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parties; inasmuch as to force an heir to intervene immediately on the occurrence of a death before he had had sufficient opportunity of ascertaining the extent of his rights might lead to permanent injustice, while to allow him six months to consider his position would defeat that object by protracting the proceedings. Although the sudden termination of a suit before the Mámlatdár consequent on the death of one of the parties might cause inconvenience to the surviving party, still that inconvenience would be merely of a temporary nature, inasmuch as it would remain open either to him or to the heirs to seek relief at any time in the ordinary civil Courts.

Under these circumstances we think that, so far as the second plaintiff's case was concerned, the Mámlatdár had no alternative but to dismiss it on his death.

As regards the first plaintiff, the Mámlatdár ought, no doubt, to have given his reasons for holding that the right of suit did not survive to him alone. But as it appears that the claim was one in which he did not allege a right to sole possession, and as it has not been suggested that the second plaintiff's interest passed entirely to him by survivorship, it is obvious that he was not competent to carry on the suit alone, and that, therefore, the Mámlatdár was right in dismissing it.

For the above reasons, we consider that this rule must be discharged with costs.

Rule discharged.

ORIGINAL CIVIL.

Before Mr. Justice Bayley and Mr. Justice Farran.

1890. *December* 22.

RANCHORDA'SS AMTHA'BHA'I, (ORIGINAL PLAINTIFF), APPELLANT, *v.* MA'NEKLA'L GORDHANDA'SS, (ORIGINAL DEFENDANT), RESPONDENT.*

Encroachment—Injunction—Highway—Place dedicated by owner of land for convenience of occupiers of adjoining houses—User of such open space—Covenant or grant presumed—Easement—Right of way—Landlord and tenant—Variance between pleading and evidence—Practice—Procedure.

The plaintiff and defendant occupied houses situated in the same lane and opposite each other. Close to both houses was an open space in which a cross had

* Suit No. 93 of 1888. Appeal No. 677.

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stood. The plaintiff alleged that the said vacant space was originally intended for and had always been used by the occupants of his house and the residents in the lane in common for the purposes of recreation, save where the cross stood. The cross had been for many years visited by Christian worshippers who prayed and worshipped there. The plaintiff also alleged that, in addition to the general use of the open space, he and his predecessors in title and the occupants of his said house had for more than twenty years used the open space as a footway and a way for carriages and other vehicles to approach the said house and to stand and be able to turn there. He complained that the defendant had wrongfully removed the cross, and enclosed the greater portion of the said open space, and he prayed for a declaration that he and the occupants of his house were entitled to the use of the said space for purposes of recreation and as a footway and carriageway and for an injunction. The defendant pleaded that the whole of the open space formerly belonged to a Portuguese religious confraternity who were the *fazendárs* of both of his property and the plaintiff's; that this confraternity had permitted the cross to be erected on the land, at which the residents of the houses of the plaintiff and defendant and other adjacent houses who were then Portuguese used to assemble and worship: that the Portuguese having left the locality the cross was removed, and the part of the open space which had been enclosed by the defendant had been sold to him by the confraternity in 1887. He denied the user of the space alleged by the plaintiff.

Held that the evidence was not sufficient to establish that the land in dispute had been dedicated to the public, but that, on the evidence, the Court was justified in presuming and ought to presume a covenant on the part of the *fazendári* owners of the cart to keep the lane, including the upper end of it, open for the use of the owners of the houses abutting upon it. Such a covenant should be presumed equally in the case of a landowner giving land for building purposes to *fazendári* tenants on a perpetual tenure at a fixed rent and in the case of a owner selling land out and out for building purposes.

Where the plaintiff suing to prevent an encroachment on certain land alleged that the land was set apart for recreation, but the evidence established that it was set apart generally for the more convenient occupation of the houses surrounding it (which would include recreation purposes),

Held that the plaintiff ought not on that account to fail altogether and be left to a fresh action. The defendant had not been misled or induced to refrain from calling evidence to rebut the plaintiff's case.

