

Legislative (1899) Department.

ORDINARY MS.

G.O., No. 122

DATED 30-11-99

INDEXED.



[Despatch Abstract.]

Recording memorandum, Revenue
Dept# forwarding certain papers
bearing on the amendment of the
Madras Irrigation Reso Act, 1868
to be supplied to the members of
the Legislative Council.

BACK PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

FURTHER PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

CURRENT NO. 448

Revenue Department

With reference to its un-official note of the 22nd instant, the Legislative Department will be furnished with 24 copies of each of the following papers bearing on the amendment of the Irrigation Cess Act, VII of 1865, Madras, for supply to the additional members of the Legislative Council—

- (1) G.O. No: 932 Rev. d. 18-11-99
- (2) B.P. No: 143 Land Rev. d. 5-5-99
- (3) Judgment of the Madras High Court in Venkatappa yya and others v. the Collector of Kistna. (XII, J.L.R. Mad. 407-411).
- (4) Judgment of the same Court in Krishnayya v. the Secretary of State for India (XIX J.L.R. Mad 24-25)
- (5) Judgment of the same Court in Second Appeals Nos: 943-945 of 1895.

Order No. 122 d/80 4-99

Recorded.

9/26-11-99

HT 28/11/99

Note

These papers numbered as paper no. 1 relating to the Bill will be furnished to the Honble members of the Legislative Council along with the Bill & statement of objects & Reasons.

9/26-11-99

28/11/99

2. Legislative Deptt. with 24 sets of papers no 165

28/11/99 30/11/99 27/11

Press

Please put in type &
Strike off 100 copies

WNV
30/11/89

G.O., No. 932, Revenue, dated 13th November 1889.

Read—again the following Proceedings of the Board of Revenue (Land Revenue), No. 672, dated 26th September 1889 :—

W. S. WHITESIDE, Esq.

THE HON. J. GROSE, M.A.

Read—the following letter from A. T. ARUNDEL, Esq., Collector of the Kistna District, to the Secretary to the Commissioners of Land Revenue, dated Masulipatam, 20th August 1889, Extra No. 220 :—

With reference to Board's Proceedings, Mis. No. 6256, dated 22nd October 1888, sanctioning the employment of Counsel to appear for Government in the appeal before the High Court, referred to in my letter, No. 5960, dated 15th October 1888, I have the honour to enclose a copy of the judgment of the High Court deciding the appeal adversely to Government.

2. The question at issue is of such vital importance to the revenue of this district and of Górávari, and the judgment in the extreme form in which it stands suggests such far-reaching and disastrous financial consequences that I beg the matter may receive the early and special attention of the Board and of Government.

3. The case is this. The appellants hold land formerly cultivated with dry crops. The surplus water from irrigated lands on a higher level floods the land, and dry crops can no longer be grown unless the cultivators bank the water out at some cost. The appellants therefore grow paddy thereon, and have been charged, according to the practice of the district, Rs. 2 per acre, being half the full rate, a reduction being made on account of the uncertain character of the irrigation. It was found by both the lower courts that the crop could not come to maturity by rainfall alone. The District Munsif found that in this particular case the cultivators (appellants) incurred loss rather than derived benefit, but this does not affect the principle of imposing the charge for water-rate, and the judgment of the District Judge now reversed by the High Court is on the principle involved.

4. The District Judge found that although the water flowed over the appellants' land against their wish, their liability to pay the water-cess was unchanged—

"The water comes from the Kistna anicut and Act VII of 1865 applies. The words of that Act are 'whenever water is supplied or used.' The cultivators are given no option in the matter. If the water is supplied to them, or if they use the water, they must pay the water-cess. In this case I hold that the water was supplied, and that whether or not it was supplied it was certainly used; I, therefore, hold that the Collector had power to impose water-cess."

Mr. Mackenzie further remarked—

"The Act only declared the existing revenue practice. These cultivators hold their land from Government, and they hold it with the implied understanding that if water is supplied to them they must pay wet rates. That an individual may be unwilling to take water and that the water comes to his field against his wish is immaterial. Government have a legal right to levy wet rates upon every field the water reaches."

5. The High Court per the Chief Justice Sir Arthur Collins and Mr. Justice Muthusami Iyer reject, not as divergent from Government rules, but as unsupported by law, all the foregoing dicta of the District Judge. They say—

"The appellants did not apply for the water and it was not allowed to flow to their land by reason of such application, and we cannot therefore say that water was supplied, inasmuch as the expression implies in its ordinary sense a previous request express or implied. Was it then used? The term ordinarily presupposes freedom either to use or to abstain from using the water, and the language of the section does not suggest an intention to exclude this freedom. The preamble * * * discloses only an intention that those who obtain a supply or use the water in view to deriving increased profits should be under an obligation to pay the water-cess. Can it be said when the Government or one or more of its tenants to whom water is supplied for profit inundate a ryot's dry land against his will for about two months every year and thereby

renders it unfit for dry cultivation, and when the ryot in endeavouring to use his lands sows Tiruvarangam paddy trusting to the precarious chance of raising a crop which may grow in spite of the inundation, and when that crop fails, that he uses the water to profit by it? If he uses it, he uses it as the only mode of repairing the injury to his land and averting the loss likely to arise from it, and we cannot say that he uses the water within the meaning of the Act, if regard is to be had to the rule that the construction we are bound to place upon statutes must be reasonable * * *. The reasonable construction is that the use contemplated by the Act is a voluntary use though not preceded by an application, and that it supposes a freedom either to take or refuse the water. We are aware of no usage whereby a ryot's land can be held to be lawfully inundated every year. We are unable to concur in the opinion of the Judge that the appellant used the canal water within the meaning of Act VII of 1865."

6. The foregoing paragraphs of the High Court judgment assign to cultivators as a legal right privileges which the Government at the passing of Act VII of 1865 understood, as I will show later on, to be distinctly excluded from the law, but to be conceded by an executive act as a matter of grace. In one or two points the passages quoted challenge the principles and practice of the Revenue administration which are in force in every ryotwari district in the Presidency.

7. To take the last sentence but one—"We are aware of no usage whereby a ryot's land can be held to be lawfully inundated every year." Such inundation with or without each individual ryot's consent goes on throughout the whole country season after season. The ordinary method of irrigation is from field to field in a system of terraces. The uppermost field is supplied direct from the irrigation sluice, and after inundation the water flows to the next field, and then to the next, until the last is supplied. In such cases no ryot, except the first, who receives his supply from the sluice, has the power to refuse the water. It must inevitably flow from terrace to terrace till it reaches the lowest, and no ryot can keep it from flowing on to his field from the field above. In many places one or more fields at a time are irrigated from field channels; and the inflow could be prevented, but even so these one or two fields may be subdivided among different owners, each of whom under the new ruling should be free to exclude water from his own plot, or failing this be exempt from payment of water rate. In most districts all such land is called "wet" and pays a consolidated assessment for both land and water. The question whether the ryot is bound to pay for the water separately, even if he cannot refuse it, does not arise in such districts, for the assessment is fixed and collected under Act II of 1864, and by section 58 the rate of such assessment is excluded from the cognizance of the civil courts. In the Kistna and Gódvári districts the system of assessment is however different as will be noted below. At present I wish to point out that the passage I have quoted does not appear to be in accord with the law which governs the irrigation of all ryotwari lands throughout the Presidency, except those supplied and charged under Act VII of 1865.

8. The peculiarity of the delta revenue system of this district and of Gódvári is this. All the delta land whether irrigated or not is *prima facie* regarded as "dry." If a ryot makes application for water which is granted, his field is transferred to "wet," and so remains until he declares that he desires to have water no longer. On such relinquishment the land is again entered in the accounts as "dry," and the water-rate is levied only if he uses the water. If he grows a crop that cannot mature without artificial irrigation and which does in fact receive a supply from the anicut, he is presumed to "use" the water, and has to pay for it. It is to the ryot's advantage under ordinary conditions to get previous sanction for water, as if he irrigates without permission and is found out, he is charged double water-rate as a punishment.

