PERERA *v.* PERERA.

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C. R., Colombo, 18,422.

Prescriptive title—Right of a plaintiff out of possession at time of action to the benefit of such title—Ordinance No. 8 of 1834, s. 2, and Ordinance No. 22 of 1871, s. 3—"Previous to the bringing of the action"—Right of Full Bench of Supreme Court to over-rule previous judgment of a Full Court—Authority of long-established decisions on property law.

The prescriptive possession created by the Ordinance No. 22 of 1871, section 3, is not defeated by reason of the action *rei vindicatio* not being brought at the very moment of time that his cause of action arose.

The Collective Court decision in *Ayanker Nagar v. Sinnatty (Ram. (1860) 75) followed.*

LAYARD, C.J.—The Supreme Court sitting collectively has no power to over-rule the previous judgment of a Collective Court.

If there be a conflict of collective judgments of the Supreme Court it would become necessary to determine which of them should be followed.

ACTION in ejectment instituted on 30th May, 1902. The plaintiff alleged that the defendant ousted him on 22nd May, 1902. The Commissioner dismissed the case, as the plaintiff, who relied on prescriptive possession, was not in possession at the time of the bringing of the action, and could not, according to the case of *Silva v. Siman* (*4 N. L. R. 144*) decided by Bonser, C.J., claim the benefit of the possession of his predecessor in title for over ten years.

The plaintiff appealed. The case was argued before a Full Bench consisting of Layard, C.J., Wendt and Middleton, J.J., on 14th August, 1903.

Bawa (with him *F. M. de Saram*), for appellant.

Dornhorst, K.C., for defendant, respondent.

The cases cited by Counsel appear in the judgment of his Lordship, Wendt, J.

Cur. adv. vult.

31st August, 1903. WENDT, J.—

The plaintiff seeks to vindicate from defendant a small parcel of land, of which he became owner by conveyance from one Don Daniel dated 1st November, 1901, and from which defendant ousted him on 22nd May, 1902. The action was brought on 30th May, 1902. At the trial the parties agreed upon issues which

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related among other points to the prescriptive possession of the land by plaintiff's predecessor in title, Pinhamy. Plaintiff did not produce or prove the Fiscal's transfer (said to have been executed over fifty years ago) on which Pinhamy was alleged to have purchased the land, and he had therefore to rely on prescriptive possession for proof of title. At the close of plaintiff's case the Commissioner ruled that the gap of eight days between ouster and action was fatal to plaintiff's case; being out of possession at the date of action he could not rely on a title which depended on prescriptive possession. After referring to the cases reported in *8 S. C. C. 31, 4 N. L. R. 144, 4 N. L. R. 302, and 5 N. L. R. 210*, he held, following the opinion of Bonser, C.J., that the words of section 3 of Ordinance No. 22 of 1871, "undisturbed and uninterrupted possession for ten years previous to the bringing of the action" meant not a ten years' possession, and then a gap of dispossession, and then the bringing of an action, but a ten years' possession lasting up to and existing at the date of the bringing of the action. He therefore dismissed the action with costs without calling upon the defendant. The plaintiff has appealed.

The appeal came up as usual for hearing before a single Judge of this Court, and in view of the conflict between the older decisions and that of Bonser C.J., in the case of *Silva v. Siman* (*4 N. L. R. 144*), was reserved for the consideration of a Full Court in order to the settlement of the question, whether a plaintiff out of possession at the date of action could establish a prescriptive title.

The question is one of the utmost importance in relation to titles to land, for it may just as truly be said now as it was by Sir Edward Creasy, C.J., forty-three years ago, that "Nothing is more common in the plaints for ejectment, which we daily read, where the plaintiff claims by prescription, than an allegation that the ouster occurred one or two or more years (short of ten) ago. Every one of these plaints must be held bad on the face of them, if the Ordinance is to be construed as the present defendant desires."

