the appointments is that they are altogether temporary. We are supported in this view by the opinion of Shepherd, J., in the case of *Seshadri Ayyangar* v. *Nataraja Ayyar*(1). It is manifest that to lay down that the committee has an unqualified power of making temporary appointments would give them a power liable to grave abuse. Such temporary managers would be merely servants removable at the will of the committee, and would serve to give the committee a control over the management inconsistent with the policy of Act XX of 1863, viz., that the actual administration of affairs should be in the hands of the trustees subject only to the supervision of the committee.

We therefore agree with the District Judge and dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Subrahmania Ayyar and Mr. Justice Miller.

MAHAMAHOPADYAYA RANGACHARIAR (PLAINTIFF), APPELLANT,

v.

THE MUNICIPAL COUNCIL OF KUMBAKONAM (DEFENDANT), RESPONDENT.*

1906, August 13, 14, 15, 28.

District Municipalities Act (Madras)—Act IV of 1884, ss. 4-B (1) (b), 4-B (3) (b) 21, 261—Supersession of a municipal body under s 4-B (1) (b) only a suspension—No notice under s. 261 required when the suit is only for injunction—Easements Act V of 1882, s. 7, ills. (a) and (i)—Right of proprietor on higher level under s 7, ill. (i), not an easement and does not interfere with the right of lower proprietor to build on his own land under s. 7, ill. (a).

The 'supersession' of a Municipal Council under section 4-B (1) (*b*) of Madras Act IV of 1884 is only a suspension of such body for a limited period and such supersession is different from and has not the effect of a dissolution under section 4-B (1) (*a*). The 'reconstitution' of such a Council under section 4-B (3) (*b*) is the revival of the old corporation and not the creation of a fresh one, and all the rights and liabilities of the superseded Council will devolve on the Council so reconstituted as its rightful successor.

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(1) I.L.R., 21 Mad., 179.

* Second Appeal No. 963 of 1903, presented against the decree of F.D.P. Oldfield, Esq., District Judge of Tanjore, in Appeal Suit No. 978 of 1902, presented against the decree of M.R.Ry. P. Narayanachariar, District Munsif of Kumbakonam, in Original Suit No. 60 of 1901.

MAHA-MAHOPA-DYAYA RANGA-CHARIAR v. THE MUNICIPAL COUNCIL OF KUMBA-KONAM.

The notice required by section 261 of the District Municipalities Act is not necessary when the suit is for an injunction.

The right of the owner of higher land under section 7, illustration (*i*), of the Easements Act, *i.e.*, that the water naturally rising in, or falling on, such land, shall be allowed by the owner of adjacent lower land to run naturally thereto is not a right in the nature of an easement and is subject to the right of the owner of such lower land to build thereon under section 7, illustration (*a*), of the Act.

The owner of the lower land cannot complain of the passage of such water as an injury, but he is not bound to keep open such way and may obstruct it by suitable erections on his land.

Smith v. *Kenrick*, (7 C.B., 515), referred to.

Rylands v. *Fletcher*, (L.R., 3 H.L., 338), referred to.

SUIT for damages and perpetual injunction. The plaintiff was the owner of certain land in Kumbakonam which was on a lower level than a road which bounded it on one side. To prevent the water collected in the road from flowing over his land the plaintiff put up a ridge between his land and the road. The servants of the defendant, the Municipal Council of Kumbakonam, cut the ridge under the orders of the defendant and the water flooded the plaintiff's land. The plaintiff instituted this suit to recover Rs. 10 as damages for the flooding of his land and asked for a perpetual injunction to restrain the defendant from similar acts.

The defendant pleaded *inter alia* that the suit so far as the injunction was concerned was not sustainable for want of notice under section 261 of the District Municipalities Act; and that the defendant had a prescriptive right to discharge the water over the plaintiff's land.

The District Munsiff held that no notice was necessary, that the defendant had failed to make out a prescriptive right, and accordingly passed a decree in the plaintiff's favour.

The District Judge on appeal held that notice was necessary and that the defendant had, on account of the higher level of his land, a right by way of natural easement, under section 7, illustration (*i*), of the Easement Act to discharge the water on to the plaintiff's land, and, as the plaintiff had not shown that the defendant had lost such right by disuse, his suit must fail. He accordingly dismissed the suit. The plaintiff preferred this second appeal.