9. I have already explained (paragraph 7) that over the bulk of the irrigated area it is impossible to stop the irrigation of individual fields, inasmuch as the supply passes down from field to field. Where the irrigation is systematic and complete, the village community is content and happy, and all the ryots tacitly agree to carry out their irrigation and agricultural operations simultaneously. If any single individual were to relinquish irrigation for his field, he would still grow rice on it, and having done so would be charged double rates for using the water after nominally relinquishing it. But under the new ruling of the High Court, "the use [of water] contemplated by the Act is a voluntary use * * * and * * * presupposes a freedom either to take or refuse the water." The Judges also hold that the growing of a wet crop on land involuntarily irrigated is not a "use" of the water. Under this ruling, therefore, the present system cannot hold together, and the revenue of the Kistna and Gódvári districts from their enormous irrigation works is placed in jeopardy. The ryots have merely to file statements declining to have water any more, and then, if the upper field of a terraced series is irrigated direct from the sluice with the consent of the owner thereof, the owners of all the fields below must under the new ruling receive their supply of water free of charge, because they have no option of refusing it. The same course can be adopted for all fields or plots, but one, irrigated from any single inlet.

10. The view adopted by the High Court seems to arise from an initial misconception as to the effect of irrigation which unfortunately was not rectified by Counsel. The Judges ask—"Can it be said when the Government * * * inundates the ryot's dry land against his will * * * and thereby renders it unfit for dry cultivation, * * *, that he uses the water in view to profit by it?" Yes, it can and ought so to be said. Speaking generally, and allowing

for well-known exceptions in saline soils, &c., no ryot will grow dry crops, when he can grow wet, because the wet are more profitable. Mr. Master in an elaborate report (see paragraph 16 *infra*) on the irrigation of the Kistna district for inquiring into which he was specially deputed by Government in 1869 writes (paragraph 158):—"The opinion of most of the officers whom I have consulted is to the same effect: granted water in abundance, a suitable soil, good prices, and there is not a single ryot who, having once tried the system of wet cultivation, would desire to revert to dry. It has been the universal reply to my inquiry from the people themselves in all parts of the delta that they had no objection whatever to wet cultivation, but rather prefer it to dry." There are in this district and in Gódvári nearly a million acres inundated every year from the anicut works without regard to the individual ryot's present assent, but to his permanent content, and thereby rendered unfit for dry cultivation, and it is the special privilege and benefit of these great delta areas that it is so, and the source of their great and growing wealth.

11. Apart from the great areas thus continuously supplied with water, there are thousands of acres not so advantageously situated in which the ryots grow dry crops if no water can be had, but invariably grow wet crops if irrigation is possible, though uncertain, and the soil permits.

12. Even in these less fortunate areas there are gradations. Where the chance of irrigation is least, a paddy is grown called Jilama or Budama, which in favourable seasons may come to maturity by rainfall alone. With a scanty rainfall it fails unless a few artificial waterings can be given. In lands where it is pretty certain there will be a supply, though intermittent, paddy called Velavadam or China Yeradam is grown. This is charged Rs. 2 per acre. It pays better than a dry crop, and it is planted knowing that water must be "supplied" or "used" to bring it to maturity. The Tiruvarangam paddy requires a more regular supply, and a charge of Rs. 4 per acre is at times made instead of Rs. 2. Finally, in lands swampy and for periods water-logged, there is a strong coarse paddy called Pedda Yeradam—a productive six months' crop—that may be properly charged Rs. 4 per acre.

13. In the extract from the High Court's judgment quoted in paragraph 5, a remark is made as to the failure of crop. "Can it be said * * * when the crop fails, that he uses the water to profit by it." This is another matter of universal revenue practice that was not laid before the Judges. In case of total failure of the crop such as is alleged in the case under appeal, the ryot is entitled to a remission, not only of the water-cess, but also of the land assessment. The inquiry of the Revenue officer in the case before the Courts did not show the alleged destruction of crop, and on appeal to the Collector the decision of the subordinate officer imposing the water-rate was upheld. It must be noted, however, that such remissions, if granted, are an act of grace, and leave untouched the legal power of Government to levy water-rate and land assessment even when the crop has failed. Moreover by universal revenue practice, the ryot is bound to pay both land assessment and water-rate if he chooses without reasonable cause to leave his land untilled when water is available. This rule, too, must fall before the new judgment.

14. In addition to what has already been said, it must also be remembered that continual endeavours are made to defraud the public revenue by concealing the fact of irrigation. In the course of an elaborate inquiry conducted in this district this year, cases almost innumerable have come to light in which irrigation has been denied, or involuntary or excessive floodings alleged, but in which an inspection has shown the artificial inlets and outlets or the irrigating stream and the stubble of harvested crops. In paragraph 42 of his report, Mr. Master writes—"In years of drought the practice was to ask the overseers and delta gumastahs for permission to water their dry crop; the application being postponed to the last moment in hopes of a fall of rain; or they would surreptitiously take water by making breaches in the bund. * * * on the one hand the ryots assert that they did not use the channel water, but that their lands were flooded by the channel having overflowed its banks; on the other hand, the officers of the Department of Public Works say that the water was surreptitiously taken." To prevent these and other openings for fraud it is of vital importance for Government to be able to withdraw by administrative order the absolutely free option which the High Court has declared to be conferred by law.

15. I will now show that this privilege of refusing water which the High Court have declared to be the cultivator's legal right has never been so regarded by the Government or by the Legislature, but that on the contrary it has been an administrative concession gradually yielded under an important safeguard, and that as an administrative concession as distinguished from a legal right, it has been approved by the Governor-General and the Secretary of State.

16. The whole subject is very fully discussed in Mr. C. G. Master's report, which is printed with G.O., No. 3112, dated 6th December 1869. Under the water rate rules first introduced in 1861, the Revenue authorities were unable to permit the reconversion of irrigated lands to dry, and lands unsuited to irrigation were in many cases cultivated with dry crops, but charged with land assessment *plus* water-rate (report, paragraph 37).

17. Revised water-rate rules were issued by Government on 31st October 1865, that is, subsequent to the passing of Act VII of 1865. Rule II runs—"All lands now permanently

supplied with the means of irrigation for a single wet crop and which are now cultivated as nunjah and have actually been irrigated for two or more seasons shall be classed as 'irrigated' and charged Rs. 4 per acre per annum in addition to their fixed land assessment. Such land shall not be transferred to punjah unless the means of irrigation fail permanently." The option is here distinctly limited.

18. The question of the option of taking or refusing water is discussed in paragraphs 203 *et seq.* of the report. The Statement of Objects and Reasons of Act VII of 1865 throws no light on it. But the Governor-General in according his assent to this law did so on the understanding that "no water-rates will be levied under the Act for water which has not been used" (G.O., No. 2445, Revenue, dated 10th October 1865). Report, paragraph 231. This shows that the Governor-General in Council interpreted the Act to permit the levy of water-rate when water was supplied but declined, that is to say, that the legal option decided by the High Court to be conferred by the Act did not exist, and that he, the Governor-General, desired it to be conceded by an executive order.

19. In the orders of Government on Mr. Master's report which were not passed till 21st August 1872 (Government Order under date No. 1239), the position is stated and free option is conceded with a final pregnant limitation which I have italicized.

"As regards the regulation of the irrigation, the Government, after mature consideration, have come to the same conclusion as the Board of Revenue that entirely free option as to the use of water from year to year which was prescribed by the Secretary of State in 1863, as the rule to be generally observed and formed the condition of the Governor-General's assent to the enactment of Madras Act VII of 1865 for the levy of a separate water-rate, should be absolutely and unreservedly conceded, subject only to such notice of relinquishment as may be fairly demanded in order to prevent waste (paragraph 15).

"Uncertainty or inadequacy of supply, imperfect drainage or proved injurious effects on the soil, are reasons for relinquishing irrigation which should be unhesitatingly admitted. Should the cultivation of dry crops be preferred by the landholder to force him to pay for irrigation is unjustifiable (paragraph 18).

"His Excellency in Council resolves therefore to adopt the Board's view and to direct that in the Gôdâvari and Kistna deltas the free option of taking or relinquishing water from year to year be unreservedly conceded to the ryots, subject only to the condition that due notice shall be given. He believes that even when new works are desired, it is impolitic to maintain any restrictions which are opposed to the interest of the ryot, and that only when from the position of the land it cannot but derive benefit from surrounding irrigation should free option in the matter of taking or not taking water be denied."

These orders were approved by the Secretary of State in G.O., No. 178, dated 13th February 1873.

20. It is obvious that a privilege so gradually and carefully introduced by successive administrative orders and guarded finally by an important limitation would not knowingly have been conferred as a legal right by Act VII of 1865 when the granting of such concession was till a moot point.

