

(1901) 12 MAD CK 0006
In the Madras High Court

Sundaram Aiyar

APPELLANT

Vs

The Madura Municipal Council

RESPONDENT

Date of Decision : 13-12-1901

Acts Referred:

Public Health Act, 1875 — Section 149

Citation : (1902) 12 MLJ 37

Hon'ble Judges : Benson, J

Bench : Division Bench

Judgement

1. In the plaint, the plaintiff claims as owner three items of property, each, of which he describes as a plot of certain dimensions with the granite pial

built thereon, immediately to the east of his dwelling house and to the west of the street and prays that a permanent injunction may be issued

restraining the defendant (the Municipal Council of Madura) "from interfering with or from causing obstruction to the plaint sites, from removing the

granite pials built on the plaint sites or from taking any steps to remove the same.

2. The defendant in his written statement states that the slab-stones which the plaintiff was required to remove, have been only recently put up, that

as the defendant has all along been using the drain below the slab-stone, the plaintiff cannot acquire any prescriptive right against the defendant,

that the construction in question being admittedly a projection over the drain in front of plaintiff's house, the defendant has every right to remove

the same u/s 168 of Act IV of 1884 (as amended by Act 111 of 1897), and that as the defendant is only carrying out the orders of the Local

Government in removing the slab-stones, with a view to introducing a drainage scheme for the whole town, the plaintiff is not entitled to the

injunction prayed for.

3. Issues were framed as to whether the plaintiff has acquired any and what right in the said pial and whether it was competent for the defendant to

remove the pial and whether the plaintiff was entitled to the injunction sought for. The District Munsif finds that the pial has been in existence for the

last 30 years at least, that it does not in any way interfere with the cleaning of the drain ; under it and that the pial also projects a little into the street

beyond the drain and that the plaintiff having acquired a right by adverse possession is entitled to the injunction sought for. The District Miinsif in

meeting certain arguments advanced on behalf of the defendant, observes that the ground over which the pial is built forms a portion of the street

and that the public could not use such portion for any purpose, that though there is a drain under the pial in a portion of it, the "major portion of it is

ground" and that the plaintiff does not claim any right over the drain and "the question is with regard to the land."

4. The Municipality preferred an appeal to the Subordinate Judge of Madura (West) and the third ground in the memorandum of appeal runs as

follows:-""The lower court is wrong in describing the slab-stones put up as pial and in holding that the major portion of it is ground."" The

Subordinate Judge differing from the District Munsif's view that the plaintiff has acquired title by adverse possession, reversed his decree and

dismissed the plaintiff's suit. The chief ground on which his judgment is based seems to be that plaintiff's possession of the pavement has simply

been permissive as is shown by the fact of his having asked leave of the Municipality in 1892 for substituting slab-stones in place of brick work on

the pial and the Municipality, as then advised, having accorded such permission, as also by the fact of the Municipality having all along had the

control of the drain underneath the pial. The Subordinate Judge in his judgment makes the following observations as to the plaintiff's case: - ""In the

site occupied by the pial and the drain plaintiff claims no title, but he claims to be owner of it by adverse possession as against the Municipality * *

. Plaintiff, it will be seen, does not claim the site in question as his private property; it is part of the street; according to the definition of the word "

street" in the new Act the drains form part of the street.

5. This second appeal is preferred by the plaintiff against the decree of the

Subordinate Judge and the chief contention relied upon in support of the appeal is that upon the facts found by him the Subordinate Judge ought to have held that the plaintiff acquired a title by prescription, that after he has acquired such title the construction cannot be regarded as an encroachment or continuing wrong, and that the Subordinate Judge has misconstrued the application made by the plaintiff to the Municipality in 1892 (for permission to substitute stone-slabs in place of brick work on the pial) in holding that his occupation of the pial was only per. missive and not as of right. The appellant's pleader explains that the so-called pial in question is a projection from the main wall of the house over the Municipal drain and partly over the road or highway adjoining the drain, and that the projection rests upon masonry pillars standing on the road. There is no evidence or plan on record showing exactly the nature and dimensions of the pial in question, as also of the drain, and the extent of the road covered by the pial and the number and dimensions of the pillars on the road, supporting the pial, nor is there any evidence to show whether the pial is an open one or covered by roof, thatched or of masonry work.

