case before us this legal fiction peculiar to English law cannot arise, for there is no question of any easement whatever. The street itself and the soil thereof is vested in the municipality in trust for the public, so that there is no question of a dominant or servient heritage. Both are united in the same person, *i.e.*, in the proprietor, and we are referred to no authority for holding that the public, any more than a private proprietor, is to be exempted from the consequences of its own laches. The principles laid down in *Mann* v. *Brodie*(1) seem entirely applicable. The question is not really one of a continuing wrong, but of a completed trespass. It is a contest between adjacent proprietors of whom one has, it is said, acquired by adverse possession some portion of the land of the other. If there had been any question of user, it would have been sufficient to say that there is no evidence of any user by the public as a highway of that portion of the property now covered by the pavement and pial. As laid down by Lord Blackburn in *Mann* v. *Brodie*(1) "the question in short is as to possession by the "public or against the public for a period of forty years, and not, as "in England, as to user by the public for such an undefined time, "and in such a manner and under such circumstances as to justify "the inference that an owner in fee had dedicated."

Holding therefore that the defendant has, by adverse possession for over twelve years, acquired a legal title, we must confirm the decree of the learned Judge and dismiss the appeal with costs.

Wilson & King attorneys for appellants.

Branson & Branson attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Subramania Ayyar.

KELU MULACHERI NAYAR AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

CHENDU AND OTHERS (DEFENDANTS), RESPONDENTS.*

1895. March 12. April 18.

Civil Procedure Code, ss. 562, 566—Order of remand when legal—Duty of Appellate Court when addition of parties and amendment of issues is necessary.

In a suit by mortgagees to redeem a prior mortgage, issues were framed and tried and disposed of in favour of the plaintiffs as to the questions whether the

(1) L.R., 10 App. cases, 387. * Appeal against Order No. 3 of 1894.

KELU MULACHERI NAYAR v. CHENDU.

plaintiffs' mortgage was valid, whether the mortgage sought to be redeemed had been discharged, and whether the suit was barred by limitation; the Court of First Appeal was of opinion that these questions had not been properly considered, and set aside the decree for the plaintiffs and directed that a fresh trial be held, certain fresh parties being brought on the record:

Held, (1) that the order of remand was illegal;

(2) that the Lower Appellate Court should have joined the persons necessary for the suit, and should have so altered or added to the issues as to raise all questions properly arising, and should have referred them for trial to the Court of First Instance.

APPEAL against the order of O. Chandu Menon, Subordinate Judge of South Canara, in appeal suit No. 50 of 1893, reversing the decree of J. Lobo, District Munsif of Kasaragod, in original suit No. 225 of 1892.

Suit for redemption. In 1874 the land in question was mortgaged by one Chendakelakara to the ancestor of defendants Nos. 1 and 2. In 1878 the land was again mortgaged to defendants Nos. 1 and 2 by Chendakelakara's brother. In 1889 the land was mortgaged for a term of sixty years to the plaintiffs Nos. 1 and 2 and the ancestor of plaintiff No. 3 by an instrument which provided that the mortgagees were to discharge the mortgage of 1874. The defendants Nos. 1 and 2 questioned the title of the plaintiffs' mortgagors, and pleaded that in March 1879 Chendakelakara, who was admittedly the head of the family, executed a further mortgage in their favour for Rs. 1,000, which included the prior mortgages and consequently that the present suit which was brought to redeem the mortgage of 1874 should be dismissed. The District Munsif passed a decree for the plaintiffs.

On appeal the Subordinate Judge held that the question of the validity and effect of the mortgage of 1879 had not been duly tried, nor the questions raised as to the title of plaintiffs' mortgagor and as to limitation, and in the result he said: "I set aside the decree "of the Lower Court and direct that the suit be restored to the "file and that the person or persons whom the defendants allege to "be the successors of Chendakelakara, and also the plaintiffs' mort-"gagors be made parties to the suit, and a fresh trial be held with "reference to the foregoing remarks and a decision *de novo* on the "merits of the case be passed."

The plaintiffs preferred this appeal under Civil Procedue Code, section 588, clause 28.

Madhava Rau for appellants.

Narayana Rau for respondents.

JUDGMENT.—As laid down in *Ramachandra Joishi* v. *Hazi Kassim*(1) the condition necessary to a remand under section 562 as the section now stands is the omission to determine the merits. This condition did not exist in the present case as the District Munsif had disposed of the case on the merits. The order of remand passed by the Subordinate Judge must, therefore, be held to be illegal. The case to which I was referred on behalf of the respondent is distinguishable from the present case, inasmuch as there the order of remand was passed by the High Court, which could not deal with the merits under section 565, the provisions whereof have to be read with those of sections 562 and 564. And these sections are under section 587 applicable to second appeals only as far as may be. There is thus in the matter in question no analogy between the position of the High Court hearing a second appeal and that of a Court hearing a first appeal (*Ganesh Bhikaji Juvekar* v. *Bhikaji Krishna Juvekar*(2). The next contention on behalf of the respondents was that, as the Subordinate Judge found it necessary to direct that certain persons who had not been impleaded in the Court of First Instance be joined as parties to the suit, the proper thing to do was to remand the case. There is, however, nothing in section 562 to warrant this contention. In the circumstances of the case, the proper course for the Subordinate Judge was to join the person whom he found necessary as parties to the suit, to alter or amend the issues already framed, or frame fresh issues so as to raise all questions properly arising in the suit as it stands after the addition of the said persons as parties, and refer them for trial to the District Munsif under section 566 (see the observations of the Judges in *Ganesh Bhikaji Juvekar* v. *Bhikaji Krishna Juvekar*(2).

The order of the Subordinate Judge should, therefore, be set aside. The appeal should be restored to the file and proceeded with according to law.

The costs of this appeal will be costs in the cause.

(1) I.L.R., 16 Mad., 207. (2) I.L.R., 10 Bom., 398.