Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

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Jany. 9.

PARBUTTY NATH ROY CHOWDHRY AND OTHERS (PLAINTIFFS) *v.* MUDHO PAROE AND OTHERS (DEFENDANTS).*

Jalkar — Easement — Dispossession — Limitation Act IX of 1871, *s.* 27, *Sched. II, art.* 145.

A jalkar is not an easement within the meaning of s. 27 of Act IX of 1871, but is an interest in immoveable property within the meaning of Sched. II, art. 145 of that Act. Where the defendant had been exercising a right of fishing in certain water adversely to the plaintiff for more than twelve years, *Held*, that a suit by the plaintiff for a declaration that he was entitled to the exclusive right of fishing in such water was barred by limitation.

THE judgment appealed from, in which the facts are fully stated, was as follows: —

AINSLIE, J.—The plaintiffs in this suit seek to recover the rents of a certain jalkar from the defendants, who in answer allege that the jalkar is the property of Government, and if this is not so, that they have never paid rents to, and do not hold from, the plaintiffs. The Judge of the lower Appellate Court has found that, with the knowledge, but without the permission, of the plaintiffs, the defendants have been fishing in this water for at least eighteen years adversely to plaintiffs, and that the law of limitation bars this suit.

It has been urged in special appeal that the plaintiffs having enjoyed possession through other tenants cannot be barred. I think, however, that where property is of such a nature that there may be equal enjoyment thereof by several persons at one and the same time without necessary interference one with another, it is not necessary for respondent to establish the total exclusion of the plaintiffs in order to succeed on the plea of limitation. If, as in this case, the defendants can show that while plaintiffs may have been enjoying profits out of this fishery through others, they themselves have within the knowledge of the plain-

*Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice Ainslie, dated the 7th of June 1877, in Special Appeal No. 2219 of 1876, against the decree of J. O'Kinealy, Esq., Officiating Additional Judge of the 24-Pergannas, dated the 17th of June 1876, reversing the decree of Baboo Ram Doyal Ghose, Second Munsif of Bassirhaut, dated the 20th January 1876.

tiffs been appropriating the entire produce of their own fishing in the same waters without in any way acknowledging the plaintiffs' title, they do in effect prove an adverse possession *pro tanto*.

It was, however, further argued that possession for twenty years is necessary to establish a prescription. But, as the law now stands, the case does not fall within the provisions of s. 27 of the Limitation Act, and must therefore be governed by art. 145. The Judge correctly observes that the right claimed is not an easement; and although in the draft of an amended Law of Limitation recently published the meaning of the word 'easement' is intended to include such claims, it has, as the law now stands, a more restricted meaning.

As the Judge has found that the enjoyment of the fishery has not been by license or consent of plaintiffs, but, on the contrary, accompanied with a denial by plaintiffs of the defendants' right to fish, and a denial by defendants of plaintiffs' right to interfere with or tax their fishing, and that this state of things has been going on for eighteen years, the suit was rightly dismissed. The appeal is dismissed with costs.

Baboo *Chunder Madhub Ghose* for the appellants.

No one appeared for the respondents.

The judgment of the Court was delivered by—

GARTH, C. J.—We have felt some difficulty in coming to a conclusion upon this case, partly from the peculiar nature of the rights claimed by the plaintiffs, and partly from there being no provision in the Limitation Act of 1871 which applies to, or contemplates, a suit of this nature.

The plaintiffs claim to be entitled to an 8-anna share of a certain jalkar, and they pray for a declaration as against the defendants,—*first*, that they are entitled to receive rent from them for fishing in their jalkar; or, *secondly*, that the defendants have no right to fish there without paying them (the plaintiffs) rent; or, in other words, that the plaintiffs are entitled to enjoy their jalkar rights without the defendants' interference.

The Munsif very properly dismissed the first portion of the

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plaintiffs' claim, upon the ground that the defendants were not, and had never claimed to be, the plaintiffs' tenants. But he decreed their claim in the other alternative, declaring in substance that the plaintiffs had a right to the share which they claimed in the jalkar, and that the defendants could not fish there without the plaintiffs' permission. He holds that the right of fishing claimed by the defendants in the jalkar was at most an easement; that the defendants, therefore, could not become entitled to it by prescription, till they had enjoyed it as of right for twenty years (see Limitation Act of 1871, s. 27), and that their use and enjoyment of it had not been proved for more than eighteen years.

The Additional Judge on appeal reversed this decision of the Munsif. He held that neither the right of fishing claimed by the defendants, nor the jalkar rights claimed by the plaintiffs, were "easement." He apparently considered that the enjoyment of the right of fishing by the defendants was an interference by them with the exclusive right claimed by the plaintiffs, and ultimately decided that as the plaintiffs had not brought their suit to establish such exclusive right within twelve years of the defendants' first interference, their suit was barred by limitation, and ought to be dismissed.

The learned Judge of this Court has approved the finding of the lower Court, and substantially upon the same grounds.

It has now been urged before us on appeal from his decision: 1*st*, that the jalkar which the plaintiffs claim is not in its nature "immoveable property, or an interest in such property," within the meaning of the Limitation Act; and that consequently art. 145 of the 2nd Schedule to the Act does not apply; 2*nd*, that a jalkar is an easement, to which the defendants could only become entitled by twenty years' use (s. 27 of the Limitation Act); and 3*rd*, that the acts of the defendants when fishing in the jalkar were only a series of trespasses or infringements of the plaintiffs' right, each of which was a successive cause of suit; and that therefore the plaintiffs are not barred by limitation.

We think, however, that the lower Appellate Courts are right in the view which they have taken. Whatever may be the

law under the present Limitation Act, a jalkar is clearly not an easement within the meaning of s. 27 of the Act of 1871. An easement is defined by Mr. Gale in his Law of Easements (p. 5) to be "a privilege without profit" which the owner of one tenement may enjoy (as a right of way or of light over the land of another); but "conferring no right to a participation in the profits arising from it."

Now a jalkar, on the other hand, is the right to take the profits of a river, lake, or other water on a particular estate or tract of country; and although, as was decided by Justices Jackson and McDonell in the case of *Radha Mohun Mundul* v. *Neel Madhub Mundul* (1), the right to a jalkar may not involve any actual property in the soil over which the water flows, it is still, we think, an interest in immoveable property within the meaning of art. 145 of the Limitation Act.

We also agree with the lower Appellate Courts that the acts of the defendants in taking fish from this jalkar for so many years cannot properly be considered as successive acts of trespass. They appear to have been exercised continuously under a claim of right, and in the only way in which that right could be effectually asserted. Assuming that the plaintiffs' possession of the jalkar consisted of the participation of the profits derivable from it, the enjoyment by the defendants of a partial participation of those profits for a long course of years must be considered (as Mr. Justice Ainslie describes it) as a dispossession by the defendants of the plaintiffs' right *pro tanto* during that period. The plaintiffs ought, therefore, to have brought their suit within twelve years from the commencement of such dispossession.

The appeal is dismissed without costs, no one appearing for respondents.

Appeal dismissed.

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(1) 24 W. R., 200.