that the jalkar right in the Howlia from Kadipur to Shyampur and from Rajnagur to Gujra khal belongs to them, and that the portion of the river, of which the jalkar right is in dispute, lies within these limits. But as it is found that the change in the course of the river here was sudden and not gradual, the defendants are not entitled to extend their right of fishery over this portion of it. The ruling in the case of *Sibessury Dabea* v. *Lukhy Dabea* (1) is an authority in support of this view."

The Subordinate Judge accordingly gave the plaintiffs a decree for possession of that portion of the disputed land and jalkar which was found to be situate within the boundary of mouzah Bowat, together with mesne profits from the date of dispossession until delivery of possession.

On appeal the District Judge reversed the decision of the Subordinate Judge in so far as it gave the plaintiffs possession of the jalkar on the ground that the defendants held the jalkar by grant, and having been in possession for 25 years, had acquired a title to it by prescription as well.

The plaintiffs appealed to the High Court.

Baboo *Jusoda Nundun Pramanick* for the appellants.

Baboo *Bhowani Churn Dutt* for the respondents.

The judgment of the Court (O'KINEALY and AMEER ALI, JJ.) was delivered by:—

AMEER ALI, J.—The point involved in this appeal is whether a right of jalkar in a public navigable river can exist apart from the right to the bed of the river, or must it necessarily follow

(1) 1 W. R., 88.

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that right. Both these questions have been raised and discussed in other cases; still they are of some difficulty. The facts of the case are these:—The river Howlia, which is a public navigable river, flowed, prior to 1283, in a certain course; and it seems to have in 1283, or thereabouts, adopted a different channel, and is now running over a portion of the plaintiffs' land. The plaintiffs sue to establish their jalkar right over that portion of the river which flows over their land. Admittedly, the defendants have a jalkar right by grant from Government over this river within certain specified limits; and there is no question that the jalkar, which is claimed by the plaintiffs, falls within that limit; it is also undisputed that the river in its present channel is a public and navigable river. The Subordinate Judge held, apparently on the authority of the case of *Sibessury Dabee* v. *Lukhy Dabee* (1) that, inasmuch as the destruction of the river was sudden and not gradual, the defendants are not entitled to their jalkar right over the river in its present course, but that their right is restricted by the rights of those over whose lands the river now flows; and in that view of the matter he made a decree in favour of the plaintiffs. He says:—"under these circumstances" (referred to by him in the judgment), "I am of opinion that the right in this portion of the jalkar has become vested in the plaintiffs, they being owners of the bed of this river." On appeal to the District Judge, that Court took a different, and, we think, a correct view of the principle applicable to the case. It seems to us that the decision of the case depends upon the answer to the question—Do the defendants lose the right, admittedly vested in them, by a change in the course of the river, though the river does not lose the character of a navigable river, and continues subject to the rights of the public as before? We think the principle applicable to the case was discussed and enunciated so early as 1864 in the case of *Gray* v. *Anund Mohun Moitra* (2) before Loch and Norman, JJ. In that case it appeared that the river over which the defendant had a right of fishery had changed its course and formed an inlet. Afterwards it resumed its old course, leaving the inlet separate and dry. In a suit by the owner of the bed of the

(1) 1 W. R., 88.
(2) W. R., 1864, p. 108.

inlet, Norman, J., referring to the Institutes, said:—"We find it laid down that if a river, leaving its natural channel, flows in another course, the former channel belongs to them who possess the farms on its banks, to each man according to the breadth of his land on the bank; and the new channel is subject to that law which governs the river, that is, it becomes public. But if, after some time, the river returns to its former channel, the new channel again belongs to them who have the farms on its banks." And then in another passage, "applying these principles to the present case, if the river simply change its course, and there is nothing to modify the conclusion which the Court ought to draw from the simple fact, the old dry course of the river must be taken to have become private property. And as incident to and part of the same, the owner of the soil is entitled to all bheels or ponds, gulfs or damrorees, in which water remains but which do not communicate with the river except in the time of floods, and he could have claimed a settlement with the Government in respect of any jalkar in the same. The right of the defendant to the fishery in the water in question being merely granted out of, and a part of, the right of the Government to the river can no longer exist where the right of the Government itself is gone." There, as it seems to me, the learned Judges held, that inasmuch as the inlet of the river had become separated from the main channel and had partially dried up, and Government had lost its right in respect to it, the right of the defendant also was lost. But the principle laid down was—that so long as the river retains its navigable character, it is subject to the rights of the public, and the right of fishery remains in the person who held it under a grant from Government. In the present case, which is the converse of *Gray* v. *Anund Mohun Moitra*, there is no question that the defendants had been for a long time in the enjoyment of the right granted to them by Government, and that the river which forms the subject matter of the dispute is still a public navigable river. The case of *Sibessury Dabee* v. *Lukhy Dabee* (1) has no bearing on this question at issue here. In that case, the *dahi*, or streamlet, respecting which the dispute was, formed a separate and apparently dried up armlet of the river Hughli,

(1) 1 W. R., 88.

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and the learned Judges there held that an anterior right of fishery did not necessarily attach to the streamlet, which had no connection with the river Hughli. We are accordingly of opinion that the view taken by the learned Judge below is the correct view, namely, that the defendants have the right over the river in its present course to the same extent and under the same limits as they possessed previous to the change in its channel, and that the plaintiffs are not entitled to the relief which they seek

The appeal is therefore dismissed with costs.

C. D. P. *Appeal dismissed.*

1890
June 6.

Before Mr. Justice O'Kinealy and Mr. Justice Ameer Ali.

MON MOHUN SIRKAR AND OTHERS (PLAINTIFFS) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (DEFENDANTS).*

Res judicata—Suit for possession and mesne profits—Civil Procedure Code (Act XIV of 1882), *ss.* 13, 211, *and* 244—*Decree for possession and mesne profits up to date of suit—Separate suit for subsequent mesne profits.*

In a suit for recovery of possession and mesne profits, the Court has power under s. 211 of the Civil Procedure Code either to award mesne profits up to the date of the institution of the suit or up to the date of delivery of possession. And where a decree for possession is silent as regards mesne profits which have accrued between the date of the institution of the suit and delivery of possession, a separate suit will lie for such subsequent mesne profits, ss. 13 and 244 of the Code being no bar to it.

Sadasiva Pillai v. *Ramalinga Pillai* (1); *Fakharuddin Mahomed Ashan Chowdhry* v. *Official Trustee of Bengal* (2); *Byjnath Pershad* v. *Badhoo Singh* (3); *Pratap Chandra Burua* v. *Swarnamayi* (4); and *Haramohini Chowdhrani* v. *Dhamani Chowdhrani* (5), referred to.

* Appeal from appellate decree No. 1025 of 1889, against the decree of W. H. Page, Esq., Judge of Moorshedabad, dated the 20th of February 1889, affirming the decree of Baboo Nobin Chunder Ganguli, Subordinate Judge of Moorshedabad, dated the 16th of August 1888.

(1) L. R., 2 I. A., 219 : 15 B. L. R., 383.
(2) L. R., 8 I. A., 197 : I. L. R., 8 Calc., 178.
(3) 10 W. R., 486.
(4) 4 B. L. R., F. B., 113 : 13 W. R. F. B., 15.
(5) 1 B. L. R., A. C., 138.