BAKEWELL, J.

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I am also of opinion that the decree in the present case, being a consent decree, is an instrument whereby the co-owners have agreed to divide property in severalty since it is the formal record of an agreement entered into by the parties, and that it falls within the first part of section 2 (15).

The stamp paper is directed to be brought in within seven days.

APPELLATE CIVIL.

Before Mr. Justice Wallis and Mr. Justice Krishnaswami Ayyar.

1910.
July 22, 25.
September 5.

VIBUDAPRIYA THIRTHASWAMY AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

ESOOF SAHIB AND OTHERS (DEFENDANTS), RESPONDENTS.*

Highway, right to carry processions in—Where user of highway proved, presumption will be that the right is unrestricted—Trustees, dedication by.

Where user as a highway, sufficient to raise a presumption of dedication has been proved, the dedication will, in the absence of evidence to the contrary, be presumed, if possible, to be unrestricted.

Marching in procession on a highway is not an excessive user of the highway; and a right of unrestricted user will include the right of marching in procession on the highway.

Shadagopachariar v. *Krishnamurthy Rao*, [(1907) I. L. R., 30 Mad., 185], referred to.

A presumption of dedication by trustees will not be made when such dedication will contravene the purposes of the trust. The illegality of such a dedication by the trustees must be clearly proved.

APPEAL against the decree of P. Itteyerah, Subordinate Judge of South Canara, in Original Suit No. 44 of 1904.

The case for the plaintiffs and the defendants is thus set out in the judgment of the lower Court.

Plaint recites that the plaintiffs are Moktessors and managers of Shri Anantheswara temple in Udipi Kasba; that defendants Nos. 1 to 3 are the trustees of the Jammath Mosque and Asarkhana in Udipi Kasba, and the fourth defendant is the Moilar or Khazi of the said mosque, and as such the officiating priest of the Muhammadans of Udipi; that Shri Anantheswara temple is a Hindu religious institution of great sanctity and antiquity, and adjoining it there is another such temple called Chandramowleshwara; that around the site of these temples marked I in

* Appeal No. 81 of 1906.

the plan, there is an open space called Car Street, marked II and III, which is surrounded on all sides by various mutts and buildings, besides the famous shrine of Shri Krishna; that the whole of the site covered by the said temples, the Car Street and the mutts, etc., belong to the deity of Shri Anantheswara temple and form part of ward No. 95; that the said Car Street is the outer courtyard of the said Anantheswara temple, being intended and used for the celebration of numerous processions and religious ceremonies and festivals connected with the said temples; that though it was held by the High Court in Second Appeal No. 1848 of 1895 that the public had acquired a right of thoroughfare over the Car Street, it was only for the purpose of passing and repassing over it and not for the purpose of assembling and passing in a procession engaged in the performance of their religious worship or ceremonies (whether attended with music, bands, tom-toms or not) by reciting prayers and hymns which are abhorrent and repugnant to the Hindu religion and worship in those temples; that for the first time and in April 1900 on the occasion of the annual Muhammadan Bakrid festival, the Muhammadans of Udipi headed by the defendants and certain others, under colour of the said decision and with a view to insult and annoy the feelings of plaintiffs and other religionists and to cause disturbance to the performance of religious worship and various ceremonies in these temples, formed themselves into a religious procession in Badaga Pettah, and led by the fourth defendant and preceded by bands, music, etc., marched through the said Car Street on their way to the Kabirsthan in spite of the resistance offered by the Hindus; that subsequently in December 1903, and on 27th and 28th March 1904, the Muhammadans repeated the said unlawful action and trespass which caused loss to the said temple by reason of the plaintiffs having been obliged to perform purificatory ceremonies at a considerable cost on each of those occasions.

Defendants Nos. 1 and 5 to 7 contend that first defendant is not the Moktessor of the Jammath Mosque; that the suit without impleading all the trustees of the mosque is bad for non-joinder of parties; that the plaint road is not the private property of the plaint temple; that the processions in question attended with music, etc., were passing through the said road from time immemorial as of right and without any obstruction on the part of the temple authorities; that the plaint road is a public throughfare;

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that the suit for injunctions is barred by limitation ; that none of their acts were unlawful ; that they never committed any trespass ; that plaintiffs have not been put to any loss or damages; that the amount claimed is exorbitant ; and that the claim for damages is also barred by limitation.

The Subordinate Judge decreed as follows :—

In respect of III-B I give a decree as prayed for in prayers (1) to (3). As regards III-A, it is decreed that the Muhammadan inhabitants of Udipi represented by the defendants be restrained by means of a perpetual injunction from playing music and repeating prayers when taking their processions through III-A while religious worship is going on in the Anantheswara temple and that the remainder of the first prayer be rejected ;that the second and third prayers be also rejected save as directed in respect of the first prayer, and that the claim for damages be dismissed.

The plaintiffs appealed and the defendants presented memorandum of objections.