21. The final limitation above quoted goes to the root of the matter. "Only when from the position of the land it cannot but derive benefit from surrounding irrigation, should free option in the matter of taking or not taking water be denied." With this limitation the Executive Government can afford the fullest legitimate freedom to the ryot to take water or decline it, but can at the same time arrest fraudulent irrigation and reduce it to a minimum. The decision of the High Court destroys the limitation, opens wide gates for fraud, and renders our most certain source of revenue insecure.

22. The possible remedies appear to be three. First, an appeal can, I believe, be made to the Privy Council if certified by the High Court and filed within six months, but there would be immense delay and it would be impossible to make sure that the complicated conditions involving a close acquaintance with the country could be laid before the Judicial Committee.

23. Secondly, another case could be contested, for many will now be filed, and an endeavour could be made to obtain a Full Bench of the High Court to reconsider the present judgment in deciding the new appeal.

24. Thirdly, the wording of Act VII of 1865 can be altered by an amending Act. Section 1 could be amended by inserting after the word "whenever" and before the word "water," the words "whether with or without the consent of the proprietor or tenant." It would be necessary to make the amending Act retrospective so as to confirm all payments already made for water-rate. The preamble might run—"Whereas it is necessary to prevent a fraudulent use of the option that has been allowed by Government in the rules under Act VII of 1865 to take or refuse water for irrigation, it is hereby enacted as follows." The third remedy would be the speediest and most efficacious.

Resolution--No. 672, dated 26th September 1889.

The papers will be submitted to Government for information.

2. The land concerned in the case referred to by Mr. Arundel was so situated that it was subject to inundation by Government water. If the ryots, taking advantage of this, had raised ordinary paddy (such as needs a regular supply of water), there would have been reason to presume that they intended to use the water and did use it in the sense connoted by the High Court. But they raised Tiruvarangam paddy, which could be raised by rain water alone, *probably* intending to use the Government water to ripen it, but on this occasion they did not use the Government water. It killed, not benefited, the crop. On this the High Court decided that there had been no *use*. In the course of their judgment they say, Act VII of 1865 discloses the "intention that those who obtain a supply or *use the water* in view to deriving increased profits should be under an obligation to pay the water-cess." In this case, the ryots did not obtain the water, for it came "of itself," and they did not *use* the water, for it killed their crop. The Board consider that the High Court were right in this particular case. There would be no chance of success in an appeal to the Privy Council. The Board do not consider legislation is needed, but Mr. Arundel's opinion is entitled to weight, and he will be asked to watch the effect of the judgment. If, when a case occurs where the water coming by percolation has really been used to get increased profits, the imposition of water-cess is contested, the case should be taken into the courts.

(A true Copy and Extract.)

(Signed) M. HAMMICK,
Secretary.

To the Secretary to Government, Revenue Department,
with two enclosures (to be returned).
" Collector of the Kistna District.

Read—also the following Proceedings of the Board of Revenue (Land Revenue), Mis. No. 6713, dated 4th November 1889:—

Mr. H. W. BLISS.

Mr. W. S. WHITESIDE.

Read—the following letter from the Collector of Kistna, dated 14th October 1889, No. 6401:—

With reference to Board's Proceedings, No. 672, dated 26th September 1889, I beg permission to draw attention to a mistake of fact in line 6 of paragraph 2 which runs: "But they raised Tiruvarangam paddy, which could be raised by rain water alone and * * *." This paddy *cannot* be raised by rain water alone. This fact was found by both the lower courts (*vide* paragraph 3 of the report). It requires a moderately regular supply of water by irrigation to bring it to maturity (*vide* paragraph 12 of the report).

2. The effect of the judgment will be closely watched as desired by the Board. The plaintiffs in the case in question have applied on the strength of the judgment for a refund of all the water-tax ever levied on their land. This will be disposed of on its merits. If the High Court ruling merely applied to this particular case in which destruction of crop was pleaded, it would be of small moment. It is the general principle enunciated which causes concern.

Resolution—Mis. No. 6713, dated 4th November 1889.

The Board observe that High Court found in their judgment that the water was not applied for or used in view to profit. The crop according to the munsif could be planted, but

would not ripen and grow *well* without the aid of surplus water, and in the opinion of the High Court the water in this case did damage, not good. For this reason the Board considered that it was unnecessary at present to take action on the judgment.

(A true Copy and Extract.)

(Signed) HERBERT BRADLEY,
for Secretary.

To the Collector of Kistna.

Copy to Secretary to Government, Revenue Department.

Order—No. 932, Revenue, dated 18th November 1889.

Miscellaneous.

The Government agrees with the Board.

(True Extract.)

(Signed) J. GROSE,
Ag. Secretary to Government.

To the Commissioners of Land Revenue, with two enclosures.

Proceedings of the Board of Revenue (Land Revenue), No. 143, dated 5th May 1897.

Read—the following letter from E. B. POWELL, Esq., Government Pleader, Madras, to the Secretary to the Commissioners of Land Revenue, dated 25th January 1897, No. 100 :—

With reference to the question asked in paragraph 4 of the Board's Proceedings, Mis. No. 237, of the 20th instant, I have the honour to report that I did suggest a reference to a Full Bench in view of the important and far reaching results of the construction put upon the words used in section 1 of Act VII of 1865. The learned Judges altogether refused to refer the matter to a Full Bench and suggested that the shortest way of remedying any evils arising from the present language used in the Act would be by amending it. Moreover, a majority of the Judges have taken the same view and it would be quite useless to ask the Judges to re-consider a question on which they have expressed such a decided opinion.

2. The plea of limitation was not urged at the hearing, because I was satisfied it was hopeless to argue it. It is found as a fact by both Courts that the payment was made under protest and Article 16 of Schedule II of the Limitation Act would therefore clearly apply. In second appeals the Court would not allow such a finding to be questioned.

Read—also the following G.O., Mis. No. 1093, Revenue, dated 24th February 1897 :—

Read—the following Proceedings of the Board of Revenue (Land Revenue), Mis. No. 237 dated 20th January 1897. On more than one occasion the Board has refused to pay

Read—the following letter from E. B. POWELL, Esq., Government Pleader, Madras, to the Secretary to the Commissioners of Land Revenue, dated 9th January 1897, No. 30 :—

In continuation of my letter, No. 993, dated the 16th November last, I have the honour to forward herewith copies of the decree and judgment in Second Appeals Nos. 973 to 977 of 1895 on the file of the High Court, and to request that you will be so good as to obtain the Board's sanction for the payment of Rs. 11-8-10 (eleven rupees eight annas and ten pies) being my fee for opposing the same.

ENCLOSURE.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Thursday, the 12th day of November 1896.

PRESENT :

The Honourable Mr. Justice SUBRAMANIA AIYAR, C.I.E.,

and

The Honourable Mr. Justice BODDAM.

Second Appeals Nos. 973 to 977 of 1895.

Modali Sitharama Sastri	...	Appellant in S.A. No. 973 (Plaintiff.)
Kuruganti Venkateswarulu	...	" in " " 974 (")
Dhara Subbaramayya	...	" in " " 975 (")
Kuruganti Suriyanarayana	...	" in " " 976 (")
Dhara Suriyanarayana	...	" in " " 977 (")
The Secretary of State for India in Council by the Collector of the Kistna District	...	Respondent in all cases (Defendant.)

Second appeals against the decrees of the District Court of Kistna, in appeal suits Nos. 250, 249, 251, 252 and 253 of 1894, reversing the decrees of the Court of the District Munsif of Guntur in O.S. Nos. 110, 109, 112, 126 and 127 of 1893, respectively.

These second appeals coming on for hearing, the Court delivered the following:—

Judgment in S.A. No. 973 of 1895.

We think there was no "supply" by Government "or user" by the ryot within the meaning of Act VII of 1865. As pointed out by Shephard, J., in Indian Law Reports, 19, Madras 24, the mere fact that the plaintiff derives a benefit from the water does not render him liable if he had no option in the matter. The facts found in this case show that the plaintiff had no option and the finding of the District Court that they may have derived some benefit from the water is not sufficient to justify the judgment in favour of the defendant.

We allow the appeal, reverse the decree of the District Court and restore that of the District Munsif with costs in this and the Lower Appellate Court. Second Appeals Nos. 974 to 977 of 1895 follow.