THE plaintiff was the owner of a house situate in Portuguese Lane, Agiáry Street, Kálbádevi Road, in Bombay. The defendant owned a house in the same lane and opposite the plaintiff's house.

The plaintiff alleged that to the west of his house, and to the south of the defendant's house, there had been for more than twenty years an open space in which stood a cross on a pedestal. The

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vacant space measured 23 feet from north to south and from east to west about 23 feet at one end and 24 at the other.

The following paragraphs of the plaint set forth the plaintiff's case :—

"3. The said vacant space was originally intended for, and has always been used by the occupants of the plaintiff's said house and the residents in the said lane in common for purposes of recreation, save where the said cross was erected. The said cross has constantly been visited for very many years past by Christian worshippers, who have prayed and otherwise worshipped there.

"4. The plaintiff says that, in addition to the general use of the said open space, he and his predecessors in title and the occupants of their said house have, for many more than twenty years prior to the acts of the defendant complained of, enjoyed the use of the said open space as a footway and a way for carriages and other vehicles to approach the said house and to stand and be able to turn round there. The plaintiff says further that the water from his said house has been for many years past conducted through a drain under the said open space, which said drain is shown on the said plan and denoted as plaintiff's drain."

The plaintiff complained that the defendant had recently wrongfully removed the cross and enclosed the greater part of the open space by building walls, &c., thereon, leaving only a narrow passage on the east and west side of the said space. He prayed that it might be declared that he and the occupants of his house were entitled to the free and uninterrupted use of the said space for purposes of recreation and as a footway and carriageway, and for an injunction. He also prayed for a declaration of his right to drain water from his house through the drain referred to in the fourth paragraph of the plaint.

The defendant in his written statement alleged that the whole of the open space formerly belonged to a certain Portuguese religious confraternity who were the *fazendárs* of the property both of plaintiff and defendant; that this confraternity permitted a cross to be erected on the land at which the Portuguese inhabit-

ants then resident in the houses, now occupied by the plaintiff and the defendant, and other adjoining houses situate on land belonging to the confraternity used to assemble and worship; that the Portuguese having left the locality the cross was removed, and the part of the open space now enclosed by the defendant was sold to him by the confraternity on the 26th July, 1887. He denied that the vacant space had been used as a place for recreation, or that the plaintiff and his predecessors in title had enjoyed its use as a footway or carriageway for twenty years. He further alleged that sufficient space had been left for a footway and carriageway.

Jardine and *Anderson* appeared for the plaintiff.

Lang and *Inverarity* for defendant.

The lower Court (Parsons, J.) held that the plaintiff was entitled to the use of the drain referred to in the plaint, but as to the other claims in the plaint the suit was dismissed with costs. The Court found that the space was not originally intended for, and had not been used by, the occupants of the plaintiff's house as alleged in the plaint; that the plaintiff and his predecessors in title and the occupants of his house had not used the space in the mode stated in the plaint for more than twenty years, and that the plaintiff was not entitled to the space as a footway or carriageway.

The plaintiff appealed.

Macpherson (Acting Advocate General) and *Anderson*, for the appellant (plaintiff), contended that there was ground for holding that the space in question was a public highway, and on this point cited *Rex* v. *Lloyd*[1], *Rex* v. *Barr*[2], *Rugby Charity* v. *Merryweather*[3], *Vernon* v. *Vestry of St. James, Westminster*[4]. But it was not necessary to claim it as a highway. Regarding the right claimed by plaintiff as an easement, or a right arising out of an implied grant, they cited *Selby* v. *Crystal Palace District Gas Company* [5]; *Bourke* v. *Davis*[6]; Goddard on Easements, (4th Ed.), p. 101.

(1) 1 Camp., 260.
(2) 4 Camp., 16.
(3) 11 East, 375, notes.
(4) 16 Ch. D., 449
(5) 30 Beav., 606.
(6) 44 Ch. D., 110.