P. R. Sundara Ayyar, *K. N. Aiya* and *B. Sitarama Rao* for appellants.

K. Naraina Rau and *K. P. Madava Rau*, first, third, fifth to seventh, ninth to thirteenth and seventeenth to twentieth respondents.

KRISHNASWAMI AYYAR, J.—The plaintiffs are trustees of a Hindu temple. They have instituted the action to restrain the defendants who represent the Muhammadan inhabitants of Udipi by means of a permanent injunction from marching in procession through the portions marked III*a* and III*b* in the plan (exhibit WWW). The Subordinate Judge has given them a decree as prayed for as regards III*b*. The defendants made no claim to go in procession along III*b*, and as the respondents in the appeal before us no attempt was made by them to object to that portion of the decree. As regards III*a* the Subordinate Judge has restrained the defendants from going in procession with music and reciting prayers while religious worship is going on in the plaintiff's temple. Mr. Sundara Ayyar who argued the case for the plaintiffs who are the appellants before us did not contest the right of the defendants to go in procession along III*a*. But he argued against their right to go in procession with music or repeating prayers at any time along III*a* whether

worship was or was not carried on in the Hindu temple. Mr. Naraina Rao for the respondents objected to the Subordinate Judge's decree restricting their right to go with music and reciting their prayers to hours when there was no worship going on in the Hindu temple. The right to go in procession with music was the principal bone of contention before us. No serious effort was made to impugn the finding of the Subordinate Judge that III*a* belongs to the temple. We are not prepared to dissent from that finding. In addition to the evidence detailed by the Subordinate Judge, we may advert to the fact disclosed by the plan and the evidence of the plaintiff's witnesses Nos. 2 and 4 that there are traces of an old temple wall outside the limits of the street in question and on three sides of it.

Starting then from the position that the subsoil of III*a* vests in the temple, the next question is what rights the public have over the surface. III*a* is a part of the big trunk road leading from Mangalore to Kalyanpur. It was the only road between those places till the coast road was opened less than forty years ago according to the plaintiff's second witness. It is not in evidence when III*a* was laid out. Its origin is lost in antiquity. The public has used it as a thoroughfare from time immemorial. Dedication must be presumed from the user as a highway, whoever was the owner of the soil at the time of the dedication. *Regina* v. *East Mart Tything* (1), *Regina* v. *East Mart* (2) and *Turner* v. *Walsh* (3) decide that the crown is no exception. There is no evidence in this case of dedication by the trustees of the temple. The general *primâ facie* presumption of law in England is that the freehold of the road *ad medium filum* is in the proprietors of the land on either side; (see *Haigh* v. *West* (4) and *London and North-Western Railway* v. *Westminster Corporation* (5)) and that when the road was originally formed the proprietors on either side each contributed a portion of his land for the purpose. *Holmes* v. *Bellingham* (6) and In *re Whites' Charities*, *Charity Commissioners* v. *Mayor of London*(7). This rule is carried so far in England as to raise the presumption that the waste land on each side of the road is

(1) (1848) 17 L.J.Q.B., 177.
(2) (1848) 75 R.R., 653.
(3) (1881) 6 A.C., 636.
(4) (1893) 2 Q.B., 19 at p. 29.
(5) (1902) 1 Ch., 269.
(6) (1859) 29 L.J.C.P., 132 at p. 134.
(7) (1898) 1 Ch., 659 at p. 666.

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the property of the adjoining owners. *Steel* v. *Prickett*(1) and *Doe dem Pring and Another* v. *Pearsey* (2). These presumptions are based upon the fact that property in land vests in private owners. Dedication therefore of a highway under the Common Law arises by the act of the private owner of the soil. It may be open to question how far these principles have any application to India where it is not the accepted theory that the property in land for which patta is issued is in the grantee of the patta from Government more than in the Government itself. (See however *Mobaruck Shah* v. *Toofany* (3) and *Balbir Singh* v. *The Secretary of State for India in Council* (4)). In the case of waste lands at all events not included in a patta in ryotwari tracts the property has unquestionably been treated as vesting in the Government. There is no reason to suppose that the dedication of III*a* was originally made by the trustees of the temple rather than that a common owner of the site of the temple and of the road founded the temple and gave it the site and dedicated the highway to the public. The argument of Mr. Sundara Ayyar assumed that the trustees of the temple must have dedicated the highway. He then proceeded to contend that it was upon the defendants to show that the dedication was unrestricted, *i.e.*, without any reservation, that an unrestricted dedication ought not to be presumed as that would be contrary to the powers of trustees of a Hindu temple who could not make a grant injurious to the interests of the temple and that if there was a dedication without reservation, it would be invalid as contravening the purposes of a Hindu religious foundation like the temple in question. Although the nature of the user is the only basis for determining the extent of the dedication, a general user in the case of a public highway would throw the burden of proving the reservation upon the person contending for it. The law would not restrict the public to the exact mode of user of which there was evidence requiring the party pleading an unrestricted right to establish it. In *Ballard* v. *Dyson* (5), Chief Justice MANSFIELD distinguishing between a public highway and a private way, observed that in general a public highway is open to cattle, though it may be so unfrequented that no one has seen an instance of their going there; but the presumption would be for