(By the Court.)

(Signed) J. T. GILLESPIE,
Ag. Deputy Registrar, Appellate Side.

Resolution—Mis. No. 237, dated 20th January 1897.

Communicated to the Collector of Kistna in continuation of Board's Proceedings, Mis. No. 5229, dated 21st November 1896.

2. The payment of a fee of Rs. 11-8-10 to the Government Pleader is sanctioned.

3. A copy of the judgment will be submitted for the information of Government, with reference to the correspondence ending with G.O., Mis. No. 1446, Revenue, dated 9th April 1896. It will be seen that the High Court consisting of the Hon'ble Mr. Justice Subramania Aiyar, C.J.E., and the Hon'ble Mr. Justice Boddam have followed Mr. Justice Shephard's dictum in I.L.R., 19, Madras 24, and definitely ruled that in cases where a ryot has no option in the matter of excluding Government water from his lands and grows a crop, dry or wet, thereon, there is no "supply" by Government or "user" by him within the meaning of Act VII of 1865 and that the mere fact that the ryot derives a benefit from the water involuntarily flowing on to his lands does not render him liable to water-tax.

4. The Government Pleader is requested to report whether any steps were taken at the time of hearing of the second appeals in question to have them referred to a Full Bench as he appears to have suggested in his letter No. 939, dated 25th September 1895 (submitted to Government in original with Board's Proceedings, Mis. No. 4950, dated 3rd October 1895), and whether there is any reasonable prospect of getting the ruling modified on review or otherwise. He is also requested to state whether the plea of limitation under section 59 of Act II of 1864 referred to in his letter, No. 912, dated 20th September 1895, was urged at the hearing.

(True Extract.)

(Signed) R. C. C. CARR,
Secretary.

To the Collector of Kistna,
with copy of the High Court's judgment.
" Secretary to Government, Revenue Department, with copy
of the High Court's judgment and the District Court's
judgment in original to be returned (paragraph 2).
" Collector of Górávari, with copy of High Court's judgment.
" Accountant-General.
" Government Pleader, with the judgment and decree to be returned.

Order—Mis. No. 1093, Revenue, dated 24th February 1897.

Recorded with the remark that the Government Pleader's report should be submitted for the information of Government.

(True Extract.)

(Signed) LIONEL DAVIDSON,
Under Secretary to Government.

To the Board of Revenue (Land Revenue),
with original enclosures returned.

Read—the following letter from J. N. ATKINSON, Esq., Collector of Kistna, to the Secretary to the Commissioners of Land Revenue, dated Masulipatam, 26th February 1897, No. 485:—

Referring to the judgment of the High Court in Second Appeals Nos. 973 to 977 of 1895, copy of which was communicated with Board's Proceedings, Mis. No. 237, dated 20th January 1897, I have the honour to enquire whether in view of that decision I must alter the practice that has hitherto obtained in this district in regard to charge for what is ordinarily called "involuntary flow." The Board is aware, I think, of what that practice is and the accompanying copy of a letter, dated 18th August 1896, addressed by me to the Sub-Collector will show the attitude which I had taken up in the matter.

2. The recent ruling of the High Court has changed the situation completely and may have very far reaching effects. When a field is watered, without any previous application by the ryot for irrigation, it is no longer a question for consideration, whether he hoped that his crop would be benefited by the water; nor whether he planted his crop with the intention of its being benefited; nor whether the crop actually benefited; apparently it is even immaterial that he acquiesced in the flow of water to his field, and that he aided and regulated it by construction of field bunds and channels for ingress and egress of water. The High Court has now laid down boldly that if the ryot has no option in the matter, he is not liable to pay water-rate. The Board is aware that not for one wet field in a hundred is there any option, and I can see no reason why nine-tenths or even ninety-nine hundredths of the ryots in the district should not at once relinquish irrigation, and hereafter, while continuing to cultivate wet crops, claim exemption from water-rate on the ground that they had no option but to let the water flow over their fields.

3. Had the matter been taken in time, I doubt if it would ever have proceeded so far. Charge for irrigation by involuntary flow has been practically confined to a few villages in Tenali, and one or two in Bandar taluk. In each case the lands are situated in low-lying tracts locally called "badavas" which, towards the end of August, begin to fill with mixed anicut and rain water, gradually getting deeper and deeper till the rains cease. The ryots cultivate Velvadam and other dry species of paddy, because they cannot get water at the commencement of the irrigation season. It is not that they prefer to cultivate "dry" paddy. On the contrary, many of them have assured me that they want to have their land converted to wet and that, if given a proper supply of irrigation, they would grow wet crops and pay the water-rate without a murmur. On more than one occasion I have communicated these requests to the Public Works Department officers, and asked them at least to extend an irrigation channel into these badavas. But the answer has always been the same disheartening declaration that, on account of insufficient allotments and establishments, the work cannot be carried out at present.

4. I am afraid the opportunity for remedying matters in this simple way has now passed; but still it would be worthwhile trying. I can indicate exactly to the Public Works Department the localities where "involuntary flow" irrigation has occurred in the past, and if they extend irrigation channels to these tracts, it may be that the ryots will be content to pay the charge for water. But if this remedy is to be tried, it should be undertaken at once in the working season now about to commence.

5. If these measures do not satisfy those who have hitherto been charged for involuntary flow or if any tendency become apparent on the part of owners of ordinary wet land to turn this new High Court ruling to account, it seems to me that the only course open to Government is to legislate.

ENCLOSURE.—Letter to the Sub-Collector.

Resolution—No. 143, dated 5th May 1897.

The Government Pleader's letter first read above will be submitted to Government with reference to its order Mis. 1093 of 24th February 1897.

2. As already observed in paragraph 2 of the Board's Proceedings disposed of in G.O., No. 1198, dated 2nd March 1897, the Government Pleader states that the High Court's present ruling on the subject of the non-liability to water rate of lands irrigated by the involuntary flow of water cannot be modified on review or otherwise, and that his attempts to have the matter referred to a Full Bench have also proved fruitless. He adds that the learned Judges of the High Court suggested that the shortest way of remedying any evils arising from the present interpretation of the law would be to amend the law itself.

3. The Board will now proceed to give briefly the circumstances which led up to the present litigation, and will then suggest the remedies to be adopted for obviating the effect of the present ruling. The papers now dealt with refer to the Kistna and Górávari deltas, but the question of the power to levy water-cess is one of general applicability.

4. (a) At the time of the original settlement of the Gódávāri and Kistna districts, the assessment of ryotwari lands of all kinds was determined independently of irrigation, which was to be separately charged for by a uniform water-rate. If a ryot made an application for water which was granted, his field was registered as wet, and remained as such until he filed a relinquishment of the water. When water was so relinquished, the land was again entered in the accounts as dry and water-rate was levied only if the ryot used Government water.

(b) In fasli 1294 (1884-85) the holders of certain dry inam lands in the Kistna district grew a kind of wet paddy (called "Tiruvarangam") which was sown broadcast and irrigated by means of the surplus water of the wet fields above. According to the practice of the district they were charged Rs. 2 per acre or half the full rate of water-tax, owing to the uncertain character of the irrigation. They thereupon filed a suit for the refund of the water-tax alleging that they had neither applied for nor voluntarily used the drainage water, which flowed into their lands from the fields higher up, and they pleaded that the water had been supplied against their will and that the crops grown on the lands had also been damaged by the overflow. The District Munsif found that the paddy crop grown on the lands could not come to maturity by rain water alone, but nevertheless decreed in favour of the plaintiffs, holding that they had not voluntarily used the drainage water, and that they had sustained loss by the involuntary flow. In reversing the above decision on appeal, the District Judge, Mr. Mackenzie, observed that on a proper construction of Act VII of 1865 the plaintiffs must be taken to have either been supplied with or used Government water, and that Government had the right to levy water-rate, whether the water used came to the plaintiffs' fields against their will or on their application. A second appeal was thereupon preferred to the High Court, which reversed the District Court's judgment, and restored that of the District Munsif. The Honourable the Judges observed that the preamble and section 1 of the Act, read together, disclosed only an intention that those who obtained a supply from Government irrigation works on application or who used the water thereof in view to deriving increased profit, should be liable to pay the water-cess, that the use contemplated by the Act must be a voluntary use whether preceded by an application or not, and that the law pre-supposed a freedom either to take or to refuse the water.

