[PRIVY COUNCIL.]

1918.

Present: Lord Buckmaster, Lord Dunedin, and Lord Wrenbury.

BRITO *v.* MUTTUNAYAGAM.

D. C. Negombo, 9,946.

Ante-nuptial contract—Exclusion of communio bonorum—Communio quæstuum—Prescription—Co-owners.

An ante-nuptial contract entered into before Ordinance No. 15 of 1876 came into force provided as follows: "The said Tangamma doth hereby renounce all right to community so far as the property, estate, and effects of the said Christopher Brito are concerned, it being understood that the said Brito shall have, hold, and enjoy his separate property without any claim thereto on the part of the said Tangamma."

Held, that the *communio quæstuum* was not excluded by the above clause.

After the death of Tangamma, the property acquired after marriage by Brito was possessed by him for over ten years.

Held, that as the children were co-owners with the father his possession was not adverse, though there were strained relations between father and children.

"The question turns on whether *Corea v. Appuhamy* [1] applies, and that depends on the true character of the interest in the estate, to wit, the half share in communion which on the death of the lady passed to the next of kin. If that interest is or is analogous to the interest of co-parcenary the case applies; if it is a mere right of action against the surviving husband it does not. In the latter case the defence is clearly good, whether under the limitation of ten years as applying to suits in connection with land, or under the limitation of three years, which applies to all rights of action not specifically dealt with."

THE facts are set out in the judgment. The judgment of the Supreme Court is reported in *19 N. L. R. 38*.

July 22, 1918. Delivered by LORD DUNEDIN:—

The late Christopher Brito, Advocate in Ceylon, married, in June, 1866, Tangamma Nanny Tamby, a Tamil lady. The lady's father was possessed of a property called Plopalle, which he was willing to settle on the spouses. Accordingly an ante-nuptial contract of marriage was entered into between the affianced spouses, to which the father of the lady was a party, by which Plopalle was settled on the spouses and survivor in life interest, and after their death on the children of the marriage, whom failing on the heirs of the lady.

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

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The spouses had four children, two sons and two daughters; the eldest son, Philip Brito, married a wife, Lily. He died in 1911, leaving a will in favour of his wife and children, and appointing his widow executrix. The elder daughter, Theresa, married Elangai Seni Wasager Senathi Raja. She died in 1905, leaving a will in favour of her husband. The younger daughter, Aloysia, married A. M. Muttunayagam, and is with her husband appellant in this suit.

After his marriage Christopher Brito acquired an estate called Dombawinne.

Tangamma Brito died on March 31, 1900. C. Brito died on December 26, 1910, and left a will in favour of his daughter, Aloysia, appointing her husband as his executor.

After the death of the wife, Tangamma, there were violent family quarrels and estrangement between Brito and his eldest son. No claim was made against Brito in his lifetime, after the death of his wife, by any of the children as in right of their mother. There had also been quarrels between the husband and wife, but they had been settled by the husband giving up his life interest in Plopalle.

The two actions which are consolidated in this appeal were raised, the one by Lily, the widow of the eldest son, as his executrix, and the other by Senathi Raja, as executor of his deceased wife, Theresa. and were both directed against Aloysia and her husband, who, as beneficiary and executor of C. Brito, were in possession of the estate of Dombawinne. The demand of each plaintiff is for a declaration of right to one-eighth share of Dombawinne. The claims are made as in right of their share of their mother Tangamma's share of the goods in communion. Tangamma's share being one-half, and there being four children, the share of each child was one-eighth.

The law of Ceylon in the case of marriages solemnized before June 29, 1877, since which date only the Matrimonial Ordinance of 1876 has effect, is the original law founded on the Roman-Dutch law. Under that law it is not doubtful that on marriage, if there is no ante-nuptial contract providing otherwise, there ensures *ipso jure* a communion of property between the spouses. This communion of property is divided, so to speak, into two heads: communion of the property held by the spouses at the moment of the marriage, commonly called *communio bonorum*, and communion of property acquired during the subsistence of the marriage, commonly called *communio quæstuum*. It was, however, possible by an ante-nuptial contract to renounce the *communio* in either or both of its branches. Accordingly, the first argument in defence in this case is based on the marriage contract as to Plopalle. This defence was given effect to by the learned District Judge, but rejected by the Court of Appeal.

