1918.

[FULL BENCH]

Present: Bertram C.J., Shaw and De Sampayo JJ.

TILLEKERATNE *et al. v.* BASTIAN *et al.*

185—D. C. Kalutara, 7,216.

Prescription—Long-continued exclusive possession by one co-owner—Presumption — Lost grant — Dedication of highway — Ouster — Adverse possession.

It is open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner has since become adverse.

"It is a question of fact, wherever long-continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten years before action brought."

THE facts appear from the judgment.

Bawa, K.C., and *De Zoysa, for appellants.*—A co-owner cannot prescribe against other co-owners unless he has actually ousted them, or has by some overt act intimated to them that he is no longer possessing on their behalf but is possessing adversely to them.

[SHAW J.—Even if a co-owner possess for 150 years, is he supposed to be possessing on behalf of the other co-owners?] That would not make any difference. Law is not founded on relationship.

[DE SAMPAYO J.—Must not lapse of time shift the burden?] No. See *Corea v. Appuhamy.*[1] None of the co-owners can prevent the possession of the whole land by one co-owner.

[SHAW J.—The only question is whether a presumption of ouster can be gathered from the length of time.] There is no room for the presumption of ouster here. If an ouster took place it can be proved, as the persons interested are alive and can give positive evidence of ouster. Counsel cited *2 Leader 74; Morgan Digest 21, 169, 273; 7 N. L. R. 91; 10 N. R. 183 (at 186); 3 N. L. R. 213, 137; 7 N. L. R. 91; 1 Cowp. 217; 3 A. C. R. 84; Koch 61 and 42; 1 S. C. R. 64; Lightworn on Time Limit of Action 161; Indian Limitation Act 9 of 1908, s. 127; I. L. R. 33 Bom. 317; I. L. R. 35 Cal. 961.* The Prescription Ordinance has completely repealed the Roman-Dutch law on the subject. Before *Corea v. Appuhamy* [1] was decided there is no reference in our cases to a presumption of ouster. If there be evidence of exclusive possession for a very long time, and evidence of something which ought to have put the

[1] *(1911) 15 N. L. R. 65.*

co-owner who is out of possession on his guard, and if he is guilty of gross laches, then there may be prescription. The evidence must be strong and convincing, and that is not the case here. See *Brito v. Muthunayagam.*[1] If we introduce the theory of fictitious ouster, the decisions become valueless.

E. W. Jayawardene (with him *Batuwantudawa*), for defendants, respondents.—Whether possession was adverse or not must be judged by the circumstances of each case. In 1893, when Tillekeratne bought the property, he did not enter into possession, nor was the property included in the inventory of Tillekeratne's properties when he declared himself an insolvent. We were allowed to have exclusive and notorious use of this land for forty years, and to take plumbago from it. In *2 S. C. C. 166* it was held that a co-owner cannot dig plumbago without the consent of the other co-owners. Counsel cited also *3 C. A. C. 8* and *1 C. W. R. 92 and 175.*

Ouster can be presumed from long and continued possession (*2 Thom. 188; 15 C. D. 87*). Counsel also cited *29 Bom. 300; 33 Bom. 317, at 322; 1 S.C. R. 64; Koch 62; 13 N. L. R. 309; 1 Bal. Notes 88; 2 Bal. 40 and 70.*

Bawa, in reply.

Cur. adv. vult.

December 16, 1918. BERTRAM C.J.—

The facts of this case seem to raise in a very clear and succinct form a question which was discussed, but not decided, in the case of *Corea v. Appuhamy.*[2] The decision in that case had a very far-reaching effect. It laid down for the first time, in clear and authoritative terms, the principles that the possession of one co-owner was in law the possession of the others; that every co-owner must be presumed to be possessing in that capacity; that it was not possible for such a co-owner to put an end to that title, and to initiate a prescriptive title by any secret intention in his own mind; and that nothing short of "an ouster or something equivalent to an ouster" could bring about that result. The question was raised in the argument in that case, and discussed in the judgment, whether in the circumstances of the case, even admitting these principles, an ouster should be presumed from the long-continued possession of the co-owner in question. The Privy Council, without negativing the possibility of a presumption of ouster, held that this was not a case in which the facts would justify such a presumption. The questions, therefore, to be decided for the purposes of the present case are:—

(1) What is the meaning of the principle of the English law referred to under the expression "presumption of ouster"?
(2) How far is it to be considered as being in force in this Colony?
(3) Do the facts justify its application in the present case?

[1] *(1915) 19 N. L. R. 38.* [2] *(1912) A. C. 230; (1911) 15 N. L. R. 65.*

1918.

BERTRAM C.J.

Tillekeratne v. Bastian

The question of the conversion of a possession which in its origin is not adverse into an adverse possession has been the subject of prolonged controversy in our Courts. The case with which our authorities mainly deal is that of the possession of a person occupying by the permission or license of the true owner. That case is, however, so closely akin to that now under consideration, namely, that of one co-owner possessing the common property, that the two cases may be conveniently discussed together. The principles governing them are identical.