(c) Mr. Arundel, who was at that time the Collector of Kistna, pointed out that the ordinary method of irrigation in Kistna was to take the water from field to field in a system of terraces, and the High Court's judgment, which allowed a free option to ryots in the matter of use of Government water, was likely to entail considerable loss of revenue to Government; for the ryots had merely to file statements declining to have water any more, and then, if the uppermost field of a terraced series was irrigated on the application of the owner thereof, the owners of all the fields below would, under the new ruling, receive their supply of water free of charge, because they could have no option of refusing it. Mr. Arundel suggested that either an appeal might be preferred to the Privy Council, or a reconsideration of the judgment obtained in a fresh case by getting the question referred to a Full Bench of the High Court. As an alternative course he proposed that the wording of Act VII of 1865 might be altered by an amending Act. The Board, however, thought that as in the particular case then in question the ryots had neither applied for nor used the water in view to profit, it was unnecessary to take any action on the judgment; but, at the same time, it requested Mr. Arundel to watch the effect of the ruling and to take into the Civil Courts cases in which ryots, who had really been benefited by the involuntary flow of water on to their lands, contested the legality of the charge. The papers were submitted to the Government who agreed with the Board (G.O., No. 932, dated 18th November 1889).

(d) In later suits of the same nature, filed in 1892, the District Munsif decided in favour of the plaintiffs, but the District Judge found on appeal that, owing to the deficiency of rainfall in fasli 1300, the water which had flowed to the plaintiffs' fields did in fact save the crops. But on second appeal, the High Court remanded the cases to the Lower Courts for the submission of a clear finding on the question whether there had been a voluntary use of the water, such as would justify the levy of water-rate. Shephard, J., remarked that according to the decision referred to in clause (b) above, the question to be considered in such cases was, not whether in the result the plaintiffs derived benefit from the Government water, but under what circumstances they came to use it; and added that if they had no choice in the matter they could not be said to have used the water. A copy of this remand order was submitted by the Board for the information of Government. The learned Judge's observations in the case appeared to Government* to show the necessity

* G.O., Mis. No. 4358, Revenue, dated 2nd November 1895. for legislation in the matter. Government, however, awaited the final decision of the High Court in the case and in the meantime called for information from the Collectors of Gódávāri and Kistna as to the amount of revenue at stake.

(e) With reference to the above remand order the District Judge found that the plaintiffs had not derived increased profits from the use of the water and that the use could not therefore be said to have been voluntary. The High Court accordingly allowed the appeals and reversed the District Judge's decree. On receipt of a copy of the judgment, Government

observed that the High Court had not adopted the Hon'ble Mr. Shephard's view that it made no difference whether the ryot profited by the water or not and considered that legislation was not called for (*vide* G.O., Mis. No. 1446, dated 9th April 1896).

(f) In the case which forms the subject of the present reference, the District Judge upheld the levy of water-tax by Government, as he found that the plaintiff was likely to have benefited by the Government water which flowed over his land; but the High Court held that there was no supply by Government or use by the ryot within the meaning of Act VII of 1865 and that the mere fact that the plaintiff derived a benefit from the water, did not render him liable to water-rate, if he had had no option in the matter of excluding the water from his lands.

5. As it has now been finally decided that Government cannot levy water-rate under Act VII of 1865 on lands irrigated by involuntary flow of water, the question arises how the loss of revenue, which must be the logical result of this ruling, can best be avoided. One of the courses open to Government is to replace the existing system of levying a separate charge for water by the imposition of a consolidated wet assessment on all irrigated lands as in other districts. A suggestion to the above effect was made by the Collector of Gódávāri in his letter recorded in G.O., Mis. No. 1446, dated 9th April 1896. He observed that the question of legislating in the matter might lie over "until the principles on which the district is to be resettled have been finally determined." In its Proceedings, No. 43, Revenue Settlement, dated 12th March 1896, submitting proposals for the resettlement of that district, the Board has recommended that the system of levying a consolidated wet assessment might be introduced in the case (a) of all lands from which, owing to their low level, Government water cannot be excluded and which are therefore unfit for dry cultivation, and (b) of all lands which have for five years been continuously under wet cultivation. The Government had previously approved of the proposal to levy a consolidated wet assessment in respect of lands falling under class (a), but orders have not yet been received upon the whole scheme. If the above change in the method of calculating the Government assessment be approved and extended to the delta taluks of the Kistna district also, the difficulty caused by the operation of the High Court's recent ruling will disappear in respect of the vast majority of Government ryotwari lands in the deltas; for, when consolidated wet rates are introduced, the Water cess Act VII of 1865 will cease to be applicable and the Civil Court's jurisdiction to adjudicate on questions relating to the rates of assessment will be ousted under section 58 of Act II of 1864. Inconvenience will, however, continue to be caused in the case of lands registered as dry and of inam and zemindari lands, not only in Gódávāri and Kistna, but also in all other districts, and this can be remedied only by resort to legislation.

6. As pointed out by Mr. Arundel in paragraphs 15 to 21 of his letter printed in G.O., No. 932, dated 18th November 1889, legislation in the direction of authorizing the levy of water-rate in cases of actual use of Government water, whether voluntarily or otherwise, will only be in consonance with the rules which obtained in the Gódávāri and Kistna deltas before the passing of Act VII of 1865 and with the concessions allowed under the orders of the Government of India and the Secretary of State after that Act had come into force.

7. On the question of legislation, Mr. Arundel thought it sufficient to insert a clause "whether with or without the consent of the proprietor or tenant" between the words "whenever" and "water" occurring in section 1 of the Act and to adopt the following as the preamble to the amending Act:—

"Whereas it is necessary to prevent a fraudulent use of the option that has been allowed by Government in the rules under Act VII of 1865 to take or refuse water for irrigation, it is hereby enacted as follows."

The Board considers that this slight amendment would not suffice for the purpose contemplated. In the first place, the latter part of the preamble requires to be modified by the amendment of the words "fit return" and "increased profits" occurring therein; for the Gódávāri District Association urged it as one of the objections to the recent enhancement of the water-rate that the Government had more than recouped its outlay on the ancient works. Though the preamble to a legislative enactment cannot restrict the scope of the enacting words, it seems desirable to amend the words above referred to in view to avoid causing any possible misapprehension.

Secondly, the initial clause of section 1 should be amplified so as to authorize the levy of water-rate in cases of irrigation by overflow from channels or from lands higher up; and it should also be made clear that water-rate may be charged in cases of actual use of water, whether voluntarily or otherwise, and irrespective of any benefit derived therefrom.

Thirdly, the clause "additional to any land assessment that may be leviable on the said land as unirrigated or punjah," which occurs in the same section, is misleading, and should either be struck out or suitably amended; for doubts arise as to (1) whether the Act permits the levy of a charge for second crop on single crop wet inam and zemindari lands irrigated

from Government sources, and (2) whether water-rate is leviable for the irrigation of zemindari and inam lands from a Government source when such lands are entered in the proprietors' accounts as "wet," but as depending upon other sources not interfered with by Government works and are not included in the mamul wet area for which Government is bound to supply irrigation free of separate charge (*vide* proviso to section 4 of the Act).

8. The Board takes this opportunity to submit, for the consideration of Government, a few other suggestions which occur to it in connection with the revision of the Act —

(i) The Act (section 1) provides for the levy of water-rate only when water is supplied or used for purposes of irrigation. In cases where water is supplied or used for other purposes, e.g., for indigo vats, the charge to be made by Government has to be arranged by mutual agreement (Board's Proceedings, No. 383, Settlement, dated 27th November 1895). The section should be amplified to provide for the levy of water-rate in such cases also.

(ii) Under G.Os., No. 205, dated 9th March 1888, and No. 513, dated 19th June 1889, water-rate is levied on lands irrigated in ryotwari villages by intercepting and storing surface drainage water in such a way as to cut off, or tend to cut off, the supply to a Government source, or by using water obtained by percolation from a Government irrigation work when the supply thus derived is constant and full. The cess is also imposed in cases in which lands in ryotwari villages are irrigated from natural streams, which are not precarious in their nature, but afford a full supply for regular irrigation (Board's Proceedings, No. 952, dated 15th November 1888). The Board considers that an express provision should be embodied in the Act legalizing the levy of water-rate in such cases; for though the general right of the Crown to take a share of the produce in the shape of wet assessment cannot be questioned by Civil Courts, they have jurisdiction to adjudicate on the right of Government to levy a separate cess in the professed exercise of the power conferred by a special enactment (VII of 1865)—*vide* the penultimate paragraph of the High Court's judgment printed in Indian Law Reports, 12, Madras, page 407.