The appeal was preferred on the 27th July 1903. Before it came on for hearing, the Municipal Council was superseded for

seven months ending on 31st March 1906 by notification, dated 29th August 1905, under section 4-B (1) (*b*) of the Act and the Council was reconstituted after the period of supersession.

An objection was taken on this second appeal that the appeal could not be prosecuted against the reconstituted Council.

The Hon. Mr. *P. S. Sivaswami Ayyar* for *V. Krishnaswami Ayyar* and *K. Sreenivasa Ayyangar* for appellant.

P. R. Sundara Ayyar for respondent.

JUDGMENT (SUBRAHMANIA AYYAR, J.)—This case was argued fully and ably on both sides. The important questions for determination are:—

(1) Whether this second appeal cannot be prosecuted by the appellant as against the present Municipal Councillors;

(2) Whether the suit, in so far as the prayer for injunction is concerned, is unsustainable for want of notice under section 261 (1) of the Madras District Municipalities Act; and

(3) Whether the appellant was disentitled to raise the ridge put up by him on his own land adjoining the highway vested in the Municipal Council for the purpose of preventing water on the surface of the highway finding its way on to his land by gravitation.

Now as to the first question, by the notification of the Government, dated the 29th August 1905, issued under section 4-B (1) (*b*) of the District Municipalities Act (Madras Act IV of 1884), the Municipal Council of Kumbakonam, then existing, was superseded for a period of seven months till the 31st March 1906. Subsequently, Councillors were appointed or elected for the Municipality and they entered on their duties after the expiry of the period of supersession. Mr. Sundara Ayyar for the Councillors contended that the present suit, which had been instituted against the superseded Council, necessarily terminated on the supersession taking place, having regard to the definition of "Municipal Council" in section 3 (xv) of the District Municipalities Act and to section 21 of the same Act which makes every Municipal Council a body corporate. In other words, he urged that the corporation that subsisted up to the date of the supersession became thereafter completely extinct, and that the Councillors who took office subsequent to the expiry of the period of supersession constituted a fresh corporation which cannot be proceeded against for the damages stated to have been caused by,

MAHA-MAHOPA-DYAYA RANGA-CHARIAR v. THE MUNICIPAL COUNCIL OF KUMBA-KONAM.

or the injunction claimed on account of, what had been done by the superseded Council, the alleged cause of action being purely personal in reference to that body. It was argued that, though the idea of a corporation implies something more than the group of natural persons with reference to whom the corporate character is predicated, the corporation connot be taken to subsist when that group has been completely broken up, and that the provisions of the District Municipalities Act relating to supersession are only consistent with this view. The difficulty of formulating a theory as to the true nature of a corporation that would satisfy minds bent upon probing the matter from more than a practical point of view will be found well suggested in the recent brilliant paper of Prof. Maitland on 'Moral Personality and Legal Personality' in Number 14 of the Journal of the Society of Comparative Legislation. It seems to me that in discussions like the present we may not unprofitably turn for light to the rules of English Law relative to corporations, even taking that that law has, as the learned writer humorously put it, been muddling along with semi-personality and demi-semi-personality towards convenient conclusions prompted by its characteristic sound instincts. The subject of abeyance of fictitious personality will be found discussed in Grant on Corporations in the chapter on "dissolution." At page 301 cases analogous to the present are considered and the author states the following propositions as deducible from the authorities :—

"That the misuse or abuse of only some of the legal attributes "of a corporation or the usurpation of fresh liberties, etc, are "either of them, when proved, ground for a judgment of seizure "of all the liberties, etc., and therefore of the removal from the "corporators, during the pleasure of the Crown, of the corporate "character in all its parts.

"That such seizure does not operate to dissolve a corporation "but only to suspend its regular operation during the pleasure of "the crown.

"That judgment of ouster of all the corporators upon infor-"mation against them does not dissolve the corporation but only "suspends its operation.

"That in either of the two last cases the corporation may be "revived by a new charter which operates by relation, so as to "make the new body in all respects identical with the old one as

"regards prescription, choses in action, rights of common, etc., "and also as regards debts, liabilities, etc., and the same of a writ "of restitution.

"That the usual practice upon seizure has been for the crown "to appoint a custos who appears of himself to have discharged "all the functions, duties, etc., of the corporation until the "restitution of the liberties or revival of the corporation."

