## APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.*

1895. December 5, 18.

THE MUNICIPAL COMMISSIONERS FOR THE CITY OF MADRAS (PLAINTIFFS), APPELLANTS,

*v.*

SARANGAPANI MUDALIAR (DEFENDANT), RESPONDENT.*

*Limitation Act—Act XV of 1877, s. 23, sched. II, arts. 144 and 149—Encroachment on public highway—Once a highway always a highway—Suit by municipality to remove encroachment—Prescriptive right.*

The Municipality of Madras sued to recover, as forming part of a highway, a strip of land adjoining the house of the defendant on which a pial had been erected more than forty five years before the suit:

*Held*, assuming that the land in question was originally included in the street, that the defendant had acquired a title by adverse possession against the Municipality, which was not entitled to call in aid the provisions of Limitation Act, sched. II, art. 149.

APPEAL against the decree of P. Strinivasa Rau, Judge of the Madras City Civil Court, in original suit No. 160 of 1894.

The plaintiffs were the Municipal Commissioners for the City of Madras, and they sued to recover a piece of land in the possession of the defendant as forming part of Mint Street. It was alleged that the defendant had wrongfully encroached upon the land in question, which was 53 feet long 9 feet wide, and had erected a pial and pavement thereon in front of his house. The defendant pleaded that the land was never the property of the plaintiffs, that he had acquired a title thereto by prescription if not otherwise, and that the suit was barred by limitation. The defendant and his predecessors in title had long been in possession of the house above mentioned for which they held the Collector's certificate, and also of the land in dispute, for which until 1893 no certificate had been issued. In February 1893 he applied for such certificate, admitting that his title-deeds did not include the land in question. The plaint averred that the encroachment complained of came to their knowledge on or about the last-mentioned date, that the encroachment complained of constituted a continuous wrong, and that the defendant could acquire no statutory title in respect of the

* City Civil Court Appeal No. 14 of 1895.

land encroached on for the reason that it formed part of a public highway.

The Court of first instance dismissed the suit.

The plaintiffs preferred this appeal.

Mr. *R. F. Grant* for appellants.

Mr. *K. Brown* for respondent.

JUDGMENT.—This is a suit in ejectment brought by the Municipal Commissioners for the Town of Madras for the purpose of recovering from the defendant a small piece of ground in Mint Street now covered by the pavement and pial in front of the defendant's house. The plaintiffs allege that this piece of ground was originally included in the street which, by successive Acts of the Legislature, has been vested in the Municipal Commissioners for the use of the public. They are unable to state the exact date of the encroachment, but say the same came to their knowledge in February 1893 when the defendant applied for a certificate for the said ground from the Collector of Madras. They allege that the defendant could acquire no statutory title to land which forms part of the public highway, but that even if the Act of Limitation does apply, the suit is not barred.

The defendant bought the house in 1861 and it is admitted that the site now covered by the pial and pavement is not included in the measurements given in his title-deeds. It is clear, however, that this pial and pavement were in existence long before the defendant's purchase. The City Civil Judge finds that they have been certainly in existence for forty-five years and probably for a much longer period. No witnesses have been called who can recollect the house without them. The earliest Collector's certificate for the house (exhibit F) is dated 9th June 1824 and this mentions a previous possession of twenty years; so that it may be taken that the house at all events has been in existence since 1804. The plan on the reverse of the certificate gives the 'Salay Street' as the western boundary of the house, and this description is repeated in the sale-deed $F_2$, dated the 2nd of December 1830. Accepting the finding of the Judge that the pial has been in existence at any rate for forty-five years, it follows that it existed for at least eighteen years before any legislation in India vested the streets of Madras in the Municipal Commissioners of the City.

The next question is whether the ground now covered by the pavement and pial was ever really part of the street at all. The

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City Civil Judge has found that this is not proved, and we agree with him that there is no evidence that the actual site now so occupied has ever been used by the public as part of the street. No doubt if the survey plan C was conclusive, the inference might be drawn that the measurements of the street should be taken from main wall to main wall which would include the site in question in the street. But it is not shown under what authority the measurements were so calculated, and it is certain that the pial was in existence long before this survey plan was made in 1858. At the same time there is no doubt that the boundaries given in exhibit $F_1$ do favour the plaintiffs' contention, and had the inference from this document been supported by any evidence of user, we should have been disposed to hold that the land must originally have formed part of the street. The evidence does not enable us to come to any certain conclusion, but we are able to dispose of the suit upon other grounds.

Assuming therefore for the purpose of the argument that the site was originally included in the street, we have no doubt that, if the general rules of prescription and limitation apply, the defendant has long ago acquired a title by adverse possession. The site would at any rate have become vested int he municipality by Act IX of 1865, and we agree with the City Civil Judge that a corporation is not entitled to claim the benefit of article 149, schedule II of the Limitation Act. That article only applies to suits brought by or on behalf of the Secretary of State, and there is no authority for the proposition that when the Crown has once ceded property to an individual or corporation, it does (or can) also cede at the same time any right or privilege inherent in the Sovereign Power. The grantee of the property stands in respect of the property granted in the same position as any other proprietor.

An attempt, however, is made to distinguish the present case on the ground that the municipality as trustee of the public for the street is entitled to claim the benefit of the English maxim 'once a highway always a highway' and to contend that no lapse of time can convert part of a street into private property, since the obstruction to the public is a common nuisance and continuing injury, section 23 of the Limitation Act.

The English maxim 'once a highway always a highway' is based on the theory that the property in a highway is in the owner of the soil subject to an easement in favour of the public. In the

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.

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## APPELLATE CIVIL.

*Before Mr. Justice Subramania Ayyar.*

1895. March 12. April 18.

KELU MULACHERI NAYAR AND OTHERS (PLAINTIFFS), APPELLANTS,

*v.*

CHENDU AND OTHERS (DEFENDANTS), RESPONDENTS.*

*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.