Present: Mr. Justice Wood Renton and Mr. Justice Grenier. *July 18, 1910*

THE MUNICIPAL COUNCIL OF COLOMBO *v.* HEWAVITARANA *et al.*

D. C., Colombo, 23,830.

Public road—Adverse possession by private individual—Prescription.

Under the Roman-Dutch Law prescription runs even against the public at large, so as to deprive it of portions of the land forming a public road, for, though the public cannot by mere non-use lose its right to a public road, it does not follow that the right may not be lost by adverse user.

THE facts are set out in the judgment of Wood Renton J.

De Sampayo, K.C., for the appellant.—The portion in dispute was once part of a street. Section 3 of Ordinance No. 17 of 1865 defines "street" as "any road, street, &c., whether a thoroughfare or not." The rights of the public to a street are not confined to the metal portion, but extend to the whole space between the fences (*Harvey v. Truro Rural District Council* [1]). The rule of law is: "Once a street, always a street." A street cannot cease to be a street by any act on the part of private persons. The public have as much inalienable rights over the highways as they have over rivers, the seashore, &c. The rights which the public have over a highway are not forfeited by non-user (*Voet 431, 11,7*). The passage in *Voet 13, 7, 7, (2 Maasdorp, 82 and 83)* would not appear to apply to public roads, but to rights of way which the public have over private property; for Voet says that things belonging to the public, which are used for ornament of the town, pleasure, &c., may not be prescribed against. *A fortiori* highways could not be acquired by prescription. The highways only vest in the Council for the purpose of maintenance, &c.; the dominium apparently remains with the Crown or with the public.

The following cases were referred to at the argument: *Turner v. Ringwood Highway Board;* [2] *Belmore (Countess of) v. Kent County Council;* [3] *D. C., Colombo, 1,215; Vand. D. C. 83; Rajakariar v. Provincial Road Committee, Jaffna;* [4] *Queen v. Cowasjee Eduljee.* [5]

Bawa, for the respondents, not called upon.

Cur. adv. vult.

[1] *(1903) 2 Ch. 638.*
[2] *(1870) L. R. 9 Eq. 418.*
[3] *(1901) 3 Ch. 873.*
[4] *(1907) 11 N. L. R. 41; 4 Bal. 4.*
[5] *Ram. 1843-55, 105.*

July 18,1910 July 18, 1910. WOOD RENTON J.—

The Municipal Council of Colombo v. Hewavitarana

On the facts this appeal is devoid of merits, although its shortcomings are somewhat redeemed by the able and learned argument which Mr. de Sampayo succeeded in constructing in support of it. The appellant, the Municipal Council of Colombo, seeks to vindicate title to a strip of land in the Pettah, said to be a few perches in extent, valued at Rs. 562, and proved by an ample body of reliable evidence to have been regarded and treated as private property for about half a century. The Municipal Council alleges that the strip of land in suit is part of Prince street, and as such is vested in it, in virtue of the provisions of section 87 of Ordinance No. 17 of 1865, which is reproduced in section 73 of Ordinance No. 7 of 1887; that on October 12, 1904, the testator of the defendants-respondents unlawfully encroached upon the land and took unlawful possession of it; and that on or about August 14, 1905, he began to dig foundations and to erect a building, now nearly completed, upon it. The respondents in their answer denied that this strip of land is, or ever has been, a part of Prince street, or that the respondents' testator had unlawfully encroached upon it. They admitted that he had dug foundations in the land for the purpose of building, and that he had in fact built upon it, and they alleged that the strip of land in question formed part and parcel of the premises bearing assessment Nos. 23, 1st Cross street, and 53, Prince street, to which he was entitled, and of which he was in possession. The case went to trial on two issues: (1) Is the portion of land in dispute (coloured green in plaintiff's plan A) part and parcel of Prince street, and as such vested in the plaintiff Council ? (2) If so, have the defendants and his predecessors in title acquired a valid title by prescription to the said portion ? It appears from the record that the respondents had offered to buy up the land at the appellant Council's own valuation. This offer was not, however, accepted, and the case went to trial. The learned District Judge held that the land claimed by the Council had at one time, very many years ago, formed part of what was called Prince street, but that long prior to Ordinance No. 17 of 1865, by which the Municipal Council for Colombo was first created, it had become vested in the owners of the property adjoining it, and that therefore, as it had " admittedly " ceased for many years to be a part of Prince street, when Ordinance No. 17 of 1865 came into operation, it was never vested in the Municipal Council under section 87 of that Ordinance, and was not now vested in it under section 73 of Ordinance No. 7 of 1887. In view of his finding on that issue, he did not deal with the question raised by the second issue, as to whether or not the respondents' testator had acquired a prescriptive title to the property in dispute, and he dismissed the appellant's action with costs.