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Lang and *Inverarity*, for the respondent (defendant), contended that there was no evidence that the land in question had been dedicated to the public, or that it had been used except for the purpose of passing to and from one of the adjoining houses.

FARRAN, J. :—The evidence on the record is insufficient, in our opinion, to establish that the land, which is in dispute round the cross, has been dedicated to the public. There is nothing to show that any public body has ever taken upon itself the care or the lighting of the place, or that the public ever resorted to it except that members of the Roman Catholic community in Bombay used to visit, and worship near, the cross. The cross has, however, been removed by the directions of the representatives of that community, and the right to visit the *locus in quo* for the purpose of worshipping at the cross, if it ever was a right vested in the public, has consequently ceased with the removal of the cross. Although a *cul de sac* like this may be impliedly dedicated to the public—*Vernon* v. *Vestry of St. James, Westminster*(1) ; *Rex* v. *Lloyd*(2) ; *Daniel* v. *North*(3)—it requires stronger evidence to prove the dedication of such a place than is called for to prove the dedication of a way or road left open at either end without gate or notice to indicate its private character. This absence of proof and the absence of allegation in the plaint that the place has been devoted to the public, render it unnecessary for us further to consider the arguments which have been presented to the Court in this aspect of the case.

The next question which arises for consideration is whether the evidence establishes that it has been set apart by the *fazendári* owner of the oart for the more comfortable enjoyment of the several owners of the houses abutting upon it and upon the more narrow passage by which it is approached from the main street, which would imply the user of it for the purposes for which open spaces surrounded by houses are commonly used, including the user of it for the purpose of driving carts and other vehicles over it and turning them upon it. Upon a building estate land is thus set apart by grant or

(1) 16 Ch. D., 449. (2) 1 Camp., 260.
(3) 11 East, 372.

covenant, and the grant or covenant may be either express or implied. In *Selby* v. *Crystal Palace District Gas Company* (1), in laying out a building estate, lands were set apart by express covenant to be used as roads, as if the same were public roads. *Espley* v. *Wilkes* (2) was the case of an implied covenant or grant by a grantor, that land, which in the plan annexed to the grant was described as "new street," should be kept as, at least, a private street. Somewhat similar is the case of *Brown* v. *Alabaster* (3), where a grant of a house with a garden at the back was held to carry with it a right of way over a defined roadway into the garden behind, though it was not a way of necessity. It passed as a continuous and apparent easement. All the earlier authorities are collected and analysed in that case.

But in all these instances the origin of the grantee's title and the circumstances under which the grant was made were known; and an implied grant or covenant was presumed from the known circumstances of the grant itself. *Moody* v. *Steggles* (4) was, however, a case in which the circumstances, under which the right claimed by the plaintiff arose, were unknown; and the Court from long and uninterrupted user implied a grant. In this way a grant was also presumed in the case of *Lancaster* v. *Eve* (5). The law is thus stated by Fry, J., in the former case: "Where there has been a long enjoyment of property in a particular manner, it is the habit, and, in my view, duty, of the Court, so far as it lawfully can, to clothe the fact with right." If, therefore, the evidence in this case shows that the vacant space in front of the plaintiff's premises has been used by the occupiers and owners of his and the other houses in the cart in a particular manner for a long series of years, I think it is the duty of the Court to infer a legal origin for such user.

This naturally leads us to consider the evidence in the present case. There is no extant record, or direct proof, by which it is possible to determine the reason why the narrow passage which leads from the main street was allowed to widen out into an open space at its northern end. It may have been left vacant to

(1) 30 Beav., p. 606.
(2) L. R. 7 Ex., 298.
(3) 37 Ch. D., 491.
(4) 12 Ch. D., 261.
(5) 5 C. B. (N. S.) 717.