A possible objection on theoretical grounds to the doctrine of dormancy is met by the learned author thus:—

"In fact there seems to be a difficulty in reconciling the "doctrine of dormancy or dissolution for some purposes only with "strict principles of corporation law; on the other hand, however, "the inconvenience of holding that a corporation in such circum-"stances is wholly dissolved—so that their leases would be "disturbed because the lands themselves would revert to the "original owners, lands given for charitable purposes would be "lost, persons having debts due to them from the corporators could "not recover them, the corporators would lose their rights of "common, etc.,—is manifestly so great that the doctrine, though "it has been treated lately with some degree of doubt, must "probably be considered as almost established, and that such a "revival operates by relation so as to prevent the destruction of "prescriptive rights vested in the corporation, and not to interfere "with the operation of statutes of limitation either for or against "them."

Now turning to our enactment, that it has not departed from, but has, so far as it goes, followed this doctrine of dormancy is, by its provisions, made abundantly clear. Section 4-B (1) (*a*) empowers the Government to cancel the notification constituting a Municipality and to dissolve the Municipal Council when it sees fit to do so. The consequence in such a case, of course, is a total annihilation of the corporation, and under sub-section 2 of the same section the funds till then available for the purposes of the abolished Municipality are at the absolute disposal of the Government. The provisions as to supersession, which term, by the very contrast involved in its use here as distinguished from dissolution, implies a radically different thing, are framed naturally on quite other lines. No doubt the Municipal Councillors holding office at the time of the supersession cease to do so altogether. But the Municipality itself is left intact, the management of its affairs has

MAHA-MAHOPADYAYA RANGACHARIAR v. THE MUNICIPAL COUNCIL OF KUMBAKONAM.

to be provided for by the appointment of a person or persons to be chosen by the Governor in Council and, though the property held by the Councillors is, during the supersession, vested in the Governor in Council, that is so only in trust for the purposes of the Municipality concerned, as section 4-B (3) (*a*) (iii) must be read along with section 27. To put it otherwise, supersession is nothing more than the dismissal of incompetent Councillors, followed only by the appointment of, to borrow the language of the English law, a custos for the discharge of the functions of the Council pending the nomination or election of other persons who would resume work in the normal way. In a word, supersession is but a suspension of the Council. A clear argument suggested by the section itself against the contrary view is this: The former of the provisions just mentioned does not give the Governor in Council power to transfer the property vested in him during the supersession to the reconstituted Municipal Council. And as sections 23 and 24 are limited to the cases of streets, roads, etc., property other than these, taken by the Governor in Council during the supersession would, for want of a provision on the point in the Act, not pass to the reconstituted Council if that were an entirely new creation. And as the Governor in Council takes the property only during the time of the supersession, there cannot be implied in him any power to make a transfer that could operate after that period. The result of this view is the loss of such property to the Municipality which, of course, could not have been intended. Nor could the subject of what is to become of property of this description after the expiry of the period of supersession have been overlooked by the draftsman, considering that, by one of the clauses already referred to in the same section, he has provided for the disposal of the property in the event of a dissolution. The only reasonable view then is that he took it that the provision that the property shall vest in the Governor in Council during supersession only, implied, as it undoubtedly does, that thereafter it devolves by operation of law on the resuscitated Council as the rightful successor of the superseded council.

As regards the word "reconstituted" in section 4-B (3) (*b*), on which Mr. Sundara Ayyar laid great stress, it has, in the context, reference to the authorities or persons concerned taking steps for the appointment or election of Councillors who are to fill the vacancies caused by the supersession, and, "to appoint"

is one of the acceptations in which "constitute" is, as a word of the English language, used.

I therefore overrule the contention I have been considering and hold that the plaintiff is entitled to proceed with the case as against the existing Council.

Next, as regards the question of notice, I may deal with it quite shortly. Suits referred to in clause (l) of section 261 are, by its very terms, those which relate to acts "done or purporting to be done," whereas, a claim for an injunction is with reference to what it is apprehended will be done in the future. It would not be right to impute to the Legislature an intention to insist upon the lapse of the interval involved in the provision as to notice even in regard to cases where such lapse might be attended with the completion of the threatened injury, the prevention of which is the very aim and end of the suit—*cf. Kirk* v. *Todd* (1).