6. Though the District Munsif rests the plaintiff's claim solely on title by prescription and the Subordinate Judge states in his judgement that the plaintiff "does not claim the site in question as his private property," a reference to the plaint shows that the plaintiff does claim the pial in question with the site thereunder, as belonging to him with his house, subject only to the defendant's right to the drain underneath the pial. The courts below and the parties to the suit have proceeded on the assumption and footing that the statutory vesting of streets and drains in a Municipality has the effect of vesting in the Municipality the ownership of the land over which the streets, and drains are formed and it is apparently on that footing that the learned pleader for the appellant contends before us that his client has acquired title by prescription. This, no doubt, will be so, if the land itself had been acquired by the Municipality, either by purchase or otherwise and roads and drains formed thereon (Section 158 of Act IV of 1884).

But if the street or highway over the land was dedicated to the public either by the State or by the owners of the land adjoining the highway or by any other person, the ownership in the soil of the street or highway will continue vested, subject only to the burden of the highway, in the State or

the respective owners of the land on either side of the highway, ad medium filum, or in any other person who may have dedicated the street to the public as the case may be.

7. The first question, therefore, which has to be determined, is the nature of the right, title and interest vested in the Municipality, by the District

Municipalities Act, in respect of public streets and drains and this question has to be determined chiefly with reference to English decisions. In *Orr*

Ewmg v. Colquhoun L.R. 2 A.C. Lord Hatherley speaking of the Leven, a navigable but non-tidal river, says (at p. 846) ""There are two totally

distinct and different things the one is the right of property, and the other is the right of navigation; the right of navigation is simply a right of way,

and Lord Blackburn (at p. 854) states that ""the public, who have acquired by user, a right of way on land, or a right of navigation on an inland

water, have no right of property. They have a right to pass as fully and freely, and as safely as they have been wont to do."" In the case of *Galbraith*

v. Armour 4 Bell's Appeals, 374 in the House of Lords, Lord Campbell said, ""I must express my clear opinion that by the law of Scotland as well

as by the Law of England the soil of public highways is presumed to be in the conterminous proprietors; and that, if a public highway is established

by usage, over the land of another, the soil is still his, with all his former rights subject to the public servitude which he has suffered to be

established."" It will thus be seen that the right of the public to the use of land, as a highway, is not regarded as in the nature of property or

proprietary right and in the General Highway Act, 1835 (5 and 6 Will. IV. C. 50) the management of highways was practically placed in the hands

of the parish surveyor or the district surveyor as the case might be. That functionary had no right in roads beyond mere rights of control and

management and both the property in the road and the possessory rights in respect thereof, subject of course to the right of passage on behalf of all

the King's subjects, were vested entirely in the persons or the successors of the persons who had originally granted the right of passage to the

public. But in passing the Metropolis Local Management Act, 1855, the Legislature considered that, in order to enable local bodies and authorities

to execute their functions properly in regard to the management of highways, it was necessary to give to them some further powers and greater

rights than those which had been originally possessed, under the General Highway Act, by the surveyor of highways, and the object was carried

out by giving to them over and above the easement of passage which the public had and which they might be able to enforce as representing the

public and over and above the rights of control and management to which they would succeed as invested with the functions of the old surveyor of

highways, some right of property in the soil or a portion of the soil of the street per Tlieciger, L.J. in *Rolls v. Vestry of Saint George* L.B. 14 Ch. D

801. The same course was also adopted by the Indian Legislature. Under Act XXVI of 1850, which was the first enactment of the kind

applicable to this Presidency, power was given to extend the provisions of the Act to any town in the Presidency in view to "" making better

provision for making, repairing, cleaning, lighting or watching any public streets, roads, drains or tanks or for the prevention of nuisances."" The Act

did not vest in the Commissioners to be appointed thereunder, any property in the public streets, roads, &c. Whether or not the provisions of this

Act were applied to Madras does not appear. But when Act X of 1865 was passed, streets and roads were, as in the case of the .English

Metropolis Local Management Act of .1855, vested in the Municipal Commissioners as "public highways" (not being the property of and repaired

by and kept under the control of the Government and not being private property) together with the pavements, stones and. other materials thereof

and also all erections, materials, implements and other things provided for such highways (Madras Act X of 1865, Section 11), Act X of 1865

was superseded by Act 111 of 1871 and all public streets in any town to which this Act was applied, were vested with their appurtenances in the

Municipal Commissioners (Section 13). This again was superseded by Act IV of 1884 and. all public streets with their appurtenances were vested

in the Municipal Council by Section 2-3 and also sewers and drains, &c, by Section 24.