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allow ample room for worshippers at the cross to kneel and stand around it, or the cross may have been erected there because a suitable vacant space already existed, having been left unoccupied for some other reason. The fact that the cross is supposed to have been erected by public subscription rather points to the latter hypothesis as the correct one, but it is conjecture. We know from the plan (Exhibit No. 4) that before, and in, the year 1836 the vacant space existed almost exactly as it now exists, and the cross then had been erected upon it. The buildings which at that time stood in the oart were of an unsubstantial kind, described as *tatti* huts, and it may safely, we think, be inferred that the leaving of the vacant space and the letting out of the building lots were co-eval. From the plan (Exhibit 4) alone it is not quite clear whether at its date the broad space was treated as part of the passage of the oart or not. Its colouring on the plan is the same as that of the narrow passage leading to it, and to get to plots Nos. 5, 6, 7 and the northern part of plot 8, it was necessary to pass over it. On the other hand, the words on the plan "passage of oart of *3a*" rather markedly turn to the east on reaching the northern extremity of the narrow passage, as though the draftsman avoided writing on the wider space. The fact, however, that the only approach to the plots we have enumerated is over the vacant space, and that in the old deed of 1828 (Exhibit G) the vacant space is described as a road, and that there is no line or mark on the plan separating it from the narrow passsage, lead, I think, to a strong inference that the vacant space was then treated as a continuation of the passage, and the turning of the words descriptive of the passage to the east is intended rather to include the space between plots 8 and 9 in the passage than to exclude the broad vacant space from it.

As far as the memory of living witnesses goes back, the vacant space has existed and has been used by the inhabitants of the oart for all sorts of purposes. Carts and *recklás* which come up the narrow lane turn on it, and there is evidence that they have been in the habit of being driven to the northern extremity when houses are being rebuilt or repaired. Building materials are laid on it; the inhabitants and their visitors pass over it; clothes, rice, &c., are exposed over or on it to dry; *pendals* on ceremonial

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occasions are erected, and children use it to play in. A drain, which leading up the narrow passage branched off to the east and west when it reached the broad space, was in 1871 built through it by means of a contribution from most of the inhabitants of the cart to lead off the sullage water from their several houses; water-pipes, a little later, were laid down in it. All this has been done without, as far as the evidence shows, any permission being asked from, or given by, the *fazendári* owners of the cart. In one letter of 26th April, 1872, which was put in, it is, however, stated that the *fazendár* of the lane had no objection to each household connecting his drains with the general drain which had been then constructed; but this applied equally to the houses along the narrow lane and to those surrounding the broad space, and it does not appear that the *fazendár* was ever, in fact, consulted on the subject. The statement was made apparently to induce the recipient to bring pressure to bear on the owners of houses Nos. 41, 42 to pay their shares of the cost of constructing the general drain, fearing, I suppose, that they might allege that they had not applied to open connection with it. No inference as to the user of the lane and open space being permissive can, we think, under the circumstances be drawn from this statament of D'Penha. At the utmost it only shows that he considered the consent of the *fazendár* requisite to justify the householders in breaking up the land to form such connections.

Under these circumstances we consider that the Court is justified in presuming, and ought to presume, a covenant on the part of the *fazendári* owners of the cart to keep the lane, including the upper end of it, open for the use of the owners of the houses abutting upon it. It seems to us that such a covenant should be presumed equally in the case of a land-owner granting land for building purposes to *fazendári* tenants on a perpetual tenure at a quit-rent and in the case of one selling land out and out for building purposes.