This objection also therefore fails.

I now pass on to the third and last question. The arguments on behalf of the Councillors as to this were rested on the right enunciated in illustration (*i*) to section 7 of the Indian Easements Act, which is as follows :—

"The right of every owner of upper land that water naturally "rising in, or falling on, such land and not passing in defined "channels, shall be allowed by the owner of adjacent lower land, "to run naturally thereto."

That this rule is as well settled as any rule of law relating to incidents of ownership of immoveable property goes without saying. The point is whether the consequence which Mr. Sundara Ayyar has sought to derive from the rule follows. In other words is the owner of lower land precluded from preventing "water naturally rising or falling" on the adjacent higher close from coming on his own, by an act which is no more than a natural use of his own property? For example, if the proprietor of a lower plot of ground situated in a town (as in the present instance) erects a house with the result that the wall thereof throws back the water which otherwise would have passed by gravitation thereon, has he thereby rendered himself liable to an action at the instance of his neighbour? In my opinion, no. Even were the question bare of authority I should have no hesitation in holding

(1) L.R., 21 Ch.D., 484.

MAHA-MAHOPADYAYA RANGACHARIAR v. THE MUNICIPAL COUNCIL OF KUMBAKONAM.

as I do for the simple reason that the right spoken of in illustration (*i*) is not to be understood as overriding the right, for instance, recognised in illustration (*a*) to the same section, viz., to build on the land subject only to any Municipal law for the time being. Each of these rights is, of course, exercisable by its owner; but when the two come in conflict that which has of necessity to yield must go altogether or accommodate itself as best it can according to circumstances. The right put in illustration (*i*) is, in short, a right only in the sense that the passage of water from the higher to the lower close gives no right of action to the owner of the latter, that being but the result of the operation of the laws of nature.

No doubt in this sense the right is precarious, but let us see what the other view would lead to. Suppose that the owner of Blackacre, which is contiguous to, and on the same level with Whiteacre, is, in the course of agricultural improvements effected by the owner, raised in level so as to make surface water thereon pass off into Whiteacre. Is the latter to remain subject to the burden of receiving such water unless and until a change in the condition of the two properties is brought about by natural agencies? Can the owner of Whiteacre in order to prevent his land being placed under such a disadvantage restrain by action the owner of Blackacre from raising its level? Suppose again these properties are situated in a town and that Blackacre is acquired by the Municipal authorities to be laid out as a road, the road being of a higher elevation than Whiteacre. Are the owners of the lots into which Whiteacre is, let us suppose, divided, to be held disentitled to build on their properties unless they provide for the drainage of surface water coming on the highway? Can they obtain an injunction restraining the Councillors from elevating the road in order to prevent their properties becoming liable to the overflow which would result from the road being raised? The answers to these questions must, if the contention on behalf of the Councillors were to prevail, be in the affirmative. Such conversion of often necessary and perfectly legitimate acts done on one's own land into causes of litigation cannot but prove intolerable. The right answers should, of course, be in the negative, the party affected by such acts being left to protect himself by a suitable alteration of, or work done on, his own property.

Now the view of the upper owner's right urged by Mr. Sundara Ayyar would be to invest it to all intents and purposes with the character of an easement; and he did not shrink from saying that this was so. But that would be inconsistent with the spirit as well as with the language of section 7 in that, *e.g.*, the right to build enunciated in illustration (*a*) would be unduly restricted and the illustration itself read as if it contained the words "subject also to the right of the adjoining higher close owner. provided for in illustration (*i*).