8. Under Act III of 1897 amending Act IV of 1884, the definition of "street" (Section 3, Clause 27) was amended by including in the term

"street," the drains on either side. The parenthetical phrase " not being private property" next after the words "with the land." were omitted and the

reference to the " main wall of any house adjacent to the street" was superseded by reference to "the boundaries of the adjacent property." The

object of including drains in the definition of "street is by no means obvious, seeing that Section 24 vesting sewers, drains, &c., in the Municipal Council is retained. The omission of the parenthical clause "not being private property" does not, in my opinion, really enlarge the definition of "street" inasmuch as the expression "adjacent property" in the new phrase up to the boundaries of the adjacent property" will comprise "private property" though it may project beyond the actual building. Why the reference to such a distinct mark as the main wall of a house has been omitted, even when as is usually the case, the houses adjoin the street, is not apparent. There is, therefore, really no force in the argument advanced on behalf of the respondent that the amendment made by Act III of 1897 has the effect of enlarging the definition of "street" so as to include therein even private property lying between the roadway and the main wall of the house. It becomes, therefore, unnecessary to consider whether such property, even if it has now become, by virtue of the Amendment Act III of 1897, part of the "street could vest in the Municipality, in whom is vested only "a public street" which is defined as denoting only "any street" which is now vested in the Municipal Council or which may hereafter be made at the cost of the Municipal fund or which may hereafter be declared u/s 163 to be a public street (Act III of 1897, Section 3, Clause 28).

9. I shall now refer to some of the principal English cases in which the question of the extent of property and the nature of the right, title and interest possessed by urban authorities in streets vested in them under the Metropolis Local Management Act, 1855, the Public Health Act, 1875, and similar enactments, were considered and settled. The leading case in which the question first presented itself for consideration in the Court of Appeal is *Coverdale v. Charlton* L.R. 4 Q. B.D. 104. In that case it was held that by force of Section 149 of the Public Health Act, 1875, which vested all streets in the local board and under its control, the property in the soil of the street so far vested in the local board that they could demise the right of pasturage thereon to the plaintiff. *Bramwell* L.J., at pp. 116-118, says, "I am disposed to hold that this "street" vests without any property in the freehold of the soil. The word "vest" may have two meanings. It may mean that a man acquires the property "usque ad coelum" and

to the centre of the earth, but I do not think that to be its meaning here. One construction of the word "vest" here is that it gives the property in the

soil, the freehold, the surface and all above and below it; but that would be such a monstrous thing to say to be necessary for the proper control of

the streets by the local board, that I cannot suppose it to mean such a thing. Suppose the soil of the freehold passes, and consequently it carries

the right to the land to an indefinite extent upwards, and to the centre of the earth below the surface, I cannot make up my mind to say that is the

meaning of the word "vest" in Section 149. * * What then is the meaning of the word "vest" in this section The Legislature might have used the

expression "transferred" or "conveyed," but they have used the word "vest." The meaning I should like to put upon it is that the street vests in the

local board qua street; not that any soil or any right to the soil or surface vests, but that it vests qua street. * * The meaning I put upon the word "

vest" is, the space and the street itself, so far as it is ordinarily used in the way that streets are used—shall vest in the local board. * * * That would

show that "street", comprehends what we may call the surface, that is to say, not a surface bit of no reasonable thickness, but surface of such a

thickness as the local board may require for the purposes of doing to the street that which is necessary to it as a street, and also of doing those

things which commonly are done, in or under the streets; and to that extent they had a property in it.

10 Brett, L.J., says (at p. 121):—" "Street" means more than the surface, it means the whole surface and so much of the depth, as is or can be used

not unfairly for the ordinary purposes of a street. It comprises a depth which enables the urban authority to do that which is done in every street,

namely, to raise the street, and to lay down sewers, for at the present day there can be no street in a town without sewers and also for the purpose

of laying down gas and water-pipes. * * * * If the Enactment gives the local board that property in so much of the land, it gives them the absolute

property in everything growing on the surface of the land. The Legislature have, because the right of the owners to the soil in a "street" is of so little

value, intentionally taken away that right and have given it to the extent I have mentioned to the local board." (At p. 126) Cotton, L.J., in

concurrence with his colleagues, says: "Therefore, on the true construction of this Act of Parliament, the meaning to be given to the words "vest

in" must be " passed to and vested in" the local board it is sufficient in the present case to say, that the street and the surface vested in the local

board some property in the soil for the purpose for which it was to be used, and in my opinion I must hold that the "street", is a material thing and

that under this clause, it vests in the local board.