The problem before us is simply a problem of interpretation. What we have to do is to interpret and to apply to these two cases certain words which occur in section 3 of the Prescription Ordinance, No. 22 of 1871, namely, " Proof of the undisturbed and uninterrupted possession by a defendant in any action, or by those under whom he claims, of lands or immovable property, by a title adverse to or independent of that of the claimant or plaintiff in such action (that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred) . . . "

Before addressing ourselves to this question, it would be convenient to ascertain what was the common law applicable to it before this enactment, or those which it replaced, came to be enacted. The principles of the Roman-Dutch law with regard to these two cases, were as a matter of fact, not the same. With regard to possession by permission or license, a person who so possesses is said to possess *precario*. This form of possession will be found discused in *Voet XLIII., 26.* A person who is in possession of property *precario* cannot prescribe against the owner, however long his possession may be. A restitutory action in such a case can never be extinguished: *Sic ut ne immemorialis quidem temporis præscription cesset* (*Voet XLIII., 26, 3.*) In order to initiate a prescriptive title, it is necessary to show a change in the nature of the possession (*Cf Voet XLI., 2, 13.*) It is otherwise with regard to possession by a co-owner. If one co-owner is in exclusive occupation of any part of the common property, or even of the whole of it, for a period of thirty years, the claim of other co-owners for a partition of the property is absolutely prescribed, without the necessity of showing any change in the nature of the possession.

" *Si tamen unus coheredum res hereditarias totis triginta annis solus suo nomine proprio tanquam suas possederit ; magis est, ut in universum deciceps hoc cesset iudicium.* " (*Voet X., 2, 33.*)

See also *Struvious X., 2,14:* " *Si autem unus ex coheredibus tantum possidet res hereditarias communes; tunc alter, qui non possidet, post triginta annorum cursum actionem hanc movere nequit.* "

This distinction is recognized in French law, which in this respect follows the principles enunciated by Pothier. See *Planiol, Droit Civil, vol. III., 2342.*

These are the principles of the Roman and Roman-Dutch law. They are, however, only of historical interest, as it is recognized that our Prescription Ordinance constitutes a complete code; and though no doubt we have to consider any statutory enactments in the light of the principles of the common law, it will be seen that the terms of our own Ordinance are so positive that the principles of the common law do not require to be taken into account. Let us, therefore, consider the terms of our own Ordinance.

In the first place, it will be convenient to put aside one part of the enactment which at one time caused considerable confusion, namely, the words enclosed in the parenthesis: ("that is to say, a possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor, from which an acknowledgment of a right existing in another person would fairly and naturally be inferred.")

It was originally thought that these words, which appear for the first time in Ordinance No. 8 of 1834, were inserted in order to explain by way of an illustration the words "by a title adverse to, or independent of, that of the claimant or plaintiff in such action." This was so declared by the High Court of Appeal (see *Vand. 45*); and this appears to be the view taken by Chief Justice Marshall (see *Marshall's Judgments 519*). Subsequently, however, the words were held to constitute a complete definition. See *Thompson's Institutes, vol. II., 189*:—

"Sir C. Marshall looked upon the words added in the Ordinance as a partial and incomplete explanation of the words 'adverse title,' leaving it open to the law, as found in English reports and former decisions, to complete the explanation when required. But, in 1844, the Supreme Court enunciated that the words in the parenthesis were not only 'some explanation,' but a declaration of what an adverse title is under the Ordinance. The Court, after repelling certain decisions, on the ground that they were unfortunately found on the general law independent of the express provisions of the Ordinance, went on to say: 'the Ordinance of prescription has not simply declared that a possession of ten years adverse to, or independent of, that of the claimant shall give a prescriptive title, leaving it to the Court to say what is, in the law, an adverse possession; but in the parenthesis in the second clause of the Ordinance it is also declared what shall be considered such an adverse possession under that Ordinance.'" See 6,587, C. R. Colombo, No. 4, August 6, 1844.

The same interpretation was also enunciated in the judgment of the Full Court in C. R. Batticaloa, No. 9,653, in the year 1870, reported in *Vand. 44*. So late as 1892 this interpretation was

1918.

BERTRAM C.J.