The enactment which governs the present case, section 3 of Ordinance No. 22 of 1871, is in terms identical with section 2 of the Ordinance No. 8 of 1834, the first statute dealing with the acquisition of title to land by prescription. The very point we are now considering, in the shape of a case under the Ordinance of 1834, came before this Court in *Ayanker Nager v. Sinatty* (*Ram. (1860) 75*). The report represents the decision as that of the Full Bench of three Judges (Creasy, C.J., Sterling and Morgan, J.J.), but in view of a doubt on this point suggested by respondent's

counsel I have referred to the original minutes and find that the case was on 25th October, 1860, argued before the three Judges I have named—Rust appearing for the defendant, appellant—and the considered judgment of the Court was delivered on 3rd November. It was prepared by the Chief Justice. The action was in respect of a right of way claimed by plaintiff over defendant's land by virtue of prescriptive possession alone. The plaintiff had been out of possession for the greater part of the years 1857 and 1858. Thereafter he got back into possession for a short period, but defendant again dispossessed him, and at the date of action he was out of possession. One of the points considered by the Court was the objection that " plaintiff's user of the right of way had been interrupted for the greater part of 1857 and 1858, and that consequently he had not had the undisturbed and uninterrupted possession for ten years previous to the bringing of the action, which the Ordinance requires." The learned counsel for the defendant wished the Supreme Court to read the words " previous to the bringing of the action " as meaning " next before the bringing of the action." The Court considered such an interpretation would be erroneous, for reasons which it stated, and after making the remark which I have already quoted as to the frequency of plaints for ejectment founded on prescription, continued: " The Supreme Court should pause long before it so revolutionized the administration of justice in one of its most important branches, even if there was anything in the Ordinance which seemed to favour it. But the Ordinance is not so worded, and the Supreme Court has double cause not to invent law to make mischief." The Court went on to say that at the beginning of the year 1857, when the first interruption occurred, the plaintiff had acquired a prescriptive right of way over the defendant's land by uninterrupted user for ten years, and that nothing had happened since then that could deprive him of it. " A right of way undoubtedly may be lost by non-user; but then the non-user must have continued for ten years, the same length of time during which user may create a right. It would, perhaps, on considering the words of our Ordinance, be more accurate to say, not that the owner of the dominant tenement loses his right over the servient tenement by ten years' non-user, but that the servient tenement acquires liberty, and its owner gains full exclusive property in it, by the lapse of ten years without the servitude being exercised, and without any act being done from which an acknowledgment of liability to such servitude would be naturally inferred." I regard this as establishing that by ten years' prescriptive possession the possessor acquires, not merely the right

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to continue holding the land against the person who had the *dominium* when that possession began, but a title of which he can only be divested in one of the modes recognized by law, viz., by devolution in due course of law or by express grant *inter vivos*, or by some other person in turn acquiring a prescriptive title against him. Once a prescriptive title is acquired, the consideration whether the holder of it is or is not in possession is as immaterial as if the title was by deed.

It will have been noticed that the Supreme Court considered the defendant's contention in that case as tending to "revolutionize" the law. This indicates what had been regarded as the law for the previous twenty-six years during which the Ordinance of 1834 had been in operation. And it is of the utmost significance that, when the Ordinance of 1871 came to be passed, the Legislature, through aware of the interpretation put upon section 2 of the older enactment and never afterwards departed from, re-enacted it in identically the same words, with nothing to indicate that that interpretation was erroneous. So far as I am aware, the law as settled by the case of *Ayanker Nager v. Sinatty* was uniformly administered, without a doubt being cast upon it, until the case of *Cassie Chetty v. Perera* (*8 S. C. C. 31*) decided in 1886, and it must be borne in mind that the point is one of daily occurrence in our Courts.

Cassie Chetty v. Perera was the decision of two Judges only of this Court (Clarence and Dias, J.J.), and it could not therefore over-rule the opinion of the Full Court in 1860, had those learned Judges had the opportunity of considering it but they had not that opportunity. In *Abubaker v. Perera* (*9 S. C. C. 48*). and again in *Sella Naide v. Christie* (*2 C. L. R. 43*). Clarence, J., himself informs us that the Full Court decision was not cited at the argument—indeed no authority appears to have been cited at all—and he therefore based his decision in *Abubaker v. Perera* on a different ground. In *Cassie Chetty v. Perera* the plaintiff on his own showing was eight years out of possession when he commenced his action, and the District Judge, Mr. Berwick (see his judgment reported *1 Browne 401*), was of opinion that he had not at any time had ten years' possession before that. He, however, dealt with the construction of the Ordinance, and held that ten years "previous to the bringing of such action" meant ten years next previous to the bringing of such action, because such was not only the natural meaning of the word "previous," but if we were to read it in any other sense the term would be indefinitely elastic—arguments which must obviously have been considered by the Full Court in 1860.