11. James, L.J., explained the principle of the above decision as follows in *Bolls v. Vestry of St. George* L.R. 14 Ch. D. 795. "What that case

decided, and all that was necessary to decide in that case, was that something more than an easement passed to the local board, and that they had

some right of property in and on and in respect of the soil which would enable them as owners to bring a possessory action against trespassers.

Now, what was that something more? It is impossible to read any of the three judgments delivered on that occasion without seeing that in the view

of the learned judges, the soil and freehold in the ordinary sense of the words "soil and freehold," that is to say, the soil from the centre of the earth

up to an unlimited extent into space, did not pass, and that no stratum or portion of the soil-denied or ascertainable like a vein of coal or stratum of

ironstone, or anything of that kind passed, but that the board had only the surface, and with the surface, such right below the surface as was

essential to the maintenance, and occupation, and exclusive possession of the street and the making and maintaining the street for the use of the

public.

12. In the *Mayor of Tunbridge Wells v. Baird* L.R. 1896 A.C. 434 the House of Lords affirming the decision of the Court of Appeal in 1894 2

Q.B. 867 held, with reference to Section 14p of the Public Health Act, 1875, vesting certain streets in the urban authorities, that it had not the

effect of vesting the subsoil in the urban authority, and that, therefore, where a local Act authorised the urban authority to erect and maintain "in any

street or public place" lavatories for the use of the public, the urban authority had no power to excavate the soil and erect lavatories below the

surface of a street which had vested in them. Lord Halsbury (at p. 437) says, "that the street should be vested in them as well as under their control

may be, I suppose, explained by the idea that, as James, L.J., points out, it was necessary to give, in a certain sense, a right of property in order to

give efficient control over the street. It was thought convenient, I presume, that

there should be something more than a mere easement conferred upon the local authority, so that the complete vindication of the rights of the public should be preserved by the local authority; and therefore there was given to them an actual property in the street and the materials thereof. * *

* It is intelligible enough that Parliament should have vested the street qua street and, indeed, so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street." Referring to the case of *Coverdale v. Gharlton*, he observes (at p. 439) : "Lord Bramwell is reported to have said that it would be a reasonable construction of the Statute to suppose, not that the soil of the freehold had been given in the sense which I have described, but only so much that the street should be used as a street; and then his Lordship is also credited with the observation that the local authority would have authority to do such things as are commonly done in or under a street. My Lords, I think, if his Lordship did use those words, he could not have had in his mind such a question as is now before your Lordships, because, if so, it would really be inconsistent with the rest of his judgment.

"What is commonly done in a street" may include water-pipes and gas-pipes as well as sewers and it could not be supposed that any such power was intended to be conveyed by such language. I think what his Lordship must have meant was such things as are usually done in a street, for the purpose, as he elsewhere in his judgment describes it, of maintaining it as a street, and which are incident to the repair and maintenance of the street as a street. For that purpose it would be intelligible. For any other purpose, it would appear to me to be inconsistent with the language of the enactments, and contrary altogether to the policy which the Legislature has certainly always pursued, of not taking private rights without compensation. In circumstances in which it is essential to take private property, Parliament has always provided for compensation, and in this section the language itself imports that where private property is being dealt with, it can only be done with the consent of the owner.

13. Lord Herschell (at pages 440, 441) says, "The learned counsel for the appellants have contended that it has been established by decision that if a street has so vested, the soil below the street at all events to the depth necessary for the construction of sewers, has vested in the urban authority

and that they have not gone below that depth. The case relied on and the only case, I think, which can be called a decision, although I do not think

that word is I accurate even as regards that case, is *Coverdale v. Charlton*. All that had to be determined in that case was whether the vesting of

a street gave the urban authority power to let pasturage on the surface it was not necessary to decide anything more than that. If sufficient property

vested for the purpose, then there was a good demise on the part of the urban authority. But no doubt the opinion was expressed there that the

vesting of the street would carry something more than the mere surface, and that in addition to what was necessary for its maintenance as a