It is quite true that the term "servitude" has at times been used by authors as well as judges with reference to this right, and the Civil Law relied on to meet argument in denial of the existence of such a right at Common Law. But to infer from these passages in the authorities that in regard to the present matter English and Indian Law on the one hand and Civil Law on the other are identical would be a misconception; for under the Civil Law owners of higher and contiguous lower lands were under a reciprocal obligation in respect of water naturally arising or coming on the higher land inasmuch as the proprietor of the latter was himself bound not to interfere with such water finding its way in the usual course on to the lower land (Domat's 'Civil Law,' section 1583); whereas according to English and Indian Law no such obligation attaches to the ownership of the higher land [see illustration (*g*) to section 7 of the Indian Easements Act]. Nor is the use of the word "servitude" in the way referred to altogether unwarranted inasmuch as in the Civil Law, it had a very wide signification and included burdens on ownership which did not amount to easements in the sense in which this latter term is employed in the English and the Indian systems. In Roman law, whenever the enjoyment of the owner was curtailed, the property was said to be in servitude (*res servit*). When the enjoyment was in no way restricted, the property was said to be free from any servitude—to have freedom (*libertas*). In this sense, even a usufruct was as much a servitude as a right of way, both being modes of enjoyment of land in opposition to the owner (Hunter's 'Roman Law,' 2nd edition, pages 394 and 395). Certainly therefore the passages referred to, in spite of a certain want of clearness in the language occurring in one or two of the Indian decisions on the point, cannot be understood as establishing that the right enunciated in illustration (*i*) is virtually an easement, for none of them goes the length of saying

MAHA-MAHOPA-DYAYA RANGA-CHARIAR v. THE MUNICIPAL COUNCIL OF KUMBA-KONAM.

that the lower proprietor is precluded from protecting himself against the flow by what he does in the natural user of his own land. The contrary, on the other hand, has been unequivocally laid down more than once. In *Smith* v. *Kenrick*(1) Cresswell, J., implies this throughout his judgment and particularly when he observes: "Surely, the reasonable thing is that plaintiff should leave part of his own coal to protect his own workings against the influx of water" (at page 565). Cresswell, J.'s view of the law was acted upon in *Baird* v. *Williamson* (2) and applied to the facts of the case there. The statement of Erle, C.J., at pages 391 and 392 is explicit. He said: "If, while the occupier of a higher mine exercises the right to get all the minerals from his land, nature causes water to flow to a lower mine, he is not responsible for this operation of nature. If the owner of the lower mine intends to guard against this operation, he must leave a barrier at the upper part of his mine to bay back the water of his higher neighbour." This proposition was accepted in the House of Lords in *Rylands* v. *Fletcher*(3), Cairns, L.C., expressing himself thus: "If, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if, by the operation of the laws of nature, that accumulation had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving, or by interposing, some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature." This passage was quoted with approval by Lord Blackburn in *Wilson* v. *Waddell*(4) also decided by the House of Lords.

With such direct and high authorities before us, I consider it unnecessary to notice in detail the statements of law in the American works of Angell, Gould, and Farnham, to which our attention was called by Mr. Sivaswami Ayyar. Suffice it to say that, according to Farnham, the latest of these writers, the rule adopted in most of the jurisdictions in the United States is in accordance with that supported by the English opinions quoted above ('Law of Waters' volume III, sections 890 and 891).

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(1) 7 C.B., 515.
(2) 15 C.B.N.S., 376.
(3) L.R., 3 H.L., 338.
(4) L.R., 2 A.C. 95 at p. 99.

I am therefore of opinion that in removing the ridge which the plaintiff had, in the natural and perfectly legitimate user of his property, put up on his own land, the Municipal Councillors committed a trespass. Having regard to the fact that this was not the first occasion on which *they did* so, they should, I think, be restrained from repeating such illegal acts.

I think I ought not to omit to say that it seems quite odd that the local authority constituted for the very purpose, among others, of providing for the drainage in the town, so far as their means and circumstances would permit, should persist in discharging on the plaintiff's property, not only rain water falling on the highway vested in them, but also, to say the least, sewage coming from the neighbouring houses as well as the overflow of an artificial pond in the locality which, as it were by design, they are content to receive on the highway.

I would, therefore, allow the appeal and grant a decree to the plaintiff for the sum of Rs. 10 claimed as damages and allowed by the District Munsif, and further restrain the Municipal Councillors from interfering with any work which the plaintiff, in the lawful user of his land, may construct thereon to keep off surface water arising from or coming on the highway abutting the plaintiff's land. I would make the Council pay the plaintiff's costs throughout

MILLER, J.—I am of the same opinion. Mr. Sundara Ayyar's argument on the first preliminary question proceeds on the ground that, when all the members of an aggregate corporation die, the corporation is dissolved (2 Bac. Abr., 245). There is an absolute and total dissolution. That was so, no doubt, in the case of a Chartered Corporation in England, but it does not follow that in the case of a Municipal Council in this Presidency the same effect will follow the same cause. The Chartered Corporation totally dissolved by loss of all its members could not be revived, and its dissolution carried with it consequences "so disastrous that the English Courts have limited and doubted, though they may not have overthrown, the doctrine that a Municipal Corporation can be *totally* dissolved". (Dillon's 'Municipal Corporations,' 4th edition, page 246).