Tillekeratne v. Bastian

adopted in its most unqualified form by Burnside C.J. in the case of *Carim v. Dholl* [1]: " In the present case the evidence leads to no other conclusion than that the defendant's mother entered into possession of the tenement out of the charity of the owner, her brother; that she possessed it by residing in it with her family alone, without interruption or disturbance from him, for long over the prescriptive period, perhaps out of sheer benevolence, which he might have terminated at his pleasure, and during that period she never paid rent, nor performed service to him, nor did she do any act by which his ownership was acknowledged. I take it as beyond doubt that she acquired prescriptive title as against him and those claiming under him. "

Lawrie J., however, in that case refrained from basing his judgment on that ground. Thompson in his *Institutes* further records that this principle was applied in the very question since decided in *Corea v. Appuhamy*. [2] Speaking with reference to the definition of " adverse title " given by the Supreme Court, he says on page 190: " It will be seen from the last of these definitions that, as joint tenants have a unity of title, time, interest, and possession, if one joint tenant obtains his legal possession of his co-tenant's share, he cannot be said at any time to have a possession inconsistent with the probability of any just right or title on the part of his co-tenant; and thus, under this old definition, which is that of the general law, no joint tenant could prescribe against his co-tenant. But the Ordinance is held to introduce a new definition, namely, that to found adverse title, all that is sufficient is that the possession should be unaccompanied with any acknowledgment of a right existing in another person. A definition which allows a collateral or joint tenant to prescribe as well as any other person. Accordingly, in all recent cases the Court has uniformly held that under that parenthesis there can be no exception drawn in favour of the possession of one co-heir, joint tenant, or tenant in common, not being adverse to the other, from the tenure of their estates alone; and, looking to the evil arising from the extreme subdivision of land in the Colony under the existing law of succession, it may be reasonably presumed that the Legislature intended to annul all distinctions in law between the possession of such persons and others."

All this must now be considered as superseded by the decision of the Privy Council in *Corea v. Appuhamy* (*supra*), which gave the *coup de grace*, if a *coup de grace* was needed (see *per* Wendt J. in *Joseph v. Annapillai* [3]) to the theory that the words in the parenthesis in section 3 were intended as a definition of " adverse title. " It is only necessary carefully to scrutinize the terms of the section to see that that interpretation was untenable. The phrase upon which the parenthesis follows is not " adverse title," but "by a

[1] *(1892) 2 C. L. R. 118.* [2] *(1911) 15 N. L. R. 65.* [3] *(1904) 5 Tamb. 20.*

title adverse to or independent of." It is impossible to refer the parenthesis purely to the words "adverse to," it must also be referred to the words "independent of"; and though the parenthesis might conceivably have been construed as a possible definition of one of the alternatives, it cannot possibly be construed as a definition of both.

The true explanation of this parenthesis appears to have been first suggested by the late Mr. Justice Walter Pereira on page 388 of his *Laws of Ceylon (1913 edition)*, namely, that the parenthesis was intended to be explanatory of the expression "undisturbed and uninterrupted possession" occurring earlier in the section. This suggestion gives an explanation to the parenthesis which is grammatically intelligible, and it may be noted that it has been expressly adopted by the Privy Council in *Corea v. Appuhamy* at *15 N. L. R. 77:* "The section explains what is meant by 'undisturbed and uninterrupted possession.' It is 'possession unaccompanied by payment of rent or produce, or performance of service or duty, or by any other act by the possessor from which an acknowledgment of a right existing in another person would fairly and naturally be inferred.'" It is clear, therefore, that the parenthesis has no bearing on the question of the meaning of the words "adverse title"; it may henceforth be left out of account in the discussion of the question.

The ground being cleared in this manner, it would be seen that all we have to ask ourselves in this case is, what is the meaning of the word "adverse"? And that the only question we have to consider in any particular case is whether the possession in question was "adverse," or, if it was not originally adverse, at what point it may be taken to have become so. It appears to me to a certain extent unfortunate that the Privy Council in discussing this question should have adopted the technical terms of certain rules of the English law of real property which have now, in effect, been extinguished by Statute; the more so, as these rules belonged to a department of the English law which was recognized as being involved in the greatest obscurity. It was in connection with this subject that Lord Mansfield said: "The more we read, unless we are very careful to distinguish, the more we shall be confounded." See *Taylor Atkyns v. Horde* [1] *and 2 S. L. C. (11th ed.), at page 629.*

The phrase "adverse possession" was not a statutory term in the English law at all, nor was the word "ouster." The Statute of Limitations passed in the twenty-first year of King James I. did not contain either phrase. The material part of section 1 of that Statute (21 James I., c. 16) simply said that "no person or persons shall at any time hereafter make any entry into any lands, tenements or hereditaments but within twenty years next after his or their right or title which shall hereafter descend or accrue to the same."

[1] *(1757) 2 Burr. 60.*

1918.

BERTRAM C.J.

Illekeratne v. Bastian

On this it was held that the Statute only ran against a true owner in cases in which at common law he was reduced to what was known as his " right of entry "—a highly technical question. No occasion to assert a right of entry arose unless there has been an " ouster." The term " ouster " is itself highly technical. Those who are curious on the subject will find it explained in *Wood Renton's Encyclopaedia of the Laws of England, vol. X., 214.* It was considered and treated in old text books under the heads of disseisin, abatement, discontinuance, deforcement, and intrusion, terms which are no longer in common use. See *2 S. L. C. (11th edition) 651.*

The whole subject will be found explained in Mr. William Smith's note to *Taylor v. Horde* in *Smith's Leading Cases*, from which I will quote the following passage:—

" In order to determine whether the claimant had been out of possession under circumstances which would turn his estate to a right of entry, it was necessary to inquire in what manner the person who had been in the possession during that time held. If he held in a character incompatible with the idea that the freehold remained vested in the claimant, then . . . . it followed that the possession in such character was adverse. But it was otherwise if he held in a character compatible with the claimant's title."