highway, there would be transferred to the urban authority soil below that sufficient for all the ordinary uses of land below a highway. My Lords, I

confess I see considerable difficulty in accepting any such view. In the first place, the language of the enactment seems to me to point in a contrary

direction. Section 149 vests "all streets" being or becoming highways repairable by the inhabitants at large "and the pavement and stones and

other materials thereof." All that seems to point to the surface use of the street and nothing more, and I am unable to see why it should be

supposed to transfer to and vest in the urban authority the sub-soil below for sewage purposes, because that is provided for, and amply provided

for, by other provisions in the same statute. "By Section 13 "all existing and future sewers" are "vested in" and placed "under the control" of the

local authority in precisely the same language as the streets are in the section now under consideration. What necessity, therefore, is there for

transferring, by a clause vesting the streets, the soil under the street in which the sewers are, when the sewers themselves are, with certain

exceptions which it is unnecessary to go into, vested in the local authority?" * *, (p. 442)" My Lords, it seems to me that the vesting of the streets

vests in the urban authority such property and such property only as is necessary for the control, protection and maintenance of the street as a

highway for public use." Lord Maonaghten (at p. 442) concurred in this opinion and desired only to add that "the meaning of Section 149 of the

Public Health Act, 1875, is to give to the urban sanitary authority the control and management of the streets coming within the description therein

contained and such statutory right in the nature of a right of property as may be sufficient to authorise them to sue and be sued as occasion may

require in the course of such control and management.

14. This decision was followed and applied by the Court of Appeal in a case arising u/s 96 of the Metropolis Local Management Act, 1855,

Batternea Vestry v. County of London, &c, "Electric Lighting Co. 1899 1 Ch. 474. In that case, an electric lighting company, the defendant, had

illegally broken up the surface of a street within the district of a vestry in the metropolis and placed their pipes and wires at a depth of about 2 feet

below the surface. It was held that the vestry were not by virtue of Section 96, the owners of the soil of the street at that depth and that although

the defendant company had acted illegally in breaking up the street, the vestry could not maintain an action for a mandatory injunction to compel

the company to remove their pipes and wires, there being no continuing trespass upon, or interference with, any rights of the vestry. In the

Municipal Council of Sydney v. Young 1898 A.C. 457 which came on appeal before the Privy Council from the Supreme Court of New South

Wales, it was held that the Sydney Corporation Act of 1879, which vests public ways " in the Municipal Council, does not so vest in them the

proprietary right which alone gives claim for compensation, but only for purposes incidental to the exercise of municipal authority. Lord Morris in

delivering the judgment of their Lordships of the Privy Council (at p. 459) says, ""Now it has been settled by repeated authorities, which were

referred to by the learned Chief Justice, that the vesting of a street or public way vests no property in the Municipality, beyond the surface of the

street; and such portion as may be absolutely necessarily incidental to the repairing and proper management of the street, but it does not vest the

soil or the land in them as owners. " If that be so, the only claim they could make would be for the surface of the street, as being merely property

vested in them qua street, and not as general property.

15. Though the principle of the decision in *Coverdale v. Charlton* in so far as it lays down that some kind of property in the street is vested in the

urban authority, is not shaken by the decisions above referred to, yet its authority as to the nature and extent of such property is considerably

shaken. The conclusion to be drawn from the English case-law is that what is vested in urban authorities under statutes similar to the District

Municipalities Act, is not the land over which the street is formed, but the street

qua street and that the property in the street thus vested in a Municipal Council is not general property or a species of property known to the Common Law, but a special property created by statute and vested in a corporate body for public purposes, that such property as it has in the street continues only so long as the street is a highway, and that when it ceases to be a highway, by being excluded by notification of Government u/s 23 of Act IV of 1884 or by being legally stopped up or diverted, or by the operation of the law of limitation, (assuming that by such operation the highway can be extinguished) the interest of the corporate body determines; and that the clauses directing or authorising the corporate body to sell, have reference only to property absolutely vested in it, but as to property in which its interest ceases it has nothing to sell *Bolls v. Vestry of St. George* L.J.R. 14 Ch. D. 785.

