

1889
 AUG. 20.
 —
 APPEL-
 DATE
 CIVIL.
 —
 14 B. 206.

no formal litigation, perhaps no dispute. This consideration is still more important, as in many cases, before formal suit is brought and the other property valued, it is impossible to know whether the Court executing the decree is competent to adjudicate on the other property. For, as determined by the Judicial Committee of the Privy Council in interpreting the meaning of "competent Court" for the purposes of *res judicata* under s. 13 of the Civil Procedure Code, it is essential to take notice of the pecuniary limit of jurisdiction, there being in India a great number of Courts, of various grades with different pecuniary limits of jurisdiction—*Misir Raghobardial v. Rajah Sheo Baksh Singh* (1) *Rajah Eun Bahadoor Singh v. Mussumut Lachoo Koer* (2).

For these reasons, I am of opinion that the proceedings in the execution case were not relevant as evidence of an estoppel by *res judicata*, and that the decree ought to be confirmed with costs.

Decree confirmed.

14 B. 213.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

THE SECRETARY OF STATE FOR INDIA (*Original Defendant*),
Appellant v. MATHURABHAI AND OTHERS (Original Plaintiffs),
*Respondents.** [20th August, 1889.]

Construction—Act when applicable to Crown—Limitation Act XV of 1877, s. 26—Easement—Profit a prendre—Right to pasturage claimed by a village against Government—Prescription—Limitation—Custom.

The rule of construction according to which the Crown is not affected by a Statute, unless specially named in it, applies to India.

[214] *Seemle*—The provisions of s. 26 of the Limitation Act XV of 1877 do not apply to the Crown. The mere mention of the Crown in an Act has not the effect of making all its provisions applicable to the Crown, and s. 26 does not relate to the limitation of suits, but to an entirely different matter, *viz.*, the creation of rights by the enjoyment of them, which is a branch of the substantive law. The section is clearly in prejudice of the Crown's rights, and the other provisions of the Act do not afford sufficient evidence of an intention that this section should apply to the Crown.

The rule of English law, that a claim to a *profit a prendre* cannot be acquired by the inhabitants of a village either by custom or prescription, does not apply to a right of pasturage claimed by a village in the Presidency of Bombay as against the Government. The right of free pasturage has always been recognized as a right belonging to certain villages, and must have been acquired by custom or prescription.

The plaintiffs, who were the inhabitants of the village of Dani Limbda, sued for themselves and the other inhabitants to establish their right to graze their cattle on the banks and the dry part of the village tank Chandola and for a perpetual injunction restraining the defendant from interfering with such right. The defendant contended (*inter alia*) that the tank was *kharabo* or waste land, that it had never been set apart under the Land Revenue Code, s. 38, for grazing purposes, and that the plaintiffs could not acquire, as against the Government, a right of grazing by prescription. The Court of first instance held the defendant not excluded from the operation of s. 26 of the Limitation Act XV of 1877, but

* Second Appeal No. 696 of 1887.

(1) 9 I. A. 197.

(2) 12 I. A. 23.

found that there was a break in the period of prescription, and, therefore, rejected the plaintiffs' claim. The lower appellate Court held that there was no break, and awarded their claim. On appeal by the defendant to the High Court,

Held, restoring the decree of the Court of first instance, that the suit should be dismissed. Whether the plaintiffs' claim was considered with regard to s. 26 of the Limitation Act XV of 1877, or to the general law of prescription, it was essential that the user should have been as "of right" to graze cattle on the tank in question. But the right of free pasturage which certain villages enjoy according to the recognized custom of the country, and which was admittedly enjoyed by the plaintiffs' village, does not necessarily confer the right of pasturage on any particular piece of land although it may confer the right of having sufficient land set apart for the purpose of the village, and in the absence of special circumstances pointing to the tank in question having been used for grazing by the villagers in exercise of a right other than and independent of the aforesaid right, the user by the plaintiffs could only be referred to that general right.

[*Appr.*, 39 C. 53=15 C.W.N. 972=11 Ind. Cas. 180; 6 C.L.J. 218 (222); R., 21 B. 684; 31 B. 86=8 Bom.L.R. 904=2 M.L.T. 13; 34 B. 628=12 Bom.L.R. 34=5 Ind. Cas. 621; 31 C. 503 (507) (P.C.); 25 M. 457; 34 M. 58=5 Ind. Cas. 853=20 M.L.J. 362=7 M.L.T. 380=(1910) M.W.N. 75; L.B.R. (1872-1892) 550 (554); 18 C.W.N. 735=19 Ind. Cas. 890; 20 Ind. Cas. 467.]

SECOND appeal from a decision of G. Jacob, Joint Judge of Ahmedabad.