The case, however, which we have thus indicated as established by the evidence was not the case put in argument before the learned Judge in the Court below, and it varies in some degree from the case as put forward in the plaint. The broad space is there

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alleged to have been "intended,"—by which we presume is meant "set apart,"—by the *fazendári* owners for the residents in the lane, and used by them in common, *for purposes of recreation*; the plaintiff bases his right to drive and turn his carriages and vehicles on it upon a user of it in this manner by himself and his predecessors for many more than twenty years. His prayer is that it may be declared that he and the occupants of his house are entitled to the free and uninterrupted user of the open space for purposes of recreation and as a footway and carriage-way from his house and as a place in which carriages may stand and turn. The relief to which the evidence shows that he is entitled, is, in effect, the same as that which he prays for—to have the broad space which the defendant has enclosed with a wall left unobstructed. It is true that a plaintiff must succeed not only *secundum probata*, but also *secundum allegata*; but we think that it would be taking a too technical view of the pleadings to hold because the plaintiff alleges that the place was set apart for recreation, and the evidence establishes that it was set apart generally for the more convenient occupation of the houses surrounding it (which would include recreation purposes), that the plaintiff ought on that account to fail altogether and be left to a fresh action. If the defendant had been misled or induced to refrain from calling evidence to rebut the plaintiff's case, this course might be adopted; but here the defendant has called evidence which, in the main, coincides with that of the plaintiff.

We must not omit to notice that before the defendant purchased and enclosed the open space the plaintiff wanted to buy part of this very land, but the plaintiff has only recently purchased his house in the oart and may have been misled by the *fazendári* owner offering the open space for sale. The defendant has not been misled by this, for the covenants in his purchase deed show that he was aware that he was purchasing with a doubtful title and one which would probably lead him into a law suit.

For these reasons we consider that the plaintiff is entitled to a decree in terms of the prayer of his plaint (which should in express terms exclude from its operation the space heretofore

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actually occupied by the cross). As the case has been presented to this Court in an entirely different aspect from that in which it was presented to the Court below, due no doubt to the manner in which the plaintiff launched his case, we allow the appeal with costs, but without costs in the Court of first instance, and vary the decree to the extent we have indicated.

Appeal allowed.

Attorney for the plaintiff:—Mr. *Mirza Hussein Khán.*

Attorneys for the defendant:—Messrs. *Ardesir, Hormasji and Dinsha.*

ORIGINAL CIVIL.

Before Mr. Justice Parsons.

AHMED BIN SHAIK ESSA KHALIFFA AND OTHERS, PLAINTIFFS, *v.* SHAIK ESSA BIN KHALIFFA AND OTHERS, DEFENDANTS.*

1892. *April* 4.

Decree—Execution—Alteration of decree—Decree in terms of an award ordering (inter alia) delivery of moveable property—Loss of part of such moveable property and consequent failure to deliver—Application to insert in decree an order to pay value of such moveable property in event of failure to deliver—Civil Procedure Code (XIV of 1882), Secs. 206-8—Practice.

A partition suit brought by a son against his father was referred to arbitration. On the 9th January, 1890, the award was published, and on the 27th March, 1890, the defendants moved for and obtained a decree in terms of the award. By this decree it was ordered that in satisfaction of the plaintiff's claim the defendant should pay to him Rs. 1,05,000 in the manner therein stated, *viz.* Rs. 40,000 to be paid forthwith and the balance of Rs. 65,000 to be paid "upon the plaintiff's delivering to the defendant certain specified property, which included two vessels or buglows, called respectively the 'Nasri' and 'Sambuk'." In no event was defendant to be required to pay the Rs. 65,000 before the 15th November, 1890. At the date of the decree the vessel 'Sambuk' was at sea on a voyage, and on the 18th June, 1890, while still on the voyage, she was lost. On the 15th November, 1890, the plaintiff's attorneys demanded payment of the balance of Rs. 65,000. They offered to deliver the other properties specified in the decree, but stated that the vessel 'Sambuk' had been lost. They offered to pay its value, which they estimated at Rs. 1,000. The defendant, however, demanded the delivery of the buglow, which he stated to be worth a very large sum. The defendant having, under the circumstances, refused to pay the Rs. 65,000, the plaintiff applied for execution of the decree which was refused. He then obtained a rule calling on the defendant to show cause why the decree of the 27th March should not be amended

* Suit No. 383 of 1886; Appeal No. 746.