16. In connection with the vesting of street in urban authorities, I may here refer also to two other cases *Wandsworth Board of Worlcs v. United*

Telephone Co., L.E. 13 Q.B.D. 904 and *Lord Provost of Glasgow v. Glasgow and S.W. Ry. Co.* L.K. 1895 A.C. 376 which bear upon the

extent to which the urban authority has a right in the air space over the surface of a street and below, and beside a bridge over which the street

Was carried. In regard to the drain which is also vested in the Municipality, the extent of air space above the drain to which the Municipal Council

may be entitled will not be the same as in the case of the street *Mayor of Birkenhead v. L. and N.W. Ry. Co.* L.E. 15 Q.B.D. 572.

17. Turning now to Indian cases, in the *Chairman of the Naihati Municipality v. Kishori Lal Goswami* ILR 13 C. 171 it was held that the vesting of

roads in a Municipal corporation by Bengal Act V of 1876, Section 32, did not pass to the Municipality the soil beneath the roads. In *Madhu*

Sudhun Kundu v. Pramoda Nath Boy ILR 20 C. 732 the same view was taken with regard to the operation of Section 10 of the Bengal Act, III of

1864, and it was held that it does not deprive any person of any right of private property that he may have inland used as a public road and that it

does not vest the subsoil of the land in a Municipality. The decision of the Allahabad High Court in *Nihal Ghand v. Azmat Ali Khan* ILR 7 A. 362

proceeds on the same view as to the effect of Section 38 of the N.W. Provinces and Oudh Municipalities Act (XV of 1873). If the decision of this

Court in *Municipal Commissioners for the City of Madras v. Sarangapani Moodaliar* ILR 19 M. 154 is to be understood as proceeding upon the

supposition that the site and soil of streets in the city of Madras became vested in the Municipality by Act IX of 1865, and that the Municipal,

corporation thereby became the proprietor of the land in trust for the public, such supposition is wholly irreconcilable with the decisions above

referred to, both English and Indian, and with all deference to the learned Judges who took part in the decision, I am unable to concur in such

opinion.

18. I am aware that in the definition of "street" the word "land" is used in connection with appurtenances to the street lying on either side of the

roadway. It is evident that the word "land" is used as denoting only what in reality is a portion of the street as such, and that such portion of the

street vests in the Municipality only in the same way as the roadway or via trita.

19. In the view I take of the nature of the right vested in the Municipality as regards public streets, there is no disposal by the Indian Legislature of

any land or hereditament vested in Her Majesty by Section 39 of the Government of India Act, 1858 (21 and 22 Vic. C. 106) assuming that the

Crown is the owner of the land forming the street in question. It becomes, therefore, unnecessary to consider whether, having regard to the

restriction imposed on the Indian Legislature by the proviso to Section 22 of the Indian Councils Act, 1861 (24 and 25 Vic. C. 67) and to the

authorities empowered in their executive capacity to dispose of all real and personal estate for the time vested in Her Majesty by Section 40 of 21

and 22 Vic. C. 106 and Section 1 of the Government of India Act, 1859 (22 and 23 Vic. C. 41) and to the restrictions imposed by the last-

mentioned enactment on such power of disposal (which restrictions are to be prescribed from time to time, by the Secretary of State for India in

Council, it would be competent for the Indian Legislature to transfer, to a local authority, real or personal estate which, for being applied and

disposed of for the purposes of the Government of India, is vested in the Crown.

20. The question of limitation has now to be considered, but as that cannot be decided until the question of ownership in the land burdened with

the highway and the drains is determined, (in regard to which certain issues will have to be remitted to the lower appellate Court), I shall now deal