Mr. de Sampayo's argument in support of the appeal may, I think, be summarized thus. Taking as his starting point the finding

of the learned District Judge, that this land had at one time formed part of Prince street, he contended that under English Law, to which, as the question is one of prescription, he said we were bound to look, and, even if it were necessary to go so far, under Roman-Dutch Law, the Crown could not abandon the rights of the public over it. "Once a street, always a street," said Mr. de Sampayo, is the legal maxim that must be applied to the decision of the present case. He further argued that the finding of the learned District Judge as to the length of the possession of the respondents' testator was not supported by the evidence. The last point may be disposed of at once. Mr. de Sampayo read to us all the material portions of the evidence on this point, and I will content myself with saying that I adopt every word of the learned District Judge in regard to the inferences that ought to be drawn from it. Moreover, we called for, and had produced before us, by an officer of the Surveyor-General's Department, Pickering's plan (P 1), which was made in 1846, and which, according to the learned District Judge, shows that at that date the strip of land had already been encroached upon, and was not used as a part of Prince street. In the copy of Pickering's plan (P 1 A), which was also put in evidence, and produced before us at the arugment of the appeal, no such encroachment is visible. But on Pickering's plan itself there is a distinct mark at the very spot where the land here in dispute is situated, apparently cutting it off from the rest of the street. The line is faint, and bears traces of partial erasure at some time or other. But it is quite visible, and it supports the inference which the District Judge has deduced from its presence. In my opinion neither the Roman-Dutch Law nor the English Law supports Mr. de Sampayo's contention that there can be no prescription against a public corporation, or, for that matter, against the Crown itself, in regard to land of the character with which we have here to deal. Voet is quite clear on the point:—

Sed nec alio respectu id ipsum, quod in d. l 2 de via publ. et itinere pub. dicitur, populam viam publicam non utendo amittere non posse, res meræ facultatis est, quam si nullus postea actus interveniat, factum nullum quo usus impediatur: nam si quis via publica, velut re propria, usus fuerit, in eaque ædificaverit, severit, plantaverit, foderit, sepimenta posuerit, aut alia quacunque ratione impedimento fuerit, ne populus illac transiret, et ex eo tempore annorum quadraginta spatium effluxerit, populo non contradicente, neque usum viæ vindicante, nemo dubitabit, ut opinor, quin et tunc viæ istius publicæ usum populus præscriptione amiserti, dum nullum jus privatum vel publicum ex quacunque causa vel quacunque persona, quod quadraginta annorum extinctum est jugi silentio, moveri deinceps potest (*Voet 13, 7, 7*).

I cannot accept Mr. de Sampayo's argument that there is anything in the passage in which Voet subsequently explains (*Voet 44, 3, 11*)

July 18, 1910

WOOD RENTON J.