Their decision was apparently not cited to Mr. Berwick; he says not a word about it. But, in dealing with plaintiff's argument that some time must necessarily elapse between ouster and action, viz., the time necessary to come to Court, and that therefore the ten years necessary could not be held to be the ten years immediately preceding the day of action, he expresses a view which has an important bearing on the present case at least, if not on the general question. He says: "But the law is always reasonable, or at least must be worked into reason when possible. Of course an action cannot be brought in the field at the moment of forcible ejection, and all that is meant is that the ejected party shall go to law forthwith, viz., as soon as he reasonably can, and not go to sleep over his rights, for, it may be, a year—in this case eight years." There is no doubt that in the present case Mr. Berwick would have sustained the action as having been brought forthwith. The judgment of this Court, in appeal from Mr. Berwick, was delivered by Clarence, J., and is very brief. It merely mentions the view of the District Judge, and adds "We agree with him in so construing the Ordinance."

The decision in *Cassie Chetty v. Perera* did not long remain unquestioned. It was considered in *Sella Naide v. Christie* (*2 C. L. R. 43*), where eight months had elapsed between ouster and action. A majority of this Court affirmed a judgment in favour of the plaintiffs. Burnside, C.J., in whose view Dias, J., concurred, considered they had made out a prescriptive title, and supported it, remarking that *Cassie Chetty v. Perera* was in direct conflict with *Ayanker Nager v. Sinatty*, "in which the law had been distinctly laid down that the prescriptive title created by the Ordinance is not defeated by reason of action not being brought for an invasion of it at the very moment of time that his cause of action arose." Clarence, J., after alluding to the conflict of decision, thought it well not to express any opinion on the point, inasmuch as he was for ordering a ew trial, but he said that the point was worthy of reconsideration whenever it might be definitely raised, and added that the decision in *Cassie Chetty v. Perera* went further than was necessary for the purposes of that case, inasmuch as plaintiff had not had ten years' possession.

This was how the decisions of this Court stood when *Silva v. Siman* (*4 N. L. R. 144, 1 Tamb. 24*) came before Bonser, C.J., for decision in October, 1898. The plaintiff had been two years out of possession when he brought the action. *Ayanker Nager v. Sinatty*, *Cassie Chetty v. Perera*, *Abubaker v. Perera* were cited to

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the learned Judge, but he did not discuss them at all. He merely looked at the Ordinance of 1871, and held that " it was quite clear from section 3 that a plaintiff who relies upon that section must be in possession when he brings his action.....If he had been ousted there is a very simple remedy provided by law for recovering possession without going into the question of title." This view was foreshadowed by Bonser, C.J., in September, 1895, in the case of *Terunnanse v. Menike* (*1 N. L. R. 200*), where he described the Ordinance as enacted to protect actual possessors only, and intended to be used as a shield only, and not as a weapon of offence. But Withers, J., who took part in that decision, indicated a different opinion. He said: " The only law relating to the acquisition of private immovable property by prescription is to be found in the 3rd section of the Ordinance No. 22 of 1871. That section determines the mode of acquisition of a prescriptive title. It has been held over and over again by this Court that a decree of title to such immovable property can be granted under the circumstances set forth in that section."