(iii) Further difficulties arise in a case where there are several irrigation works forming a common source of supply to both Government and proprietary lands, and where these works are improved either at the sole cost of Government or at the joint cost of both Government and the proprietor concerned. In the former case Government has obviously a right to levy water-rate on all lands not classed as wet. In cases falling within the latter class, if the proprietor utilizes a larger supply than the proportion he is entitled to, i.e., enlarges the wet cultivation in his estate to a greater extent than in the Government tracts benefited by the work, the Government is, according to the opinion of a former Government Pleader, entitled to charge water-rate on the excess area so irrigated. The Government Pleader observed that to justify the imposition of water-tax, it is unnecessary that the Government should be the sole owners of the river or work of irrigation from which water is taken, and that it is sufficient that the water which has been supplied or used was what the Government was entitled to draw from such sources and which therefore could not have been taken by such persons without the permission of Government (*vide* paragraphs 6 to 8 of the letter printed at page 10 of Board's Proceedings, No. 719, dated 29th December 1893). The Board considers that the Act may be amended so as to clearly confer a right to charge water-tax in such cases also.

(iv) The second section provides that arrears of water-cess may be realized in the same manner as arrears of land revenue. Clear provisions may be introduced on the following points relating to the realization of water-rate payable to Government direct by the tenants of zemindari and whole inam villages, viz. :—

(a) Whether the tenant is a landholder within the meaning of section 1 of the Revenue Recovery Act II of 1864; and

(b) Whether his interest in the lands irrigated and in the other immoveable property owned by him can be proceeded against for the recovery of arrears of water-rate—*vide* G.O., No. 757, dated 28th December 1896.

9. In his letter of the 26th February 1897, No. 485, read above, the Collector of Kistna suggests that, in view to avoid the impending loss of revenue from water-rate, the Public Works officers may be instructed to extend the Kistna irrigation channels to the low-lying tracts, in which irrigation by involuntary flow has occurred in the past, and adds that if this remedy is to be tried, it should be undertaken in the working season now about to commence. The Board requests that the necessary instructions may be issued to the Public Works Department for putting in hand the proposed extensions at an early date.

10. In certain letters which have been separately disposed of, the Collector of Kistna has recently reported that the District Judge has confirmed certain decisions of the District Munsif of Bapatla, disallowing the right of Government to charge water-rate for irrigation by involuntary flow, and that, in view of the recent decision of the High Court, there is no use in

preferring second appeals. There can be no doubt that, as the law has now been interpreted, the orders passed by the District Judge are correct, and the Board has therefore accepted the Collector's conclusion and has informed him accordingly.

(True Copy and Extract.)

(Signed) R. C. C. CARR,
Secretary.

To the Secretary to Government, Revenue Department,
with copies of Board's Proceedings, No. 952, dated
15th November 1888, and No. 719, dated 29th December
1893, and with the enclosure to the Collector's letter, No. 485,
dated 26th February 1897, in original (to be returned).
„ the Collector of Kistna, with judgment and decrees returned.
„ the Collector of Gódvári.
Copy to the Settlement Department.

148

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Muthusawmi Ayyar.

VENKATAPPAYA AND OTHERS (PLAINTIFFS) APPELLANTS,
versus

THE COLLECTOR OF KISTNA (DEFENDANT No. 2) RESPONDENT.*

Act VII of 1865 (Madras) section 1—water-cess—Overflow from Government Works—Water supplied or used for purposes of irrigation.

Surplus water from Government irrigation works flowed on to land of the plaintiffs which they were in the habit of cultivating with dry crops and stagnated there rendering such cultivation impossible. The plaintiffs did not want the water to flow on to their land, but being unable to exclude it, planted paddy as the best crop to cultivate under the above circumstances. Water-cess was levied on the plaintiffs under color of Act VII of 1865 :

Held, the water was not supplied or used for purposes of irrigation within the meaning of Act VII of 1865, section 1, and the plaintiffs were not liable to pay the water-cess.

SECOND APPEAL against the decree of G. T. Mackenzie, Acting District Judge of Kistna in Appeal Suit No. 292 of 1886, reversing the decree of M. B. Sundara Rau, District Munsif of Bapatla, in Original Suit No. 50 of 1886.

Suit to declare that the plaintiffs were not liable to pay a water-cess, and to recover a sum of money paid by them as water-cess under protest. The circumstances giving rise to this suit appear sufficiently for the purpose of this report from the following judgment.

The District Munsif passed a decree for the amount sued for and declared that "so long as the drainage water of its own accord inundates and stands on the plaintiffs' land without any action on plaintiffs' part to bring it on to it, they are not liable to be assessed with water-tax."

The District Judge reversed the decree of the District Munsif holding it to be immaterial, "that an individual may be unwilling to take water and that the water comes to his field against his wish, and that Government have a legal right to levy wet rates upon every fields the water reaches."

The plaintiffs preferred this second appeal.

Subba Rau for Appellants.

The Acting Government Pleader (Subbramanya Ayyar) for Respondent.

The arguments adduced on this second appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Muttusawmi Ayyar, J.).

Judgment.—The appellants hold land at Zupudi in the Bapatla taluk of the Kistna district and it was formerly cultivated with dry crops. Lately, the villages lying above Zupudi were irrigated from the Kistna canal, and the excess water flowing from them submerged the appellants' land and stagnating upon it, rendered it impossible to raise dry crops. The appellants could not prevent the water from flowing to their land except by erecting a dam at a heavy cost and they did not do so. In fasli 1294 they sowed a species of paddy, called tiruvarangam paddy, and thereby attempted to raise a crop which might not perish from the land being inundated with excess water in the months of October and November. According to the evidence the crop failed that year and yielded no profits owing to the inundation. The Collector levied water-cess at Rs. 2 per acre under (Madras) Act VII of 1865, and the appellants paid it under protest and brought the present suit to obtain its refund. The contention for the respondent was that tiruvarangam being a wet crop, the water-tax of Rs. 2 per acre was imposed on the land in accordance with rule and the practice of the district. It was alleged for the Collector that the excess water flowed on to appellants' land, stagnated upon it, that no wet crop could be raised upon it solely with the aid of rain water, and that the appellants cultivated tiruvarangam crop in the expectation that excess water would flow on to their land, and utilized the excess water when it did flow as anticipated. But the appellants denied their intention to depend on drainage water, and the District Munsif found that, although the crop might be planted without the aid of the surplus water, it could not ripen and grow well without such aid. He observed, however, that in fasli 1294, the appellants sustained loss rather than derived any benefit. On appeal, the Judge concurred in the finding that the rice crop could not have been raised on the land in question by rain water alone. The District Munsif considered that the appellants were not liable for water-cess, but the Judge held that no option was given to cultivators under the Act; that the water was either supplied or used; that Madras Act VII of 1865 only declared the existing revenue practice, and that they were liable for water-cess whenever water was supplied or used. On this ground he was of opinion that it was immaterial, that the appellants were unwilling to take the water, and that it came on to their land against their wish, and that the Government had a right to levy wet-rates

* Second appeal No. 1148 of 1888.

1889.
March 5,
April 29.

upon every field the water reached, and he dismissed the suit with costs. It is urged in second appeal (1) that no water-cess could be lawfully levied under Madras Act VII of 1865, (2) that water was neither supplied nor used voluntarily, (3) that in the circumstances of this case, the levy of water-cess was not in accordance with revenue practice or custom, and (4) that it was competent to the Civil Courts to take cognizance of the suit.

The water-cess in question was levied under Madras Act VII of 1865, and it is therefore competent to the Civil Courts to see whether it was levied in accordance with the provisions of that Act. It is provided by section 1 that "whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank, &c., or work belonging to, or constructed by, Government, it shall be lawful for the Government to levy at pleasure on the land so irrigated a separate cess for the use of the water, which cess shall be additional to any land assessment that may be leviable on the said land as unirrigated or punjah; and the Government may prescribe the rules under which and the rates at which, such water-cess as aforesaid shall be levied, and alter or amend the same from time to time."