with it only in view to drawing attention to the salient points on which the question of limitation turns. Under the English law, the maxim "once a highway, always a highway," is founded upon the notion that the public cannot release their rights and that there can be no extinctive presumption or prescription per Byles, J., in *Dawes v. Hawkins* 8. C.B.N. S. 858, 29 L.J.C. P.347. Of course a highway may both in England and here be extinguished or diverted under statutory provisions. The extinctive presumption and prescription referred to by Byles, J., are not the result of any statute of limitations, but of immemorial prescription from which a grant is to be presumed; but only, in cases, in which such grant could have a lawful origin. In the case of a highway, there could be no lawful grant even by the Crown, much less by any other authority or person, to obstruct the same or appropriate it or continue a nuisance thereon *Attorney-General v. Parmeter* 10 Price 378 and *Parmeter v. Gibbs* 24 R.R. 723. The principles enunciated by Byles, J., are as applicable in India as in England, but, even if in England the right of highway is not extinguished by the operation of the law of limitation, it by no means follows that such extinction does not take place under the law of limitation in India. It would appear that in England up to the passing of the Public Health Act, 1875, there was no statutory provision which vested property in highways repairable by the inhabitants at large in any public body [per Lord Russell, C.J., in *Reynolds v. Urban District Council of Presteign* L.R. 1896 1 . *Octave Chavigny, &c, v. Lacite De Montreal* (1886) L.R. 12 App. Cases 149. See *Bombay Act V of 1871*) (Land Revenue Code), Section 37]. Until, the highways were thus vested in a corporation, it seems tolerably clear that no question of limitation could have arisen in respect of highways under the English law of limitation. But it is not equally clear that since the vesting of highways in urban authorities, the English law of limitation could have no operation upon the property thus vested in them, and I have not been able to find any case in the English reports in which the question was raised for considered. It is noteworthy that neither in *Wallasay Local Board v. Gracey* L.R. 36 Ch. D. 593 nor in *Tottenham Urban District Council v. Williamson and Sons* L.E. 1896 Q. B. 353 in which the Court of Appeal approved of and followed, the former decision (in both of which it was held that under the provision of the Public Health Act, 1875, the local authority cannot, in the absence of special damage, sue

in respect of a public nuisance, except by an action in the nature of an information with the sanction of the Attorney-General) was it sought to

sustain the suit on the ground that u/s 149 of the Act, streets were vested in the local authority and that it was therefore competent for the local

authority to maintain the suit in its own name. The Indian law of limitation has from the commencement been more comprehensive than the English

statutes, and the recent amendment of the Indian law of limitation by Act XI of 1900, (which provides a period of 30 years from the date of

dispossession or discontinuance for a suit by or on behalf of any local authority for possession of any public street or road or any part thereof from

which it has been dispossessed or of which it has discontinued the possession) seems to me to be now decisive on the question, whatever doubt

may have possibly existed prior thereto ; and I do not think that this new Article (146A) can be reasonably read rioted to streets or roads formed

by the Municipality on lands belonging to or acquired by it in proprietary right. The operation of Section 28 of the Limitation Act (XV of 1877)

upon this new article will be to extinguish the right of highway on the expiration of 30 years from the date of dispossession of the Municipality by

encroachment and thus free the land from the burden of the highway, if the person encroaching upon the highway be the owner of the land. If the

owner of the land on which the highway exists be a third party, an encroachment of a permanent character on the public highway will also, as a

general rule, operate as occupation of the soil and possession of the owner of the soil equally with the Municipal (sic) and his ownership will be

extinguished in favour of the trespasser at the expiration of the ordinary period of limitation, viz., 12 years, and at the expiration of 30 years the

ownership thus acquired by the wrong-doer will be freed from the burden of the highway. But if the highway had been dedicated to the public by

the Crown, the right of the Crown as owner of the land can be extinguished only at the expiration of 60 years" adverse possession " or occupation

by the trespasser. The curious result therefore of the new article of the Limitation Act will be that, in cases in which the site of the street belongs to

the Crown, on the expiration of 30 years from the date of dispossession of the Municipality, the Crown will have the land freed from the burden of

the highway and will be entitled to remove the obstruction or encroachment and after removing the same, it may again dedicate, as a highway, the

portion of land thus freed from the burden. But if it suffers the obstruction to continue for a further period of 30 years, the trespasser would

become the absolute owner of the land. Section 23 of the Limitation Act which provides that in the case of a continuing wrong, a fresh period of

limitation begins to run at every moment of the time during which the wrong continues, will cease to have operation from the moment when by

virtue of Section 28, the wrong ceases to be such by virtue of the title conferred by the statute on the wrong-doer. If prior to the enactment of the

new Article (146-A), the ordinary period of 12 years under Article 142 or 144, as the case may be, were applicable as against the Municipality in

respect of encroachments on public streets, the same result would have followed, except that the highway would have been extinguished at the

expiration of 12 years instead of 30. I may also add that a person who causes an encroachment or obstruction of a permanent character on a

highway or exceeds the right of ordinary and reasonable user of it for the purpose of passing and re-passing, will, besides committing a public

nuisance (at any rate in the case of an obstruction or encroachment), be also guilty of a trespass on the land for which the owner can sue him.