The Municipal Council of Colombo v. Hewavitarana

that there can be no prescription against property, *jure Reipublicæ ad ornatum et adspectum publicum urbis pertinenti*, to require us to hold or to justify us in holding that the express language, which I have cited above, should be restricted to roads of a private character. Nor do I think that it results from any of the English cases to which Mr. de Sampayo referred us, that a private individual may not prescribe against the Crown or a local authority for a piece of land such as we are here concerned with, even if it adjoins a street, and may itself at some remote time have been used for some of the purposes to which a street is put. In the case of *Turner v. Ringwood Highway Board*,[1] Vice-Chancellor James expressly points out that many of the acts relied on by the adjoining proprietor as acts of ownership establishing a title as against the Highway Board were only acts which, under the English Statute Law, an owner of land adjoining a highway was entitled to do, and he said that it could not be held that the mere tolerance of acts of that character by the Highway Board could extinguish the rights of the public. In *Harvey v. Truro Rural District Council*,[2] it was held that in the case of an ordinary highway running between fences, although the space between them may be of a varying and unequal width, the right of passage *prima facie*, and unless there be evidence to the contrary, extends to the whole of the ground between the fences, and that the public are not confined to the metal portion. All the space between the fences is presumably dedicated as highway, unless the nature of the ground or other circumstances rebut that presumption. The mere disuse of a highway for any length of time cannot deprive the public of their rights in respect of it, and the mere consent of a public authority to an obstruction or encroachment upon it is ineffectual for the purpose of legalizing that obstruction or encroachment. It is obvious that in this decision the question now before us is treated as being one dependent on the evidence in each case. I do not think that the circumstances in *Harvey v. Truro Rural District Council* are at all analogous to those with which we have here to deal. We are not here concerned with a piece of land enclosed between two fences distinctly marking off a highway road. We have to do with a strip of land which indeed adjoins a street, but which for more than living memory has been treated, first by the Crown and afterwards by the Municipal Council on the one hand, and by the successive owners of the land on the other, as forming no part of it, but as private property appurtenant to these premises. I would point out that in the case of *Belmore (Countess of) v. Kent County Council*,[3] it was held that, even as regards unenclosed spaces by the sides of a metal highway, there is no invariable presumption that the highway extends to the fence on either side, and that the nature of the district, the width and level of the margins, and the

[1] *(1870) L. R. 9 Eq. 422.* [2] *(1903) 2 Ch. 638.*
[3] *(1901) 3 Ch. 873.*

irregularity of the lines of fence are circumstances to be taken into account in determining the fact of dedication. At the most the evidence in the present case cannot be put on a higher level than that in *Belmore (Countess of) v. Kent County Council*, and I do not myself think that it can fairly be placed so high.

It appears to me, therefore, that there is nothing either in Roman-Dutch Law or in English Law to prevent us from holding on the particular facts of this case, and I would propose to hold, first, that the land in question is land of a character that can be acquired by prescription as against either the Crown or any local authority, and in the second place, that it has been so acquired by the respondent. Taking, as I do, that view of the evidence, there is no need for us to consider Mr. de Sampayo's last point, as to whether the Roman-Dutch or the English Law should be applied to the determination of this case. It is immaterial which of these laws we follow. Under them both the appellant's case fails. I would dismiss the appeal with costs.

GRENIER J.—

In this action the plaintiff Council seeks a declaration of title to a small strip of land coloured green in the plan A filed with the plaint. It was alleged by the plaintiff that this strip formed part of Prince street, and on the issues framed at the trial, the defendants having claimed the land by right of prescriptive possession, and having denied that it ever formed part of Prince street, and was therefore vested in the plaintiff Council, the onus was on the plaintiff Council to establish its title.

The cause of action alleged was that the testator of the defendants unlawfully encroached upon Prince street on or about October 12, 1904, and took unlawful possession of the strip of land in question, and on August 14, 1905, unlawfully began to dig foundations and to erect a building on the land. In view of the evidence, the effect of which has been rightly appreciated by the District Judge, and to which I shall presently refer, this cause of action is somewhat remarkable, to say the least of it. Now, let us see how the plaintiff Council has discharged the onus, which was clearly on it, on its affirmative proposition that this strip of land formed part of Prince stret. The streets of the Pettah of Colombo were laid out, I believe, during the Dutch occupation, and although it would be extremely difficult to obtain particulars after the lapse of so many years as regards the width of any particular street, yet, as the plaintiff Council was suing for a declaration of title, it was bound to place before the Court all the evidentiary materials at its command on the point. An attempt was made to adduce hearsay and secondary evidence, for I find that Mr. Skelton, Municipal Engineer, was asked to state the result of his examination of certain documents, which were not produced, in order to show that the streets in Pettah

July 18, 1910

GRENIER J.

The Municipal Council of Colombo v. Hewavitarana

were originally fifty feet in width, and on defendants' counsel objecting, the District Judge properly ruled that the evidence was quite inadmissible, in the following terms: "There is no material on which the Court can decide whether the witness' conclusion is correct, unless the documents are produced. I am informed that it is impossible to produce the documents." We have, therefore, no legal evidence as to the original width of Prince street, and the plaintiff's case was therefore defective in a most material part. The absence of the evidence I have indicated rendered it almost impossible for the plaintiff to prove any such encroachment as is alleged, unless it was in a position to adduce strong proof that the strip of land in question was used by the public as a part of Prince street from and before the time when the first Municipal Councils Ordinance came into operation in 1865.