It is quite clear that the Legislature, in the statute which we are considering, did not intend to effect such a total dissolution. The words "supersede for a specified period" are themselves sufficient

MAHA-MAHOPA-DYAYA RANGA-CHARIAR v. THE MUNICIPAL COUNCIL OF KUMBA-KONAM.

to prove that fact, and, in my opinion, the word "reconstitute" points in the same direction, indicating rather the revival of the former body corporate than the creation of a new one.

Ordinarily the words "supersede for a specified period" would be equivalent to "suspend"; and it is evident that they were intended here to have that signification. If the section did not expressly declare the effects of supersession, there can, I think, be no doubt that, at the end of the specified period, the former Council would revive with its former members and all its former rights and liabilities, and the property which is vested in the Governor in Council "during the period of supersession" would cease to vest in him. It is not possible, I think, as the section is worded, to hold that it was intended to create a new corporation in place of that superseded. That view would seem to involve the existence of two Councils at the same time, one revived by efflux of time, the period of supersession having expired, and the other constituted under the section.

It being then the intention of the Legislature, so far as that can be gathered from the statute, to revive the former corporation at the expiry of the period of supersession, is that intention nullified by the fact that one of the declared effects of supersession is to deprive the body corporate of all its members? I do not think so. The fact is that the comparison of the body corporate constituted under Madras Act IV of 1884 with a Chartered Municipal Corporation in England is likely to mislead. The bodies are not similar. In the case before us the corporation is a small body in whom is vested certain properties in trust for certain public uses (section 27). The body can be renewed without any act of any of its own members, by the will of the Governor in Council. The dissolution of a Chartered Corporation is complete when all its members are gone because it has no power to act or to revive itself. But the English cases show that it was found necessary to hold that, even when an integral part of the corporation, *e.g.*, the whole governing body, was lost, and the corporation could not act or renew the governing body and so was dissolved to certain purposes, a fresh charter might be granted reviving the former corporation with all its old rights, and with the old or new corporators [*cf. Rex* v. *Pasmore*(1) and *Mayor of Colchester* v.

(1) 3 Durn & East, T. R. 199.

Brooks(1)]. Under our statute the body corporate is the governing body, and the analogy is incomplete: the body can be renewed by a power external to itself whenever its members fail and, in that respect, is rather analogous to a corporation sole than to a Chartered Municipal Corporation under the English common law.

That being so, there seems to be no reason why effect should not be given to the intention of the legislature and why we should not hold that the re-constituted Council is a revived corporation, revived with all its rights and liabilities, which during the period of supersession were suspended but not destroyed.

The preliminary objection therefore fails.

The second preliminary question is whether the Lower Appellate Court was right in holding that, in so far as the prayer for an injunction is concerned, the notice given to the Council by the plaintiff under section 261 of the Act was defective and insufficient.

I think it is unnecessary on this point to say more than this. Before the amendment made by Act III of 1897, sections similar to section 261 in other laws were held on general principles not to apply to suits for an injunction; and whatever be the proper construction of sub-section (3) to section 261, added by the Act of 1897, that sub-section does not seem to me to require us to hold that a suit for an injunction is now within the section.

The next question is, in effect, whether the plaintiff was bound to provide for the passing in its natural course of the drainage water standing on the road west of his garden, the road being on a higher level than the garden.

The point has been argued on the natural rights of the parties and not on the footing of the acquisition of an easement by either, and it was argued also on the footing that the water in question was not flood water accumulated by reason of any extraordinary flood, but the usual seasonal accumulation in rainy weather. In fact we have to take it that the defendant's right in question is that declared in illustration (i) to section 7 of the Easements Act, that is, it is to be taken that the water is water naturally rising in or falling on the road.

For the appellant it is contended that the right so given is not an easement but is the right to pass the surface water on to the

(1) 7 Q.B., 339.