As I have said, it would probably have been better if in Ceylon we had been relieved of this technical and antiquated phraseology. The word " ouster " is unknown to our local law, and does not spontaneously convey any idea to the mind. It would be well, I think, that we should drop the word " ouster," and that, instead of asking whether there has been an " ouster," we should ask ourselves simply whether the possession in question was or has become adverse. And it will be sufficient for this purpose to adopt the definition given in *Smith's Leading Cases* that " adverse possession " is " possession held in a character incompatible with the claimant's title."

What, then, is the real effect of the decision in *Corea v. Appuhamy (supra)* upon the interpretation of the word " adverse " with reference to cases of co-ownership? It is, as I understand it, that for the purpose of these cases the word " adverse " must, in its application to any particular case, be interpreted in the light of three principles of law:—

(i.) Every co-owner having a right to possess and enjoy the whole property and every part of it, the possession of one co-owner in that capacity is in law the possession of all.

(ii.) Where the circumstances are such that a man's possession may be referable either to an unlawful act or to a lawful title, he is presumed to possess by virtue of the lawful title.

(iii.) A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity.

It will be seen that the first of these principles is a principle of substantive law; it is established by numerous authorities in the law of England. See *Ford v. Grey*,[1] *Culley v. Doe*.[2] There is also adequate, though not very extensive, authority for the principle in our own reports. See the cases cited in the argument in *Corea v. Appuhamy* before the Privy Council.[3] The principle is not peculiar to the law of England, and may be found in Pothier. See *Planiol, Droit Civil, vol. III., s. 2342.*

The second and third of the above principles are presumptions, *i.e.*, they are principles of the law of evidence. It is the third of these principles, namely, that a person who has entered into the possession of land in one capacity is presumed to continue to possess it in the same capacity, which has been the basis of our local decisions on this subject, both as regards tenants in common and as regards possession by licensees. Thus, it was the foundation of the judgment of Lawrie J. in *Jain Carim v. Pakeer*,[4] where he said: " . . . . the party claiming adversely to the possessor must allege and prove that the possession was not *ut dominus*. If he succeeds in proving that the possession began otherwise than *ut dominus*, then the burden of proof is shifted, for, to use the words of Rough C.J., which have often been quoted with approval in this Court: 'It being shown that the possession commenced by virtue of some other title such as tenant or planter, the possessor is to be presumed to have continued to hold on the same terms until he distinctly proves that his title has changed.' "

It has been enunciated in a series of judgments of Wendt J., which are often quoted as authorities for the proposition, *e.g.*, *Orloof v. Grebe*,[5] *Joseph v. Annapillai*,[6] *Perera v. Menchi Nona*,[7] and it was recognized by the decision of the Privy Council in *Naguda Marikar v. Mohammadu*.[8] The same principle is embodied in the oft-quoted Roman law maxim: *neminem sibi ipsum causam possessionis muturæ posse* (*Voet XLI., 2, 13*). It is also embodied in Art. 2240 of the Code Napoleon: " *On ne peut point se changer à soi-méme la cause et le principe de sa possession* "; and in a further Article, viz., 2231: *Quand on a commence a posséder pour autrui, on est toujours presumè posséder au méme titre, s'iln'y a preuve du contraire.*"

The effect of this principle is that, where any person's possession was originally not adverse, and he claims that it has become adverse, the onus is on him to prove it. And what must he prove? He must prove not only an intention on his part to possess adversely, but a manifestation of that intention to the true owner against whom he sets up his possession. The burden he must assume is, in

[1] *1 Salk. 285.*
[2] *(1840) 11 Ad. & E. 1008.*
[3] *(1912) A. C. 230.*
[4] *(1892) 1 S. C. R. 282.*
[5] *(1907) 10 N. L. R. 83.*
[6] *(1904) 5 Tamb. 20.*
[7] *(1908) 3 A. C. R. 84.*
[8] *(1903) 7 N. L. R. 91.*

1918.

BERTRAM C.J.