The learned District Judge has very carefully considered and discussed the evidence, and I agree generally with the conclusions he has arrived at. It is clear to my mind that this strip of land never formed part of Prince street within the memory of man, and that for half a century and over it was used and treated as private property. The evidence on this point is overwhelming. I do not accept the finding of the District Judge upon the evidence he refers to in his judgment "that the strip of land did very many years ago form part of Prince street." To support such a finding there must be, in my opinion, proof of an incontestable character. Pickering's plan, which wa smade in 1846, shows an encroachment. The encroachment must have existed before 1846. The first Municipal Councils Ordinance was passed in 1865. No steps were taken to recover this alleged encroachment till nearly forty-five years after, and then the plaintiff Council comes into Court with a cause of action which entirely ignores a state of active and continuous possession by defendant's testator and his predecessors in title for fifty years or so. I do not attach much importance to the fact that the premies conveyed to defendant's testator was described as being of the extent of 10.37 perches. The words used in the certificate of title are "10.37 perches more or less." But this is certain, that after this certificate was issued to defendant's testator in September, 1904, he naturally looked upon the strip of land as forming part of the premises conveyed to him, and began to make use of it for building purposes.

It was admitted by appellant's counsel that the strip was never metalled, and had not been used for wheeled traffic. The evidence of Sourjah, one of the plaintiff's witnesses, is clear on the point. The strip is so situated in relation to the metalled roadway that it was entirely out of the line of foot passengers and wheeled traffic. And, therefore, the inference seems to me irresistible, especially in view of the fact that neither the Crown before 1865, nor the plaintiff Council after that year, until the present action was instituted, laid any claim to it; that it was regarded both by the Crown and the plaintiff Council

as private property, and not as forming part of Prince street. The plaintiff Council seems to have been roused into action only after the testator of the defendants began building operations, and not to have taken the slightest notice of this strip. Although for forty years and more it had been put to certain distinct uses compatible only with private ownership, I will assume, however, that the strip did form part of Prince street at some indefinite time in the remote past. Plaintiff's counsel based an argument upon this, and asserted that a street cannot form the subject of prescriptive possession, and that once a street always a street, is the legal maxim applicable to this case. This argument does not find support in the Roman-Dutch Law, for prescription will run even against the public at large so as to deprive it of portions of the land forming a public road, for though the public cannot by mere non-use lose its rights to a public road, it does not follow that the right may not be lost by adverse user (*Maasdorp, vol. II., 83*, citing from *D 43, 11, 7* and *Voet 13, 7, 7*).

In Ceylon it is, I believe, accepted law that a title by prescription can be acquired against the Crown by adverse possession for a third of a century and upwards (*D. C., Colombo, 1,215; Vand. D. C. 83*). So that even on the assumption that this strip was originally Crown land, at a period anterior to the passing of the first Municipal Councils Ordinance of 1865, the defendant's testator and his predecessors in title have by adverse user acquired a good legal title by prescription. The English authorities cited by Mr. de Sampayo, and which are referred to in the judgment of my brother, do not apply at all to the facts of this case. The facts and circumstances of each case of this kind must first be clearly found and ascertained before the law contained in the maxim—once a street always a street—is applied. I would only refer to the case of *Belmore (Countess of) v. Kent County Council*, in which it was laid down that there is no invariable presumption that the highway extends to the fences on either side, and that the nature of the district, width and level of the margins, and the irregularities of the line of fence are circumstances to be taken into account in determining the fact of dedication. In the present case there is absolutely no evidence to show what the width of Prince street was when it was first laid out. There were no fences on either side fixing the width of the street. The strip of land in question was, on the contrary, never used as part of Prince street. It was never metalled as almost all streets in a city are for wheeled traffic. No such traffic ever passed over it, and the evidence adduced by the defendants shows that there were fruit trees on it, that it was used as a small flower garden, and that the plaintiff Council took steps only in 1904 to assert its right to it. In my opinion this action was altogether an ill-advised one, and it was very properly dimissed by the District Judge. I would accordingly dismiss the appeal with costs in both Courts.

20–

Appeal dismissed.