This was a suit brought in 1883 by the plaintiffs, who were the inhabitants of the village of Dani Limbda, to establish their right to graze cattle on the banks and the dry part of the village tank [215] Chandola, and to obtain a perpetual injunction restraining the defendant from interfering with that right.

The defendant contended (*inter alia*) that the tank land had not been assigned for grazing purposes; that it was Government property under s. 37 of the Land Revenue Code (Act V of 1879); that in 1881 the tank was made over to the Irrigation Department; that the plaintiffs could not acquire any legal right by user; that no right could be created against Government by prescription; that the right of profit *a prendre* could not be so acquired; and that the land, even if assigned for grazing, could be resumed or otherwise appropriated.

The Assistant Judge who tried the suit rejected the plaintiffs' claim, on the ground that in 1874 the defendant had re-appropriated a part of the land in question and imposed an assessment upon it—an encroachment upon the plaintiffs' enjoyment which they had not resisted, and that there had, therefore, been a breach in the period of prescription on which the plaintiffs sought to base their right against the Crown.

The following is a portion of his judgment:—

" * * * The plaintiffs constitute the inhabitants of the village of Dani Limbda. When the survey was introduced in 1861 into that village, the land in suit, (Survey No. 82), was entered upon the Government records as *kh. rabo*, or waste land, and there can, I think be no doubt that from that time to the present cause of action the villagers have been in the habit of grazing their cattle on it. It is also indisputable that in the year 1874 the Collector re-appropriated a small portion of this land and fixed an assessment on it, and gave it a separate survey number. This fact is not in dispute. In the year 1881 the Revenue authorities, with the sanction of the Commissioner, made over this land, which is the area of the tank, known as the Chandola tank, to the Irrigation Department. A *pal*, or embankment, was then in course of construction, and to prevent injury being done to it the irrigation people prohibited the villagers from grazing their cattle in the surrounding bed of the tank. Thinking that

1889
AUG. 20.
—
APPEL-
LATE
CIVIL.
—
14 B. 213.

1889
AUG. 20.
—
APPEL-
LATE
CIVIL.
—
14 B. 213.

this was a merely temporary restraint, they submitted, but finding, in July of 1882, that they were to be permanently deprived of their old grazing [216] rights, they filed this suit * * *. As they understood their position, their cause of action did not arise till 1882, or just beyond the twenty years, limit that would give them a prescriptive right against the Crown under the Indian law * * *. But, as I have stated in the opening portion of my judgment, it appears that in 1874 the Collector re-appropriated a small portion of this land and put an assessment upon it; and it is not pretended that plaintiffs, or any of them, attempted to resist this encroachment upon their enjoyment, either at the time or within a year subsequently. The period of prescription is, therefore, in my opinion, indisputably broken * * *.

The plaintiffs appealed to the District Court, who reversed the decree of the lower Court and gave the plaintiffs a decree.

The defendant preferred a second appeal to the High Court.

Latham, Advocate-General, *Shantaram Narayan* (Government Pleader with him) for the appellant (defendant):—This appeal raises two points, viz., 1st, whether the Secretary of State is bound by the provisions of s. 26 of the Limitation Act: 2nd, whether such a right as is claimed by the plaintiffs can be acquired as against him. The provisions of the section do not include the Crown. The Government is expressly mentioned in art. 149 and arts. 15, 16 and 17. The rule is that the Crown is not bound by a Statute unless named in it: Maxwell on Statutes, 161 *et seq.* A much longer period than in the case of ordinary persons is given to the Crown: Chitty's Prerogatives, 379. Where there is no express provision of law, the maxim *nullum tempus occurrit regi* applies. The Easements Act V of 1882 gives sixty years for acquiring an easement as against the Crown. The same period is given under the English Acts. Only those sections of the Limitation Act apply to the Secretary of State in which he is expressly mentioned: *Ex parte Postmaster General*; *In re Bonham* (1); *Venubai v. The Collector of Nasik* (2).

Profits *a prendre* cannot be claimed as an easement by the inhabitants of a town or village, either by custom or by prescription. An undefined body, like the inhabitants of a village, cannot acquire an easement. There must be a permanent individual [217] to acquire an easement, for it is a right enjoyed by a dominant tenement over a servient tenement. The right must be an ascertained and defined right. Here the right claimed is to put any number of cattle to graze. Again, there is nothing to show that the grazing claimed has been enjoyed as *of right*. Under s. 38 of the Revenue Code (Act V of 1879), a certain portion of a village land is set apart for grazing purposes, but the control remains with Government. There is no finding here that the pasturage has been enjoyed in opposition to Government, and it is to be presumed that it was enjoyed by permission and favour of Government, and can be stopped at any time.