The point for decision is whether water was, upon the facts found in this case, either supplied or used within the meaning of the section. The appellants did not apply for the water, and it was not allowed to flow to their land by reason of such application, and we cannot therefore say that water was supplied, inasmuch as the expression implies in its ordinary sense a previous request express or implied. Was it then used? The term ordinarily presupposes freedom either to use or to abstain from using the water, and the language of the section does not suggest an intention to exclude this freedom. The preamble states that large expenditure has been, and is still being, incurred, in the construction and improvement of works of irrigation and drainage to the great advantage of proprietors and tenants of land, and that it is right and proper that a fit return should, in all cases alike, be made to Government on account of the increased profits derivable from lands irrigated by such works. It discloses only an intention that those who obtain a supply or use the water in view to deriving increased profits should be under an obligation to pay the water-cess. Can it be said when the Government, or one or more of its tenants to whom water is supplied for profit, inundates a raiyat's dry land against his will for about two months every year, and thereby renders it unfit for dry cultivation, and when the raiyat in endeavouring to use his land sows tiruvarangam paddy trusting to the precarious chance of raising a crop which may grow in spite of the inundation, and when that crop fails, that he uses the water in view to profit by it? If he uses it, he uses it as the only mode of repairing the injury to his land and averting the loss likely to arise from it, and we cannot say that he uses the water within the meaning of the Act, if regard is to be had to the rule that the construction we are bound to place upon statutes must be reasonable. It is urged by the Government Pleader that the appellants may recover compensation for the injury done to their land from the party who is answerable for it, and that they must be taken to use the water within the meaning of the Act; though their land is flooded against their will and though tiruvarangam paddy was sown because there was a chance of its yielding a crop notwithstanding the inundation. We are unable to accede to this contention. If it were to prevail, the Government might be enabled to take advantage of their own wrong if they were under an obligation to protect the appellants' land against its being periodically flooded with the water which they bring in the canal. If holders of lands above Zupudi are the cause of the injury and are liable for the loss arising therefrom, even then the Government would be in the position of a landlord who supplies water to his tenant for their mutual profit with the knowledge that the tenant usually allows it to inundate the land of another tenant and to stagnate thereon so as to become a nuisance and without arranging for the abatement of the nuisance or providing against its recurrence. In either view of the case, we must decline to accept the suggestion. The reasonable construction is that the use contemplated by the Act is a voluntary use, though not preceded by an application, and that it presupposes a freedom either to take or refuse the water. We are aware of no usage whereby a raiyat's land can be held to be lawfully inundated every year. We are unable to concur in the opinion of the Judge that the appellant used the canal water within the meaning of Madras Act VII of 1865.

It is then urged that the Collector was at liberty to claim wet assessment on the ground that a wet crop was raised, that a wet assessment was due by virtue of the right of the ground to a share of the produce, and that any assessment imposed or levied in the exercise of the prerogative of the Crown is not open to be revised by a Court of Justice. But it is not denied that the water-cess was levied under the color of the Act in the case before us, and it is not therefore a case in which either a share of the wet crop has been claimed or a wet assessment has been demanded as an equivalent by virtue of the prerogative of the Crown. When a special cess is demanded in the professed exercise of a special power conferred by a legislative enactment and when that enactment directs when and how it is to be collected, Courts of Justice are bound to see that the power is exercised in accordance with the provisions of the Act, unless their jurisdiction is expressly or by necessary implication taken away by the Act.

We set aside the decision of the Judge and restore that of the District Munsif with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Best.

KRISHNAYYA (PLAINTIFF), APPELLANT,

versus

SECRETARY OF STATE FOR INDIA (DEFENDANT) RESPONDENT.*

Irrigation Cess Act (Madras)—Act VII of 1865—Lands irrigated under Kistna anicut—Water-cess—Optional or compulsory use of water.

A raiyat occupying land in the Kistna delta made no application for the supply of water, but water from the irrigation channels flowed from time to time on to his land from irrigated lands of a higher level, and he had no option as to whether to accept or refuse the supply. No increased benefit was derived from the water by the raiyat. A sum having been levied from him on account of water-cess, he now sued to recover the amount:

Held, that the plaintiff was entitled to recover.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 452 of 1893 reversing the decree of B. Veerasami Ayya, District Munsif of Guntur, in original suit No. 232 of 1892.

The plaintiff was a ryot occupying land in the Kistna delta, and the plaint alleged that in fasli 1300 he raised on his land a crop of *mosadam* paddy and that the crop was damaged by water which flowed on to it from fields on a higher level which were irrigated under the Kistna anicut, and that he was assessed to pay and paid under protest a certain sum on account of water-cess, which sum he now sought to recover. It was pleaded that the suit was barred by Revenue Recovery Act, II of 1864 (Madras), section 59, and that the imposition of a water-cess was rightly made, since the crop of *mosadam* paddy was a wet crop and as such benefited by irrigation, although in a favourable season it is possible to cultivate it with rain water alone.

The District Munsif held that *mosadam* paddy was a crop not merely depending on rain, but needing occasional irrigation, not inundation, and that the plaintiff was neither a loser nor a gainer by the water flowing on to his land, and that even if he were a gainer thereby he would not for that reason alone have become liable for the water-cess. On these findings he passed a decree for the plaintiff as prayed.

The District Judge, on appeal stated the circumstances out of which the claim arose as follows:—

"The river Kistna passes through the hills at Bezwada and then becomes a delta river. It flows on a level higher than the surrounding country, which slopes away from each bank of the river and down to the sea with an even slope of about one foot per mile. More than thirty years ago Government threw across the river at Bezwada a great transverse dam, called the anicut, and thus provided a constant head of water to irrigate the delta. This water was conveyed from each end of the anicut into the delta by the old channels of former flood action or by new channels excavated for the purpose. The system of channels to supply the whole delta is not yet completed, and it is a mistake to think that there is a separate channel to each ryot's holding as there is a water pipe to each house in a city. The system is much more rough and ready. The water is let off from the channels into the fields nearest the sluices, and from these fields it flows down to other fields. It flows from terrace to terrace of rice fields, or it is led along by small distributary channels kept up by the raiyats themselves or it flows down any natural slope to a lower village with its fields, until finally it passes to the Koleru lake, the Romperu swamp or the sea. The ideal system would be to have a channel and a sluice at each man's holding, with a hydrometer to measure the amount of water issued to him, but the existing system is simply that the water is put into the delta and left to flow down to the fields that require it.

"In 1865 the Secretary of State desired to have separate returns of the receipts from the Kistna and Gódvári anicuts, and to enable Government to obtain these returns, Madras Act VII of 1865 was passed. The land in the Kistna delta was classed as dry land and a charge per acre was made for the water from the anicut channel supplied or used. I imagine that Government in passing this Act looked on it as making nominal change in the land revenue accounts and had no idea that the Act would affect the rights of the cultivators. I believe that in those days no officer in the Madras Presidency thought that a ryot could refuse to take the water when it was supplied.

"In 1885 a ryot in Zupudi of Bapatla taluk was compelled to pay water-rate on land upon which he had attempted to raise a crop of paddy when the excess water from the higher villages flowed down upon it. I expressed the view that the ryot had no legal option to

refuse the water and must pay, but this view was emphatically set aside by the High Court. The case is reported as *Venkatappayya v. the Collector of Kistna*(1). This decision caused a sensation in the district.

"In the present suit the plaintiff has lands on a low level and the excess water from the higher villages flowed upon his lands. He had cultivated the land with *mosadam* paddy. The evidence shows that this paddy can be cultivated with an abundant rainfall, but that if the rain be not sufficient to make water stand on the field, the paddy must be irrigated. The evidence also shows that the rainfall that year was deficient, and the plaintiff by the help of this excess water which flowed to his land, did reap a crop. Plaintiff and his witnesses say that the water was a yard deep and damaged the crop, but I suspect that to be an exaggeration. Plaintiff made no application for water. Upon these facts the question before me is whether the Collector can demand water-rate."

In the result the District Judge reversed the decree of the District Munsif and dismissed the plaintiff's suit.

Pattabhirama Aiyar and Venkatarama Sarma for appellant.

The Government Pleader (Mr. E. B. Powell) for respondent.

SHEPARD, J.—It seems to me desirable before we decide this appeal, which raises an important question, that we should have before us more distinct findings on the facts. It appears from the District Munsif's judgments that several questions of facts were raised before him and the District Munsif records his opinion upon them. In the judgment of the District Judge there is only one of the fourteen paragraphs of which it consists, which touches the particular facts of the case.

