

The application was saved from limitation by the provisions of Section 7, Limitation Act, if the applicant did not attain his majority more than three years before the application was made, which is apparently not denied. We set aside the Judge's order and restore that of the Court of First Instance with costs.

[121] APPELLATE CRIMINAL.

The 3rd August, 1881.

PRESENT:

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, AND MR. JUSTICE INNES.

In the matter of Alfred Lindsay (Petitioner).*

Right of way—Obstruction—Procedure under Section 532, Criminal Procedure Code.

Where a complaint was made to a Magistrate that an obstruction had been raised and existed on land reserved by Government and dedicated as a public road:

Held that an *ex parte* order, purporting to be made under Section 532 of the Code of Criminal Procedure, directing the party in possession not to retain possession of the land until he should obtain the decision of a competent Civil Court adjudging him to be entitled to exclusive possession, with a further direction to remove the obstruction, was bad in law.

THE facts and arguments in this case appear in the Judgment of the Court (TURNER, C.J., and INNES, J.), which was delivered by TURNER, C.J.

W. Morgan for the Petitioner.

The Acting Government Pleader (*Mr. Powell*) appeared in support of the order.

Judgment.—On the 7th July Mr. James O'Shaughnessy, the Local Fund Engineer of the Nilgiri District, made a complaint to the Joint Magistrate, Colonel Clementson, that a public road from the Chengal Estate to Coonoor had been obstructed by the petitioner, who was described as the agent and partner of Mr. Mullaly. Mr. O'Shaughnessy, who was examined on oath, deposed that the road was on Government reserve land; that it had originally been obstructed in February; that on the 14th June he had, with the permission of Mr. Lindsay, removed the obstruction, but that after the land had been used as a road for four or five days, Mr. Lindsay renewed the obstruction by erecting a wire-fence in two places, cutting a trench, and building a wall. Mr. O'Shaughnessy prayed that an order might be issued for the removal of the obstruction. In support of the application Captain Reade, the proprietor of an estate in the neighbourhood of the alleged road, [122] was examined and confirmed the statements of Mr. O'Shaughnessy. A letter from Mr. Lindsay was also filed in proof of his alleged consent to the removal of the obstruction. The letter was in the following terms: "In reference to our conversation to-day on the subject of disputed right of way towards Ibez Lodge and Chengal, I regret to say that I have no authority to enter into a negotiation in regard to it. All I can say is

* Petition 303 of 1881 against the order of Colonel Clementson, Joint Magistrate of Ootacamund, dated 7th July 1881.

that I shall offer no opposition to you or to your agents in removing the obstruction now existing on the road if you think it necessary or desirable to do so, pending the result of any legal or other proceedings Mr. Mullaly may think proper to institute regarding it here."

It cannot be said that Mr. Lindsay, who represents himself as the agent and not a partner with Mr. Mullaly, conveyed in this letter any consent to the removal of the obstruction. On the contrary, he disclaimed having any authority to enter into negotiations on the subject, and while intimating he would abstain from opposing the removal of the obstruction by the Engineer, intimated pretty plainly he regarded it as a proceeding from which Mr. Mullaly could, and probably would, seek a remedy.

On the evidence of O'Shaughnessy and Captain Reade, and on the production of the letter above quoted, the Joint Magistrate, without giving Mr. Lindsay any notice of the complaint, or affording him the opportunity to appear and oppose the application, issued an order in the following terms:—

"Under Section 532, C.C.P.

To ALFRED LINDSAY, Esquire,

"Ibex Lodge, near Coonoor.

"A dispute having arisen concerning the right of use as a public thoroughfare of certain land leading from Ibex Lodge to Coonoor, being also the public road and situate in Puttiah 18, Land Register No. 28, between those places and within my jurisdiction, the possession of which said land is claimed exclusively by one Alfred Lindsay, and it appearing to me on due inquiry that the said land has been open to the enjoyment of such use by the public, and that the said use has been ordinarily enjoyed within three months of the institution of the said enquiry:—

"I do order that possession of the said land be not retained by the said Alfred Lindsay, or by any one in his interest, to the exclusion of the enjoyment of the right of use aforesaid by the public until [123] he shall obtain the decree or order of a competent Court adjudging him to be entitled to exclusive possession. And as, by certain wire-fences, ditches, walls, erected and dug across the said road exclusive possession is at present retained by the said Alfred Lindsay, he, the said Alfred Lindsay, is hereby directed to remove the said obstructions before 12 o'clock noon, Tuesday next, the 12th July 1881."

Mr. Lindsay in his affidavit states the receipt of this order was the first intimation he received of the institution of proceedings against him. He has applied to this Court to quash the order as bad in law and passed without due inquiry. He asserts that the land is the property of Mr. Mullaly; that the public have no right of way over the land; and that no such right of way has been ordinarily exercised within three months preceding the date of the institution of the inquiry.

We are constrained to admit the validity of the objections taken to the proceedings and to the order of the Magistrate.

The complaint made to him should not have been dealt with under Section 532 of the Code of Criminal Procedure.

The complainant did not claim for the public merely a right of way over the land of Mr. Mullaly; he complained the land over which the road ran had been reserved by the Government and dedicated as a public road, and he asserted that the road had been obstructed.

If the Magistrate considered that on the facts stated there was ground for taking action, he should have proceeded under Section 521.

Section 532 authorizes the Magistrate to exercise the jurisdiction it confers only when the subject of the dispute is open to the use of the public. The Legislature, in conferring on the Magistracy power to intervene for the temporary settlement of disputed civil rights, is careful to direct the preservation of the *status quo* existing at the time proceedings are instituted. Having imposed on the exercise of jurisdiction the condition that the subject of the dispute is open, the Legislature, in declaring the order the Magistrate is competent to pass under this section, have refrained from empowering the issue of directions for the removal of an obstacle.

In the case before the Court, on the face of the complaint, it appeared that the subject was not open to the use of the public and the complaint prayed for the removal of the obstruction.

[124] The provisions of Section 532 were therefore inapplicable, and, if they had been applicable, so much of the order as directs the removal of an obstruction must have been set aside as *ultra vires*.

There is another substantial objection to the order arising from the procedure adopted by the Magistrate. If he had taken action under Section 521, he might have issued his order on *ex parte* evidence, or indeed on a mere report, but it would have been competent to the person to whom the order was directed to appear and show cause against it, and to have demanded the submission of the question of right to the decision of a jury. For proceedings under Section 532 a different procedure is described. Here the inquiry precedes the issue of the order, and the inquiry presumes not that one party only, but that both parties to the dispute will be afforded the opportunity of appearing and adducing evidence on all material matters.

No such inquiry was held by the Magistrate, and without it his order could not have been supported.

Holding that the circumstances did not exist to confer on the Magistrate jurisdiction under Section 532, that his order so far as it directed the removal of the obstruction was not warranted in the proceedings he adopted, and that it was passed without due inquiry, we declare it bad in law and set it aside.