The opinion of Bonser, C.J., in *Silva v. Siman* being that of a single Judge could not of course over-rule the Full Court's decision of 1860, but it was itself very soon dissented from in a decision of two Judges of this Court, (Moncreiff, J., and Browne, A.J.), dated September, 1900, in *Banda v. Banda* (*4 N. L. R. 302, 1 Browne 262*), a case in which plaintiff had been two years out of possession. The Court disapproved of *Silva v. Siman* and reiterated the interpretation adopted by the Full Court. Moncreiff, J., aptly pointed out that the opposite construction took no account of the words " to establish his claim in any other manner to such land," which indicated that the remedy was not limited to merely evicting or maintaining a plaintiff in possession. Browne, A.J. speaking with an experience of nearly thirty years at the Bar and on the Bench, said he had always understood that the ten years' adverse possession gave a title which was capable of being vindicated like any other title to land. And from my own knowledge of the practice since the year 1880 I can fully bear this out, and I may add that the construction adopted in *Cassie Chetty v. Perera* came as a surprise to the profession. That case was in fact not regarded as having changed the law, and I am not aware of a single subsequent case in which it was followed by this Court.

In March, 1901, in *Dabare v. Martelis Appu* (*5 N. L. R. 210*), Bonser, C.J., elaborated the view he had expressed in *Silva v. Siman*, and Browne, A.J., gave a most useful recapitulation of the statutory enactments and of the earlier authorities. Bonser, C.J.,

claimed to have on his side the high authority of Withers, J., but did not refer to any particular decision of his. The point, however, did not arise in the case, and what fell from the Bench was subsequently stated to be *obiter dictum*.

In an unreported case, D. C., Chilaw, 1,954, decided on the 8th July, 1901, Lawrie, A.C.J., declared that he did not share the opinion of Bonser, C.J., that by our law possession did not give title.

This review of the decisions rendered, and opinions expressed, by Judges of this Court shows, I think, that the authority of the decision of the Full Bench in *Ayanker Nager v. Sinnatty*, even if doubted or dissented from by individual Judges in comparatively recent years, has never been shaken, much less over-ruled. In my opinion, we ought to follow that decision and leave it to the Legislature to alter the law so declared, if it sees fit to adopt now a course which it did not take in 1871 when dealing with the subject. Assuming the original interpretation was wrong—I am far from thinking so myself—"to reverse it suddenly" (to quote the words of Sir Edward Creasy, *Vanderstraaten, p. 276*) "would be to shake the titles to many properties and to cause great and general inconvenience." The Chief Justice was there maintaining a view of the law which had prevailed for over thirty years, but which he considered erroneuos, and he quoted the words of Lord Mansfield in *Robinson v. Bland* (*1 Burr. 1077*), which I think are deserving of the utmost respect in the consideration of a matter such as we have now in hand: "Where an error has been established and taken root, upon which any rule of property depends, it ought to be adhered to by the Judges till the Legislature thinks proper to alter it, lest the new determination should have a retrospect and shake many questions already settled."

I think the decree appealed from should be set aside and the case remitted to the Court of Requests for the completion of the trial. The plaintiff will have the costs of appeal.

MIDDLETON, J.—

I agree with my brother Wendt that it is our duty to uphold the ruling of Chief Justice Creasy and the Full Court. Whatever may be the thought of the correctness of that decision—and I see no reason to question it—I think the wise *dictum* of Lord Mansfield is peculiarly appropriate to this case.

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I agree. I have only to add, that during the course of the argument of this appeal, immediately it was admitted that this Court sitting collectively forty-three years ago had decided that ten years' possession by any person gave not merely the right to continue to hold the land, but a title by which such persons could only be divested by devolution in due course of law or by express grant *inter vivos* or by some other person acquiring a prescriptive title by possession against him, and that there had been no collective decision of this Court questioning that judgment, I felt that this Court is bound by the collective judgment of 1860, and that it was not in our power to review it. If the judgment of the Collective Court above referred to, which has been, as pointed out by my brother Wendt in his judgment, always followed, save in the cases referred to by him, is wrong, the error can only be remedied by appeal from a judgment of this Court to His Majesty in Council or by legislation.

I have personally always favoured the construction placed on the Ordinance by Mr. Justice Clarence and Chief Justice Bonser, and have reason to believe that the latter was quite right in claiming "to have on his side the high authority of Withers, J." I may or may not be right in respect of the meaning I place on the words of the Ordinance. Whether I am or not is a matter of no consideration in deciding this appeal, because, as I said before, I consider that this Court sitting collectively has no power to overrule the previous judgment of a Collective Court. If there had been a conflict of collective judgments of this Court, it might have been possibly necessary to determine which we should follow; there is no such necessity in this case.