Without any discussion of the evidence, the District Judge finds that the rainfall was insufficient and that the water which flowed to plaintiff's field did in fact save the crop and produce a harvest, whereas the Munsif finds that the plaintiff was neither a gainer nor a loser by the water. In my opinion, however, the circumstance that the plaintiff was in fact a gainer is not sufficient to justify the dismissal of the suit, or to distinguish the case from *Venkatappayya v. the Collector of Kistna*(1). The facts of that case are not very clearly stated in the report. Apparently the plaintiff there, was, by reason of the submersion of his lands, driven to growing *tiruvarangam* paddy, a crop requiring irrigation. The crop failed, but it is not said that it failed in consequence of the excess water. The *ratio decidendi* appears to be that the plaintiff was practically compelled to use the water in order to obtain any crop. According to this decision, the question is not whether in the result the plaintiff derives benefit from the water, but under what circumstances he came to use it. If he had no choice in the matter, then, as I understand the decision, he cannot be said to have used the water within the meaning of the Act. I think the District Judge should be asked to return a finding on the question whether the plaintiff used the water for purposes of irrigation within the meaning of the Act.

BEST, J.—The finding of the Judge is that *mosadam* paddy—a crop of which was raised and reaped by the plaintiff—though it can be cultivated with an abundant rainfall, must be irrigated if the rain be not sufficient to make water stand on the field; that in the year in question the rainfall was deficient and that it was by the help of the water that flowed to his land that plaintiff reaped a crop. The case is therefore distinguishable from *Venkatappayya v. the Collector of Kistna*(1), where there was a failure of the paddy crop which the ryot endeavoured to raise, to avert, if possible, the loss that would otherwise be incurred by reason of the land being rendered unfit for dry cultivation. The learned Judges who decided that case are careful to limit their decision to the "facts found in the case" and upon those facts they held—and rightly so—that to compel the then plaintiff to pay the cess would be to violate the rule that requires the construction to be placed on statutes to be reasonable, for it is clear from the preamble of Act VII of 1865 (Madras), that the cess is only payable on account of the "increased profits" derivable from lands irrigated by the works referred to therein. Stress is laid on behalf of appellant on the following passage in the judgment above referred to. "The appellants did not apply for the water and it was not allowed to flow to their land by reason of such application and we cannot therefore say that water was supplied inasmuch as the expression implies in its ordinary sense a previous request, express or implied." These last words are significant. It is not necessary that there should have been an actual request for the water, the request can be "implied." Immediately afterwards in considering the word "used" the learned Judges say "the term ordinarily presupposes freedom either to use or abstain from using the water and the language of the section does not suggest an intention to exclude this freedom," and further at p. 410 they say "the reasonable construction is that the use contemplated by the Act is a voluntary use though not preceded by an application". A previous request can be implied therefore if there has been a voluntary use of the water. I concur in remitting for trial the issue suggested by my learned colleague.

(1) I.L.R., 12 Mad., 407.

The District Judge is requested to submit his findings within one month from the date of receipt of this order, and seven days will be allowed for filing objections after the findings have been posted up in this Court.

In compliance with the above order, the District Judge F. H. Hamnett submitted the following findings:—

"The appellants had no choice but to use the surplus water or to run the risk of serious damage, if not the total loss of any dry crops they might attempt to raise on the lands. The use of the water was not, therefore, optional, inasmuch as the appellants had no freedom to either take or refuse the water.

"I now consider the question whether the appellants had the intention of deriving an increased profit by the use of the water.

"What should, in my opinion, be the real important question is whether the appellants derived any increased profits by the use of the water as compared with the profits they would ordinarily have got by raising dry crops. There is no clear evidence on this point, but it may be presumed that wet crops, if properly irrigated, yield a much larger return than dry crops, otherwise the ryots would not pay an extra tax of Rs. 4 an acre over the dry assessment for the use of Government water. This would be a legitimate inference to draw if water was obtained in the way it is usually supplied to wet fields. In the present case the tax imposed was eventually reduced to Rs. 2 an acre, and I gather from exhibit III that this tax must have been imposed on the ground that the crops raised were wet crops irrigated by drainage water of which the jamabandi officer (or his superior, the Collector) was satisfied, the supply was too precarious to allow of the cultivation of a regular wet crop. We start then with the fact that the supply is a precarious one. It is very doubtful whether wet crops raised with such a precarious supply would be more remunerative than good dry crops raised on the same land. The Revenue Inspector proves that the lands in these particular cases only yielded 2½ tooms an acre as compared with 15 tooms, the average yield of ordinary wet lands. The value of 2½ tooms would not be more than about Rs. 5 and this is not in excess of what the lands might have yielded if cultivated with dry crops, the assessment of the lands (as dry lands) being Rs. 2 an acre and the assessment being supposed to be about half the net yield of the lands. It is urged that fasli 1300 was a bad year and that the appellants would probably have got no dry crops at all. This might be so, but in June or July when the appellants planted their *mosadam* crops, it was too early for any one to predict whether the rains were going to fall or not. When they planted the crops, therefore, they could have had no intention of deriving an increased profit from the use of Government water, which they could not have realized from dry crops, assuming that dry crops were cultivable in spite of the flow of surplus water over the lands. I find therefore that there is no proof that the appellants derived any increased profit or intended to derive any increased profit as compared with the profit which their lands if capable of cultivation as dry lands would have yielded in an ordinary season and that, on this ground, and there was no use of the water for irrigation purposes within the meaning of the Act which presupposes that the tax is only paid for use of water which is intended to yield increased profits.

"I have also found above that the use of the water was not optional but compulsory."

These appeals coming on for final hearing, the court delivered the following judgment:—

Judgment.—It is now found that it was practically impossible for the plaintiff to divert the water and prevent it coming over his land and that no increased benefit was derived from the water.

The inference drawn by the Judge is that the use of the water was not voluntary. On these findings following the decision in *Venkatappayya v. the Collector of Kistna*(1) we must allow the appeal, reverse the decree of the District Judge and restore that of the District Munsif.

The appellant is entitled to costs throughout.

(1) I.L.R., 12 Mad., 407.

190

IN THE HIGH COURT OF JUDICATURE AT MADRAS,
THURSDAY, THE TWELFTH DAY OF NOVEMBER ONE THOUSAND EIGHT HUNDRED AND NINETY-SIX.

Present :

The Hon'ble Mr. Justice Subrahmania Aiyar, C.I.E.,

and

The Hon'ble Mr. Justice Boddam.

Second Appeals Nos. 973 to 977 of 1895.

Modali Sitarama Sastri ...	Appellant in Second Appeal No. 973 (<i>Plaintiff</i>).
Kuruganti Venkataswaralu ...	" " " 974 (").
Dhara Subbaramayya ...	" " " 975 (").
Kuruganti Suriyanarayana ...	" " " 976 (").
Dhara Suriyanarayana ...	" " " 977 (").

The Secretary of State for India in Council } Respondent in all cases (*Defendant*.)
by the Collector of the Kistna district.

Second appeals against the decrees of the District Court of Kistna in appeal suits Nos. 250, 249, 251, 252 and 253 of 1894, reversing the decrees of the Court of the District Munsif of Guntur in original suit Nos. 110, 109, 112, 126 and 127 of 1893, respectively.

These second appeals coming on for hearing, the Court delivered the following:—

Judgment in Second Appeal No. 973 of 1895.—We think there was no “supply” by Government “or user” by the ryot within the meaning of Act VII of 1865. As pointed out by Shephard, J., in I.L.R. 19, Madras 24, the mere fact that the plaintiff derives a benefit from the water does not render him liable if he had no option in the matter. The facts found in this case show that the plaintiff had no option and the finding of the District Court that they may have derived some benefit from the water is not sufficient to justify the judgment in favour of the defendant.

We allow the appeal, reverse the decree of the District Court, and restore that of the District Munsif with costs in this and the Lower Appellate court. Second appeals Nos. 974 to 977 of 1895 follow.

(By the Court.)

(Signed) J. T. GILLESPIE,
Ag. Dy. Registrar, Appellate Side.

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29/11

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189 ,

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ENCLOSURES TO C. No.

ORDER OF GOVERNMENT

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LETTER OF GOVERNMENT.

STATEMENT WITH DITTO.

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