Harrison v. Rutland, L.K. 1893 (1) Q. B. 142 and Hicicman v. Maisey 1900 (1) Q.B. 752.

21. In connection with the requisition of the Municipal Council that the plaintiff should remove the pial over the drain in front of his house, it should

be borne in mind that the owner of land adjoining a public highway, is legally entitled to erect gates or open doors so as to give him access to the

highway at any point he pleases, whether the soil of the highway be his or not L.R. 7. Q.B. 166 and 67 L.T. 169. London and North Western

Railway Co. v. Mayor, &c., of the City of Westminster, Weekly Notes, November 30th 230 S.C. LT 12.

22. For the determination of the second appeal it is necessary to remit the following issues for trial by the lower appellate Court:

(a) When and by whom was the street in question dedicated as a highway to the public and when was it first vested in any "local authority" as that

expression is defined in Section 3, Clause 28 of the General Clauses Act (X of 1897) and when and by whom was the drain in question, formed

and when was it vested "in a local authority?"

(b) Irrespective of the operation, if any, of the law of limitation, who is entitled to the ownership of the land covered by the street and drain in front

of the plaintiff's house, over which the structure claimed by the plaintiff projects.

(c) When was the plaintiff's house originally built and whether the structure in question was erected along with the building, and if not when and

how long afterwards ?

(d) What are the nature and dimensions of the structure in question and the drain underneath it, the extent of the road covered by it and the number

and dimensions of the pillars on the road supporting it?

23. As some of the issues now to be sent for trial involve the question of the right of the Government to the ownership of the soil in public streets,

and as all material documents bearing on this question will, be in the possession of Government, I think it desirable that the Secretary of State for

India in Council should be joined as a party to the suit and appeal in this and the connected second appeals Nos. 792 and 1101 under Sections 32

and 582, Civil Procedure Code. But at this stage of the case I am not disposed to do so without the consent of Government. The appellant and the

respondent state that they have no objection to the Government being joined as a party.

24. Parties will be at liberty to adduce fresh evidence at the trial of these issues and to exhibit the requisite plans after duly proving the same. The

Subordinate Judge will submit his findings on the above issues within three months after the receipt of this judgment.

Benson, J.

25. I entirely concur with my learned colleague as to what is meant by the Legislature vesting streets in a Municipal Council. The whole current of

authority both in England and in India shows that such vesting does not transfer to the Municipal authority the rights of the owner in the site or soil

over which the street exists. It does not own the soil from the centre of the earth usque ad coelum, but it has the exclusive right to manage and

control the surface of the soil and so much of the soil below and of the space above the surface as is necessary to enable it to adequately maintain

the street as a street 4 Q.B.D. 104 and it has also a certain property in the soil of the street which would enable it as owner to bring a possessory

action against trespassers L.R. 14 Ch. D. 725 ""so that the complete vindication

of the rights of the public should be preserved by the local authority"" 1896 A.C. 434 per Lord Halsbury). "This property is, as my learned colleague put it, not general property or a species of property known to the Common Law, but a special property, the creature of the Statute, and vested in the local authority for a public purpose.

26. I am also prepared to concur as to the results that will flow from the application of the law of limitation if the plaintiff has established a prescriptive right to a portion of the public street, but having regard to the limited and special nature of the right over the soil vested in the Municipal Commissioners, it is difficult to see how the erection of the pial described in the plaint could amount to a dispossession of the Municipal Commissioners in respect to this right so as to enable the plaintiff to acquire the right of a full owner over the site occupied by the pial. The Subordinate Judge has found as a fact that the plaintiff's possession was ""always under leave of the Municipality, who had control of the drain underneath."" Apparently there was nothing else which the Municipality had any occasion to do in the exercise of its duty to maintain the street (including the drain) on behalf of the public. It lies on the plaintiff who seeks for an, injunction to establish his title and the only title alleged is by prescription. It is difficult to see how the erection of this pial which apparently did not interfere with the maintenance of the street as a street could be hold to be a dispossession of the Commissioners with regard to the street. The information on the record, however, as to the nature and extent of the pial is not very full or accurate. Before finally deciding the question I agree that it is desirable to have further evidence on these points. I therefore concur in the order proposed by my learned colleague. I reserve for consideration after we have a finding on the issues referred, the question whether the remedy by injunction is one that ought, in any event, to be granted in a case like the present where the removal of the pial is alleged to be necessary on sanitary grounds.