Tillekeratne v. Bastian

fact, both definite and heavy, and the authorities have been accustomed to emphasize its severe nature. Thus, it is sometimes said that he must prove an " overt unequivocal act " (*per* Wendt J. in *Perera v. Menchi Nona* [1]). I do not think that this principle is put anywhere more forcibly than in the Indian case of *Jogendra Nath Rai v. Baladeo Das.*[2] The whole judgment is one of great interest, but appears, perhaps to allow somewhat undue emphasis to the American authorities on the subject. I quote from page 969:—

" Much stronger evidence, however, is required to show an adverse possession held by a tenant in common than by a stranger; a co-tenant will not be permitted to claim the protection of the Statute of Limitations unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him; it must further be established that the fact of adverse holding was brought home to the co-owner, either by information to that effect given by the tenant in common asserting the adverse right, or there must be outward acts of exclusive ownership of such a nature as to give notice to the co-tenant that an adverse possession and disseisin are intended to be asserted; in other words, in the language of Chief Justice Marshall in *MacClung v. Ross* [3]: ' A silent possession, accompanied with no act which can amount to an ouster or give notice to his co-tenant that his possession is adverse, ought not to be construed into an adverse possession '; mere possession, however exclusive or long-continued, if silent, cannot give one co-tenant in possession title as against the other co-tenant; see *Clymer v. Dawkins,* [4] in which it was ruled that the entry and possession of one tenant in common is ordinarily deemed to be the entry and possession of all the tenants, and this presumption will prevail in favour of all, until some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others; when this occurs, the possession is from that period treated as adverse to the other tenants."

One cannot read this statement of the law without being impressed with the artificial nature of the position which it embodies, if its principle is accepted without qualification. The presumptions of the law of evidence should be regarded as guides to the reasoning faculty, and not as fetters upon its exercise. Otherwise, by an argumentative process based upon these presumptions, we may in any particular case be brought to a conclusion which, though logically unimpeachable, is contrary to common sense. It is the reverse of reasonable to impute a character to a man's possession which his whole behaviour has long repudiated. If it is found that one co-owner and his predecessors in interest have been in possession of the whole property for a period as far back as reasonable memory reaches; that he and they have done nothing to recognize the

[1] *(1908) 3 A. C. R. 84.*
[2] *(1907) I. L. R. 35 Cal. 961.*
[3] *(1820) 5 Wheaton 116.*
[4] *(1845) 3 Howard 674.*

claims of the other co-owners; that he and they have taken the whole produce of the property for themselves; and that these co-owners have never done anything to assert a claim to any share of the produce, it is artificial in the highest degree to say that such a person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession. Where it is found that presumptions of law lead to such an artificial result, it will generally be found that the law itself provides a remedy for such a situation by means of counter-presumptions. If such a thing were not possible, law would in many cases become out of harmony with justice and good sense.

In this very instance the English law provided a corrective of the principles which it has developed by means of a counter-presumption, that is to say, a "presumption of ouster." The leading case on this point is *Doe v. Prosser*,[1] where Lord Mansfield said:—

"It is very true that I told the jury they were warranted by the length of time in this case to presume an adverse possession and ouster by one of the tenants in common of his companion; and I still continue of the same opinion . . . . The possession of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; because such possession is not adverse to the right of his companion, but in support of their common title; and by paying him his share, he acknowledges him co-tenant. But if, upon demand by the co-tenant of his moiety, the other denies to pay and denies his title, saying he claims the whole and will not pay, and continues in possession, such possession is adverse and ouster enough . . . . In this case no evidence whatever appears of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgment of the title in them, or in those under whom they would now set up a right. Therefore, I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession for such a length of time is a sufficient ground for the jury to presume an actual ouster . . . . ."

The same principle was expounded by Lord Kenyon in another case, in which it was held, nevertheless, that the facts did not warrant the application of the principle: *Peaceable v. Read*[2]:—

"I have no hesitation in saying where the line of adverse possession begins and where it ends. *Primâ facie*, the possession of one tenant in common is that of another; every case and *dictum* in the books is to that effect. But you may show that one of them has been in possession and received the rents and profits to his

[1] *(1774) 1 Cowp. 217.*

[2] *(1801) 1 East 569, at page 574.*

1918

BERTRAM C.J.

Tillekeratne v. Bastian

own sole use without account to the other and that the other has acquiesced in this for such a length of time as may induce a jury under all the circumstances to presume an actual ouster of his companion. And there the line of presumption ends. . . . ."

The only real question that we have to decide in this case, apart from the question of fact, is whether the principle of this counter-presumption is in force in Ceylon. As I have said, the judgment of the Privy Council in *Corea v. Appuhamy* (*supra*) referred to this principle, but did not definitely declare that it must be considered in force in Ceylon, as a corollary of the general principle which that case enunciated. It does not appear to me that there can be any reasonable doubt on the subject. The case for declaring this principle to be part of the law of Ceylon is indeed, overwhelming. It was referred to before the decision in *Corea v. Appuhamy* by Middleton J. in the Full Court case of *Odris v. Mendis.*[1] It has been recognized and applied in a series of the judgments of this Court since that decision, namely, *William Singho v. Ram Naide,*[2] *Mailvaganam v. Kandiya,*[3] *A. S. P. v. Cassim,*[4] and *Samara v. Duraya.*[5] It has been adopted in *India.* See *Gangadhar v. Parashram,*[6] *Amrita Ravji Rao v. Shridhar Narayan.*[7] It is also supported by various passages in the old Roman-Dutch law authorities. These passages all relate to a special sort of adverse possession. Adverse possession as between co-owners may arise either by absolute exclusion of one of the co-owners or by the conversion of undivided shares into divided shares. The principles governing the two cases are the same. One co-owner who takes part of the property as his share from that moment possesses that share adversely to the co-owners. There are numerous references to be found in the Roman-Dutch law authorities to the effect that where co-owners are thus found to have occupied the land during a prolonged period, some mutual arrangement for this purpose must be presumed from lapse of time. For example:—