(1) (1819) 20 R.R., 717.
(2) (1827) 7 B & C., 304.
(3) (1879) I.L.R., 4 Calc., 206.
(4) (1900) I.L.R., 22 All., 96.
(5) (1808) 9 R.R., 770.

cattle as well as carriages. In the case of a private way however he was of opinion that when there was no grant, usage alone indicated the extent. Although it seems to be the better opinion at the present day that there may be a partial dedication of a highway, limited as to time or as to the extent of the user though not to a part of the public (see Glen on 'Highways,' pp. 38 and 39; *Poole* v. *Huskinson* (1) and the *Marquis of Stafford* v. *Coyney* (2), there is no instance in which the public being entitled to use the highway at all times and men and cattle and carriages being entitled to pass and repass, any restriction was imposed on the manner of passing along the highway. It is true a highway is for passing and repassing and it may amount to a trespass to use it for other purposes. See *Regina* v. *Pratt* (3), *Harrison* v. *Duke of Rutland* (4), *Hickman* v. *Maisey* (5). Mr. Sundara Aiyar has not attempted to argue that marching in procession is an excessive use of a highway. That question notwithstanding the observations of Mr. Justice BHASHYAM AYYANGAR and Mr. Justice SUBRAHMANIA AYYAR in *Vijiaraghava Chariar* v. *Emperor* (6) must now be deemed to have been set at rest by the decision of the Privy Council in *Sadagopa Chariar* v. *Krishnamoorthy Rao* (7), approving entirely of the judgment of this Court in *Sadagopa Chariar* v. *Rama Rao* (8). And the two cases of *Kandasami Mudali* v. *Subroya Mudali* (9) and *Mannada Mudali* v. *Nallaya Gounden* (10) are explicit upon the point. The presumption of the complete dedication was affirmed in *Mannada Mudali* v. *Nallaya Gounden* (10) by BENSON and SANKARAN-NAIR, JJ., when they said "there is no evidence as to the origin of the user nor is there any evidence that the dedication was subject to any conditions." Dedication would be assumed if dedication was possible. *Farquhar* v. *Newbury Rural Council* (11). Where there has been a general user by the public a dedication without reservation would be presumed if that was possible. Mr. Sundara Aiyar's contention that a dedication without reservation cannot be presumed to have been made by the trustees of the Hindu temple has not been supported by references to

(1) (1843) 63 R. R., 782.
(2) (1827) 7 B. & C., 257.
(3) (1855) 99 R. R., 792.
(4) (1893) 1 Q. B., 142 at p. 149.
(5) (1900) 1 Q. B., 752 at p. 755.
(6) (1903) I. L. R., 26 Mad., 554.
(7) (1907) I. L. R., 30 Mad., 185.
(8) (1903) I. L. R., 26 Mad., 376.
(9) (1909) I. L. R., 32 Mad., 478.
(10) (1909) I. L. R., 32 Mad., 527 at p. 529.
(11) (1908) 2 Ch., 586.

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the ceremonial or ritualistic practice of Hindu temples. If a rival sect marching in procession with music on the highway would be contrary to the religious usages of the adjoining temple, there is no authority for presuming a dedication restricted in respect of processions with music. It has undoubtedly been held that property vested in trustees cannot be presumed bo have been dedicated as a highway where such dedication would be contrary to the purposes of the trust. See *Rex* v. *The Inhabitants of Leake* (1) and *Neaverson* v. *Peterborough Rural Council* (2) and Pratt on 'Highways,' p. 23. But that is not sufficient to justify a conclusion of no dedication when the user as a highway, for all purposes is established and objection is taken only to processions with music as opposed to the religious usages of the temple. It is enough however to say that as no evidence has been adduced in this case that the procession with music of the Muhammadan inhabitants would contravene the purposes of the trusts of the Hindu temple there is no impediment to the presumption of a dedication by the trustees of the highway unrestricted as to the mode in which the procession might be carried. But as pointed out already we are not obliged by any evidence in the case to suppose that the highway was dedicated by the trustees of the temples. If it was not, no question of the legality of an unreserved dedication can possibly arise. It follows that the Subordinate Judge was wrong in granting the injunction as regards III-A. We must therefore dismiss the appeal with costs and allow the memorandum of objections in part by dismissing the suit as regards the injunction granted in respect of III-A. But as the respondents have partially failed with reference to the memorandum of objections we make no order as to costs in regard to it.

WALLIS, J.—I agree and will only add that, if it were proved that an unrestricted dedication by the trustees would be illegal—which has not been proved here—then a presumption in favour of a restricted dedication might arise as in *Grand Junction Canal Company* v. *Petty*(3), but before such a presumption could be raised, I think an illegality of the kind suggested would have to be clearly proved.

(1) (1833) 39 R. R., 521 at p. 529. (2) (1902) 1 Ch., 557 at p. 578.
(3) (1888) 21 Q. B., 273.