Rav Saheb Vasudev Jagannath Kirtikar for the respondents (plaintiffs):—The Crown has been bound by the rules of limitation and easement. See *Ponnusawmi Tevar v. The Collector of Madura* (3); *The Collector of Thanai v. Dadabhai Bomanji* (4). The right claimed here has been enjoyed by the villagers for a very long time. The right claimed can be acquired by a village by prescription. A village community is a permanent body and

(1) L. R. 10 Ch. D. 595 (601).

(3) 5 M. H. C. R. 6.

(2) 7 B. 552, note.

(4) 1 B. 352 (361).

forms a proprietary unit, and like an individual can acquire an easement. The rules of English law which have been cited are not applicable in India. The term 'person' includes a body of individuals: see s. 2, cl. (3), General Clauses Act, of 1868. This shows that the Indian Legislature recognizes a community as a person acquiring rights as an individual. By the Easements Act, s. 18, such a right is capable of being acquired by a village. There is no difference between an easement and profits *a prendre*.

1889
AUG. 30.
—
APPEL-
LATE
CIVIL.
—
14 B. 213.

JUDGMENT.

The judgment of the Court was delivered by

SARGENT, C. J.—The plaintiffs in this suit, describing themselves as inhabitants of the village of Dani Limbda, seek to establish their right to graze their cattle on the banks of and in the dry part of the Chandola tank and for a perpetual injunction to restrain the defendant from interfering with such right. The Assistant Judge says that the plaintiffs constitute the inhabitants of the village, and the suit would, therefore, appear to be in [218] proper form; but in any case no objection was taken, either in the Court below or on appeal here, that the plaintiffs should have proceeded under s. 30 of the Civil Procedure Code.

The defendant says that the Chandola tank is *kharabo*; that it has never been assigned for grazing under s. 38 of the Land Revenue Code; that the plaintiffs could not acquire a right of grazing by prescription against Government; and that the tank was made over in 1881 to the Irrigation Department, who have spent large sums in repairing it, and regrets to be obliged to interfere with the grazing as tending to impair its usefulness.

Both the Courts below treated the Secretary of State as not excluded from the operation of s. 26 of the Limitation Act XV of 1877, and the lower appeal Court held that the villagers had used the ground in question for grazing during twenty years "ending within two years next before the institution of the suit," differing in this from the Assistant Judge, who held that there had been a break in the period of prescription. The Advocate-General on behalf of Government has contended before us that s. 26 of Act XV of 1877 is not applicable to a claim against the Secretary of State, on the ground of the well-established rule in England, that the Crown, whose interest he represents, is not included in an Act unless there be words to that effect; 2ndly, that such a right being in the nature of a profit *a prendre* cannot be acquired by prescription by a fluctuating body such as the inhabitants of a village; and lastly, that there has been no user as of right.

The above rule of construction of Acts as regards the Crown relied on by the Advocate-General would appear to be equally applicable here as in England, and it was so regarded by the Division Court consisting of West and Nanabhai Haridas, JJ., in *Ganpat Putaya v. The Collector of Kanara* (1) where they say "This rule of interpretation is well established, and applies not only to the Statutes passed by the British, but also to the Acts of the Indian Legislature framed with constant reference to the rules recognized in England."

In the present case the question involves claims against public lands, which, before the transfer of the Government to the Crown, [219] were

1889
AUG. 20:
—
APPEL-
LATE
CIVIL.
—
14 B 213.

vested in the East India Company, but which, by Act 21 and 22 Vic., c. 106, s. 37, have become in the same manner vested in the Crown. Prior to the Limitation Act, IX of 1871, in which s. 26 of Act XV of 1877 is first found, there is no reason to doubt that, as against the East India Company and subsequently against the Crown, (against which "all such remedies were given as might have been had against the East India Company" by Act 21 and 22 Vic., c. 106, s. 65) claims in the nature of easements and *profits a prendre* might be acquired by prescription—*Ponnusawmi Tevar v. The Collector of Madura* (1) and the remarks of the Court in *The Collector of Thana v. Dadabhai Bomanji* (2).