(i) "*Observandum tamen præsumi inter fratres divisionem factam eo casu, quo res hereditarias aut communes diutino tempore possederunt, fructus percipiendo, tributa consueta solvendo, sumptusque alios faciendo suo nomine. Idque ex præsumpta voluntate, ratione tanti temporis, quod facit præsumi intervenisse divisionem.*" *Perez, III, 37, 4.*

(ii) "*Posset hic quæri, An Saltem possit divisio præsumi inter fratres, qui longo tempore res hereditarias aut communes separatim possederunt, fructus percipendo, sumptus impendendo suo nomine? Recte id aliqui affirmant, idque ex præsumpta voluntate, ratione tanti temporis quod facit præsumi intervenisse requista.*" *Zoesius, X., 3, 3.*

(iii) *Cf. also Sande Dec., Fris. IV., 11, 3.*

[1] *(1910) 13 N. L. R. 309.*
[2] *(1915) 1 C. W. R. 92.*
[3] *(1915) 1 C. W. R. 175.*
[4] *(1914) 2 Bal. Notes 40.*
[5] *(1913) 2 Bal. Notes 70.*
[6] *(1905) I. L. R. 29 Bom. 300.*
[7] *(1908) I. L. R. 33 Bom. 317.*

It may be taken, therefore, that this principle is part of the law of the Colony, and that it is open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner has since become adverse.

What does such a presumption mean? Does it mean that the Court must find as a fact that some definite transaction took place between the parties by which the claim of the person now setting up the adverse possession was recognized, or that some formal intimation was made by him to the other party, or that some unequivocal and notorious act on his part brought the claim palpably to the notice of the other? I do not think so. The presumption based upon lapse of time was a benevolent presumption, and often assumed the character of a legal fiction. The best known applications of the principle are the presumption of a lost grant and the presumption of the dedication of a highway. Lord Mansfield, speaking generally of presumptions of this character in *Eldridge v. Knoot*,[1] says: "There are many cases not within the statute where from a principle of quieting possession the Court has thought that a jury should presume anything to support a length of possession." (*See also Taylor on Evidence, paragraph 313 (a).*)

With regard to presumptions of lost grants, the English Courts went to most extraordinary lengths. See the judgment of Cockburn C.J. in *Angus v. Dalton*,[2] where it was said, at page 105:—

"The boldness of judicial decision stepped in to make up defects in the law which the supineness of the Legislature left uncared for; . . . . but after the Statute of James, user for twenty years was—here, again, without any warrant of legislative authority—held to be sufficient to raise this presumption of a lost grant, and juries were directed so to find in cases in which no one had ever existed, and where the presumption was known to be a mere fiction."

Cockburn C.J., indeed, declares that the Prescription Act was introduced to put an end to the "scandal on the administration of justice which arose from this forcing the conscience of juries." Similarly, with regard to the presumption of the dedication of a highway. Long user of a highway by the public was considered evidence of an intention to dedicate by the owner, but it was not necessarily thought that he had really intended to dedicate it. He was considered to have acted in such a way that it was proper to treat him as though he had so intended. See *per Lord Ellenborough* in *Rex v. Lloyd*[3]: "If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public. Although

[1] *(1774) 1 Cowp. 215.*
[2] *(1877) 3 Q. B. D. 85.*
[3] *(1808) 1 Camp. 260.*

1918.

BERTRAM C.J.

Tillekeratne v. Bastian

the passage in question was originally intended only for private convenience, the public are not now to be excluded from it, after being allowed to use it so long without any interruption."

In applying this principle to Ceylon, therefore (though it is not necessary to go to the lengths which Cockburn C.J. criticised in *Angus v. Dalton* (*supra*)), I would apply it in the same spirit, and I think that the principle enunciated by Lord Mansfield in *Doe v. Prosser* (*supra*) should be interpreted in this sense. It is, in short, a question of fact, wherever long-continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten years before action brought.

I will now proceed to apply these principles to the fact of the present case. The claim under consideration is a claim by the plaintiffs to a one-eigth share of certain lands which belong to a family descending from one Simon de Silva. Simon de Silva had five sons: one admittedly died without issue; three—juwanis Andris, and Selenchi—are represented by the defendants; and the plaintiffs claim to have acquired the interest of the fourth, one Allis. Allis is said to have married a woman called Abohamy, and to have had one son, Babappu, who in 1893 purported to sell his interest to Don Nadoris Tillekeratne. Tillekeratne died in 1901, and the plaintiffs claim by inheritance from him.

