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we concur. S. 374 is to the effect that "in any fresh suit instituted on permission granted under the last preceding section, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought;" and applying this rule to the application for execution of the 19th February, 1883, which is before us, the question of limitation must be determined as if the application of the 20th July, 1880, had never been filed, and the present application will in consequence be barred by limitation. We set aside the order of the lower appellate Court, and allow the appeal with costs.

Appeal allowed.

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

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NIHAL CHAND (DEFENDANT) v. AZMAT ALI KHAN (PLAINTIFF).*

Public highway—Diversion of road—Right of owners of land adjoining old road—Grant by Municipality of land forming old road—Act XV of 1873 (N.-W. P. and Oudh Municipalities Act), s. 38.

There is a presumption that a highway, or waste land adjoining thereto, belongs to the owners of the soil of the adjoining land.

S. 38 of Act XV of 1873 (N.-W. P. and Oudh Municipalities Act) was not intended to deprive persons of any private right of property they might have in the land used as a public highway, or to confer such rights on the Municipality, nor has the section any such effect.

In a case where such land ceased to be used as a public highway, and was granted by the Municipality to third persons, who proceeded to build thereon,—held that the owners had a good cause of action against such persons for the demolition of the buildings and restoration of the property to its original condition.

THE facts of this case, so far as they are material for the purposes of this report, were as follows. The plaintiff in this suit was one of the co-sharers in a patti in "Qasbah" Muzaffarnagar, that is to say, in the town of Muzaffarnagar. In this patti there was a plot of land numbered 2566 in the "khasra abadi" or list of town lands. The plaintiff, alleging that the defendant had wrongfully built on this plot, sued the latter for the demolition of the buildings and the restoration of the land to its original condition. The defence to the suit was that the land in suit formed a public road, and was therefore the property of the Municipality, under s. 38 of Act XV of 1873, and consequently the plaintiff had no

* Second Appeal No. 124 of 1884, from a decree of Maulvi Muhammad Mak-sud Ali Khan, Subordinate Judge of Saharanpur, dated the 10th December, 1883, modifying a decree of Maulvi Muhammad Ruhullah, Munsif of Shamli, dated the 22nd June, 1883.

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right to sue; and further that the road having been diverted from the land in question, and such diversion having deprived the defendant of a portion of a house belonging to him, the Municipality had made a grant of the land in question to the defendant, and he was entitled to build thereon. The Court of first instance (Munsif of Shamli) held that the proprietary right of the plaintiff and his co-sharers in the land was not extinguished, because by s. 38 of Act XV of 1873 the road was vested in, and became the property of, the Municipality, and that the Municipality was not competent to make a grant of the land to the defendant. It further held that as the road had been abandoned, the land reverted to the plaintiff and his co-sharers in the patti. It therefore held that the suit was maintainable, and gave the plaintiff a decree in respect of the land as claimed. On appeal by the defendant, the lower appellate Court (Subordinate Judge of Saharanpur) affirmed this decree.

On second appeal by the defendant it was contended on his behalf that the Municipality were competent to convey the land to him, and that it did not revert to the zamindars of the patti because the road was abandoned.

For the respondent it was contended that the zamindars of the patti in which the land was situate had a proprietary right in it although it was used as a public road; that s. 38 of Act XV of 1873 only vested the road in the Municipality and could not extinguish such proprietary right; that the Municipality had no power to convey the land to the appellant; and that, when the road was abandoned, the zamindars acquired full proprietary rights in the land. *Empress v. Brojonath Dey* (1) was referred to.

Munshis *Kashi Prasad* and *Hanuman Prasad*, for the appellant.

Messrs. *W. M. Colvin* and *G. T. Spankie* and Pandit *Bishambhar Nath*, for the respondent.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgment:—

OLDFIELD, J. —The plaintiffs are zamindars of “*Qusbah*” Muzaffarnagar, and sue the defendant, who is also a zamindar, on the allegation that a plot of land, comprising 175 square yards, formed a portion of a highway connecting Sulabtanganj with the

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Shamli road and waste land adjoining it, entered as No. 2566 in the "*abadi khasra*," was owned by the plaintiffs and other co-sharers, and defendant has wrongfully enclosed it; also that another piece of land, comprising 28 square yards, No. 1300, is land adjoining the Shamli road, on which the defendant has built a *chabutra*. Plaintiffs seek to have the erections made by defendant demolished and the land restored to its original state. The defendant admits that the 175 square yards in No. 2566 was once part of a road, but alleges that the Municipality, in straightening the road, diverted it from this portion, and took the road through a portion of a house belonging to defendant, and gave the above land to him in exchange for the land taken; and that No. 1300 is part of an existing public road to which the plaintiffs have no right. The Court of first instance (Munsif) decreed the entire claim. The Subordinate Judge (lower appellate Court) decreed the claim in respect to No. 2566 and dismissed the rest. The defendant has appealed. We are only concerned with the claim for No. 2566.

The Subordinate Judge has found that this land was formerly a highway, and that the plaintiffs and defendant as the zamindars of the "*qasbah*" are owners of the soil, and since it has ceased to be a highway, they have full rights over it; that the Municipality had no power to make the land over to the defendant; and the latter as a joint owner could not enclose it against the will of the plaintiffs. In our opinion the decision must be affirmed. The land was either a highway or waste land adjoining it, and there is a presumption that such land belongs to the owners of the soil of the adjoining land. The plaintiffs and defendant own jointly, as zamindars of the "*qasbah*," the adjoining land, and the presumption in their favour that they jointly own the highway has not been rebutted.

S. 38 of the Municipalities Act was not intended to deprive persons of any private right of property they might have in the land used as a public highway, or to confer such right on the Municipality, nor has the section any such effect. The plaintiffs, as joint owners, now that the land is no longer a public highway, have a good cause of action against the defendant. The appeal is dismissed with costs.

Appeal dismissed.