That being the state of the law prior to the Limitation Act IX of 1871, we find enacted by s. 26 of that Act a new mode of acquiring an easement against the owner of the servient property, the object of which, as stated by the Privy Council in *Rajrup Koer v. Abdul Hossein* (3), was to make it more easy to establish rights of easement than it had hitherto been by prescription. In Special Appeal No. 7 of 1877, *Venubai v. The Collector of Nasik* (referred to in the note at I. L. R. 7 Bom. 552) the above Act came under the consideration of Westropp, C.J., and Melvill, J., who held that the period for execution in the case under Act IX of 1871 was the same for Government as for the subject, on the ground that the express provision for a longer period of limitation in favour of Government, in case of suits, showed it was intended that Government should be bound by the ordinary period of limitation in the case of executions. But this inference cannot be extended to s. 26 of the Limitation Act which relates to an entirely different matter from the limitation of suits, *viz.*, to a branch of substantive law and the creation of rights by the enjoyment of them, unless indeed the mere mention of the Crown in an Act be held to have the effect of making all its provisions applicable to the Crown. That this is not so, the decision of the appeal Court in *Ex parte Postmaster-General; In re Bonham* (4), where the applicability of the Bankruptcy [220] Act to the Crown was disallowed, is an authority in point. In that case Crown debts were especially provided for by the Act, but the Court of appeal held that that was not sufficient to show that all the other provisions of Act were intended to apply to the Crown, and proceeded to consider them *seriatim*. Here the section in question is clearly in prejudice of the Crown's rights, and we, therefore, think that, on principle, the provisions of the Act do not afford sufficiently clear evidence of an intention to include the Crown in s. 26. That the Crown's rights were not actively present to the mind of the Legislature when enacting s. 26 may be fairly inferred from the provisions in the Easements Act of 1882 fixing a period of sixty years in lieu of twenty years for acquiring an easement against the Crown. However, in the view we take of the case, it is not necessary to express a decided opinion on the question.

Assuming for a moment that s. 26 of Act XV of 1877, (which includes a *profit a prendre* in the term "easement"), is not applicable to the Crown, it would be still open to the plaintiffs to establish their claim by the general law of prescription. See *Maharani Rajroop Koer v. Syed Abdul Hossein* (5) and *Achul Mahta v. Rajun Mahta* (6). The Advocate-General has indeed urged upon us that a claim to a *profit a prendre* cannot be

(1) 5 M. H. C. R. 6.

(2) 1 B. 352 (361).

(3) 6 C. 394 (403).

(4) L. R. 10. Ch. D. 595 (601).

(5) 7 I. A. 240.

(6) 6 C. 812.

acquired by the inhabitants of a village either by custom or prescription. This is undoubtedly true by English law, unless where a grant can be presumed incorporating the inhabitants for that purpose—*Lord Rivers v. Adams* (1); *Chilton v. Corporation of London* (2), *Goodman v. Mayor of Saltash* (3). Apart from considerations peculiar to English law, the main reason for the rule is the fluctuating character of the claimants, which from the possible increase of the number of claimants might practically operate to divest the owner of all the profits of his property; and it was on this ground that the ruling in *Lord Rivers v. Adams* (1) was held applicable in *LutchmEEPut Singh v. Sadaulla Nushyo* (4) to a claim by the tenants of a pargana to the right of fishing in the [221] plaintiff's baills. But, however this might be as regards a claim to a *profit a prendre* of such a nature as that in question in *LutchmEEPut Singh v. Sadaulla Nushyo* (4) and against individuals, the above objection cannot, in our opinion, be taken to a right of grazing by a village in this Presidency as against the Government. The right of free pasturage has always been recognized by Government as a right belonging to certain villages and must have been acquired by custom or prescription (5). But whether the plaintiffs' claim be considered with regard to the 26th section of the Limitation Act of 1877 or to the general law of prescription, it is still essential that the user should have been as "of right" to graze cattle on the tank in question, and as nothing occurred when the survey was introduced in 1861 to alter the nature of the plaintiffs' previous enjoyment, the question as to the character of the user by the villagers will be virtually the same whether the claim be made under the Act of 1877 or the general law of prescription. Now this right of free pasturage, which certain villages enjoy according to the recognized custom of the country, and which was admittedly enjoyed by this village, does not necessarily confer the right of pasturage on any particular piece of land, although it may confer the right of having sufficient land set apart for the purposes of the village—a question which is not now before the Court—but in the absence of special circumstances—and there are none in this case—pointing to the tank in question having been used for grazing by the villagers in exercise of a right other than and independent of the above right, the user can only be properly referred to that general right.

We must, therefore, reverse the decree of the Court below and restore the decree of the Assistant Judge, with costs on the respondents throughout.

Decree reversed.

(1) L. R. 3 Ex. D. 361. (2) L. R. 7 Ch. D. 735. (3) L. R. 7 Ap. Ca. 641.

(4) 9 C. 698.

(5) See 18th Rule of the Rules under the Survey Act at p. 249 of the Survey Manual and the 16th Rule of the Rules laid down in 1848 and 1849 by Government for the guidance of the Revenue Officers at p. 37 *idem*, and see also the Land Tenures of British India by Baden Powell, p. 72.