The question turns on the relationship of Babappu to the family. His paternity is not denied, but his legitimacy is put in question. Allis and Juanis, another of the sons of Simon de Silva, are said by the plaintiffs to have married sisters. It is asserted by the defendants, on the other hand, that the connection of Allis with Abohamy was an irregular one. After the death of Allis, Abohamy left the locality and married a man in another village, where she settled, her child Babappu being at that time about eight years old. The date of the birth of Babappu is not definitely fixed, but it may be conjectured that he was born about the year 1856, and that this migration to the other village consequently took place about 1864.

The learned District Judge has come to the conclusion that although the evidence of a lawful marriage is not wholly satisfactory, yet it may be taken that Babappu was the lawful son of Allis, though he adds that "it is extremely doubtful whether he was recognized as a legitimate son." He is said at one time to have stayed with his uncle Juanis, who had married his mother's sister. This visit is consistent with the connection between his mother and Allis having been an irregular one, but it is difficult to reconcile the visit with the finding of the District Judge that he was a legitimate son, whose legitimacy was not recognized by the family. In the year 1885 he was associated with another member of the family,

namely, the first defendant, a son of Juanis, as a recipient of a Crown grant. There is a presumption in favour of marriage, and though, as I have said, there are difficulties in the view taken by the District Judge, I think, on the whole, his conclusion should be accepted, namely, that though Babappu was the legitimate son of Allis, he was not accorded this status by the family.

The property in question was plumbago land. From the year 1877 until the present time it has been worked only intermittently and through the medium of lessees. But the only branches of Simon de Silva's family who have dealt with the land have been those connected with the three sons of Simon de Silva above mentioned: Juanis, Andris, and Selenchi. The extent to which the land was worked is not very clearly defined; but Babappu, who is still alive, says that at all times be received his ground share, and that after his sale to Tillekeratne in 1893 he continued to receive that share, with the acquiescence of Tillekeratne, or at any rate, without any objection on his part. This evidence the learned District Judge rejected. He does not believe that Babappu's claim to the share was ever recognized by the other branches of the family, or, indeed, that it was ever made. We must take it, therefore, that Babappu was a person whose status in the family was, to say the least, doubtful, and that from the year 1864 he lived in another locality, and neither asserted nor received any recognition of any claim to a share of the land in dispute. Accepting the supposition that he was born in 1856, he would have attained his majority in 1877. The period, therefore, for which the claim now asserted has been dormant is no less than forty years; and it is a very significant fact that Tillekeratne, who purported to have acquired his share in 1893, became insolvent in 1897, and did not include this land in the schedule of his assets.

These being the facts, it is very difficult to say that any proof has been given of any overt unequivocal act manifesting to Babappu the fact that the possession of his uncles, and those through whom they claim, was adverse to his claim. Their attitude was a negative one; they ignored him, and according to their own evidence, they were barely aware of his existence, if aware of it at all. On the other hand, it would be doing violence to the ordinary ideas of mankind to say that the possession of these branches of the family must be presumed to have been that of co-owners with Babappu, because no definite positive act can be pointed to as initiating or bringing home to him a repudiation of the claim which he now makes. It would, moreover, be contrary to equity that a person possessing a doubtful status in the family, who has lived apart from it for over a generation in another locality, should be permitted through the medium of a sale to a speculative purchaser to revive his obsolete pretensions, and to assist those claiming through that purchaser to invade the family inheritance. The case is one in

1918.

BERTRAM C.J.

Tillekeratne v. Bastian

which in my opinion, the Court ought to presume that the possession of the three branches of Simon de Silva's family, who actually dealt with the land, became adverse to the claim of Babappu at some point more than ten years prior to the institution of this action.

I would, therefore, affirm the decision of the learned District Judge, and dismiss the appeal, with costs.

SHAW J.—

The Judge has found that Babappu, under whom the appellant claims, was the legitimate son of Allis, who was admittedly a co-owner of the land. The appellants are, therefore, entitled to a share in the land, unless Babappu's co-owners have prescribed against him and his successors in interest.

The precise time when Allis died, and Babappu succeeded to his interest, does not appear from the evidence; but it must have been over fifty years ago, and the Judge has found as a fact that neither Babappu, his vendee Tillekeratne, nor the appellants have ever had any possession of Allis's share, which has, since the death of Allis, always been possessed by his co-owners and their successors. These findings of fact appear to be justified by the evidence, and I see no reason why we should differ from them on appeal.

The Judge has also decided that Babappu's co-owners have prescribed against him and his successors in interest, and has accordingly dismissed the plaintiff's action. The nature of the holding of a co-owner of land and the circumstances under which a co-owner can commence to acquire a prescriptive title against other owners under Ordinance No. 22 of 1871 is authoritatively laid down by the Privy Council in the case of *Corea v. Appuhamy*.[1] That case shows that the possession of one co-owner is in law the possession of all, and that a person who has entered into possession in his capacity of co-owner must be considered to continue to possess in the same capacity until he has by some ouster of his co-owners, or by something equivalent to an ouster of them changed the character of his possession and commenced to hold adversely to them. In effect, the case appears to decide that the position of a co-owner in Ceylon is the same as it was in England prior to the Statute 3 & 4 W. 4. c. 27.