MAHA-MAHOPADYAYA RANGACHARIAR v. THE MUNICIPAL COUNCIL OF KUMBAKONAM.

lower land, if the lower owner does not or cannot prevent it; in other words, it is the right of the upper owner to pass the drainage if he can, and if the lower owner does not effectually prevent the passage he cannot complain of any injury done by it to his land. The right in question is stated in the case of *Smith* v. *Kenrick*(1), to which my learned colleague has referred, to be based on a rule of the Civil Law to the effect that the lower owner owes a natural servitude to the upper in respect of receiving, without claim to compensation, the surface water from the upper land. The decision in that case was that it was for the lower owner, if he wished to do so, to maintain the barrier existing between the two closes and that the upper owner was not bound to leave a barrier in his own land. Between the rule of the Civil Law as there stated and the right enunciated in illustration (i) there does not appear to me to be any substantial difference, and from that case it would seem that the so-called 'servitude' does not operate to prevent the lower owner from keeping out the water from the upper land, *i.e.*, it is not an easement over the lower land. That case, no doubt, was one where there was in existence a natural barrier between the lands of the plaintiff and the defendant, but in *Rylands* v. *Fletcher*(2) the Lord Chancellor stated the right of the plaintiff to be not merely to maintain but also to *interpose* a barrier for his own protection against an accumulation of water on the upper land, whether upon the surface or underground, and referred to *Smith* v. *Kenrick*(1) as illustarating the rule so laid down.

No Indian case has been cited directly in point. The case of *Hameedoonnissa* v. *Anundmoyee*(3) is so far against the defendant that it declares the right of the lower owner to protect his land unless it is shown that he has by his act caused substantial injury to the upper owner. We are dealing with this case on the footing that, apart from questions of damage to the upper land, the defendant claims the right to keep open the way to pass the surface water, and on that footing that case is against him.

The cases of *Subramaniya Ayyar* v. *Ramachandra Rau* (4), and *Abdul Hakim* v. *Gonesh Dutt*(5), were cases of obstruction to a watercourse and consequent injury to owners of land above the

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(1) 7 C.B., 575.
(2) L.R., 3 H.L., 338.
(3) 1864, Special Number of W. R., 25.
(4) I.L.R., 1 Mad., 335.
(5) I.L.R., 12 Calc., 323.

obstruction; and the case of *Imam Ali* v. *Poresh Mundul*(1), was one of prescription, *i.e.*, of an easement. In none of these cases have the Indian Courts declared that the right of the upper owner operates as an easement over the lower land. In the present case the plaintiff, the owner of land in a town, has the right to enclose his plot, or to build upon it [*cf.* illustration (a) to section 7 of the Easements Act]; and if that right comes in conflict with the natural right of the upper owner to take advantage of the situation of his land, it seems to me that the latter must give way unless the former is to be unduly restricted, for, in this way only can the full enjoyment of the right of the lower owner be secured.

I, therefore, concur in the order proposed by my learned colleague. The appeal is allowed, the decree of the Lower Appellate Court is set aside, and the plaintiff will have a decree for damages in the amount of ten rupees, the injunction as stated in my colleague's judgment, and his costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Moore and Mr. Justice Sankaran Nair.

1906
March 13, 21.

MANIKKA VASAKA DESIKAR ALIAS GNANA SAMBANDA PANDARA SANNADHI (SECOND DEFENDANT—SECOND COUNTER-PETITIONER), APPELLANT,

v.

BALAGOPALAKRISHNA CHETTY (PLAINTIFF—PETITIONER), RESPONDENT *

Hindu Law Religious endowment-Decree against head of mutt binds successor in execution proceedings—Decree on promissory note executed by head of mutt binds the mutt—Compromise decree, effect of-Parties to suits—Sishyas cannot be made parties.

A decree passed against the head of a mutt as representing the mutt is binding on his successor who cannot dispute the validity of the decree in execution proceedings but can do so only by a properly framed suit.

Sudindra v. *Budan*, (I.L.R., 9 Mad., 80), referred to and followed.

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(1) I.L.R., 8 Calc., 468.

* Civil Miscellaneous Second Appeal No. 67 of 1905, presented against the order of F.D.P. Oldfield, Esq., District Judge of Tanjore, in Appeal against Order No. 67 of 1905, presented against the order of M.R.Ry. T. T. Rangachariar, Subordinate Judge of Kumbakonam, in Execution Petition No. 139 of 1904 in Original Suit No. 56 of 1901.