The question for our consideration in the present case is whether, from the uninterrupted sole possession of certain co-owners extending over a large number of years, and the conduct of the other co-owners in not asserting any right to possess, a presumption of an ouster by the co-owners in possession and the commencement of an adverse holding by them can be presumed, and if so, whether in the present case such a presumption should be drawn. The judgment in *Corea*

[1] *(1911) 15 N. L. R. 65.*

v. Appuhamy [1] does not pretend to lay down any rule as to the manner in which the " ouster or something equivalent to an ouster " may be established by evidence.

In England, under the previously existing law, it was held that juries might properly be directed that they could presume an ouster of the other co-owners after an uninterrupted possession for a number of years. An example of this is found in *Doe v. Prosser*,[2] where uninterrupted possession for thirty-six years was held to justify such a presumption, and that an ouster might have been so presumed is recognized in the judgment in *corea v. Appuhamy*.[1]

I see no reason why similar presumption should not be made in suitable cases in Ceylon.

That such a presumption may be made appears to have been recognized by the Court in *Appuhamy v. Ran Naide*,[3] and by Middleton J. in his judgment in the Full Court case of *Odris v. Mendis*,[4] and it has also been recognized in India in the case of *Bahavant v. Bhal Chandra*.[5] Presumptions of this character seem to be authorized by section 114 of the Evidence Ordinance of 1895. In the present case, although Babappu, according to his own evidence, knew that his co-owners had during his minority granted a mining lease in respect of the land, he never, when he attained majority, attempted to assert any right to his share, and, although he purported to sell to Tillekeratne in 1895, his vendee never possessed, nor was the land included in the inventory of his estate on his death in 1901, and his heirs, the present appellants, made no attempt to assert any right to possess until the year 1916.

It appears to me that the correct presumption to draw from the long uninterrupted possession of Babappu's co-owners, and the conduct of himself and his vendee, is that Babappu and his vendee knew that Babappu's co-owners were holding adversely to him, and that they had, in fact, ousted him from possession.

I would therefore dismiss the appeal, with costs.

DE SAMPAYO J.—

I have had the advantage of perusing the judgment of the Chief Justice, and I agree with his conclusions of law and fact. A presumption of adverse possession may, I think, be drawn from the fact of exclusive possession by one co-owner extending over such a long period as to render non-possession by the other co-owner inexplicable, except upon the theory of acquiescence in an adverse claim. In the present case the circumstances appear to me to amount to something more than presumption. Babappu, from whom the plaintiffs claimed title, appears not to have been really recognized as a legitimate son of Allis by the rest of the family.

[1] *(1911) 15 N. L. R. 65.*
[2] *(1774) 1 Cowper 217.*
[3] *(1915) 1 C. W. R. 92.*
[4] *(1910) 13 N. L. R. 309.*
[5] *I. L. R. 24 Bom. 300.*

1918.

DE SAMPAYO J.

Tillekeratne v. Bastian

He must have known that he was being intentionally excluded from possession. He was not so well off as to make a share of the produce of the land of no importance to him, and yet, according to the finding of the District Judge, which there is no reason to question, he never did at any time claim or take his alleged share. Moreover, the nature of the possession is significant. The land had no plantation worth considering; it was plumbabo land, and the defendants dug plumbago therein both by themselves and through lessees all throughout. While a co-owner may without any inference of acquiescence in an adverse claim allow such natural produce as the fruits of trees to be taken by the other co-owners, the aspect of things will not be the same in the case where valuable minerals are taken for a long series of years without any division in kind of money. The effect of this becomes still more pronounced where the co-owner, being also a co-heir, has alienated his share to a stranger, and the stranger, too, is kept out. Babappu sold his alleged share in 1893 to one D. N. Tillekeratne, whose widow and children the plaintiffs are, and it is proved that Tillekeratne never possessed the share he purported to buy. He appears to have owned and worked a plumbago pit on another land in the neighbourhood, and it is remarkable that, a plumbago merchant as he was, he never claimed or took a share of the plumbago, which to his knowledge was being dug from this land by the defendants and their lessees. The plaintiffs perceived the force of this circumstance, and unsuccessfully attempted to prove that Babappu had with the consent of Tillekeratne taken a share of the produce of a few plantain bushes and trees on the land.

I think that the circumstances sufficiently justify the inference of what was alluded to by the Privy Council in *Corea v. Iseris Appuhamy*[1] as " something equivalent to an ouster, " and that this change, even if it did not take place in the time of Babappu, must be regarded as having occurred at all events in 1893, when he sold to Tillekeratne. In my opinion the defendants have succeeded in establishing their claim to the whole land by prescription, and I agree that the appeal should be dismissed, with costs.

Appeal dismissed.

[1] *(1912) A. C. 230.*