The words in the contract are (after the settlement of the estate on the persons above mentioned): "And in consideration of the premises the said Tangamma doth hereby renounce all right to

community so far as the property, estate, and effects of the said Christopher Brito are concerned, it being understood that the said Christopher Brito shall have, hold, and enjoy his separate property, without any claim thereto on the part of the said Tangamma. "

Their Lordships are of opinion that this is a question of construction, and of construction alone. Either the *communio quæstuum* was renounced, or it was not. That was settled at the moment of signing the contract, and it seems to their Lordships illegitimate to do what the learned District Judge did, viz., to try to colour the construction by the after-behaviour of the parties.

On the question of construction their Lordships agree with the Court of Appeal. It appears to be absolutely settled by consistent authority that the *communio quæstuum* and the *communio bonorum* must be each indubitably dealt with, that is to say, that mere general words which may be satisfied by reference to the *communio bonorum* will not avail to discharge the *communio quæstuum*. Thus, Van Leeuwen (*Con. For. 1, 1, 12, 10*) says: " If community of goods be excluded, community in gains accruing or losses resulting is only held to be excluded if that be expressly stated. " To the same effect is *Burge 3,397*, who there cites a passage from Ven Wese: " *Igitur exclusâ pactis dotalibus bonorum communione lucri damnique in matrimonio facti communio remanet.* " This being so, it seems impossible to say that in this contract the *communio quæstuum* w excluded. Mr. Lawrence argued that the generality of the English word " property " must not be taken as equivalent to *bona* as opposed to *quæstus*. But it was a contract drawn up in Ceylon by Ceylon lawyers who knew the law, and it was incumbent on them to make the matter clear. The onus is on the party who says that *quæstus* were excluded. That onus was not in this case discharged.

The second ground of defence is based on the Limitation Statute. It is said that after the death of the wife, Christopher Brito, and after him the appellants, possessed the property on adverse title for ten years. This defence was also sustained by the learned District Judge, but was rejected by the Court of Appeal.

It is the fact that no claim was made by the wife's next of kin after her death, and that the strained family relations made it likely that such a claim would have been preferred. From these circumstances, the District Judge drew the conclusion that the possession was " adverse. " This, however, depends on what was the character of C. Brito's possession as a matter of right. The learned District Judge seemingly overlooked the case of *Corea v. Appuhamy*,[1] which the learned Judges of the Court of Appeal took as decisive of the question. In that case it was held by this Board that the possession of one co-parcener could not be held as adverse to the other co-parceners. Lord Macnaghten, who delivered

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

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the judgment, cited the dictum of Wood V.C. in *Thomas v. Thomas*[1]: "Possession is never considered adverse if it can be referred to a lawful title."

The question, therefore, comes to turn on whether that case truly applies; and that depends on the true character of the interest in the estate, to wit, the half share in communion which on the death of the lady passed to the next of kin. If that interest is or is analogous to the interest of co-parcenary the case applies; if it is a mere right of action against the surviving husband it does not. In the latter case the defence is clearly good, whether under the limitation of ten years as applying to suits in connection with land, or under the limitation of three years, which applies to all rights of action not specifically dealt with. Accordingly, Mr. Lawrence's argument was entirely directed to this point. The point is, perhaps, rather assumed than argued in the judgments of the learned Judges of the Court of Appeal, but they do not seem disturbed by any doubts on the point. It may well be that they thought it so clear that, no argument to the contrary being addressed to them (for the argument before them evidently turned on alleged ouster), they thought it unnecessary to discuss the point. Thus, Ennis J. says: "On the death of Tangamma, Christopher became a co-owner of Dombawinne with his children." Shaw J. says: "Christopher Brito undoubtedly remained in possession of the property from the time of his wife's death, but he was a co-owner with his children."

The authorities are not so absolutely clear on the matter as might be wished, and that for this reason. They are chiefly concerned with the question of continuing community, or "Boedelhouderschap." In some of the provinces this existed, in others it did not. Where it did, then, until put an end to by the lodging of an inventory, &c., there was a real continuing *communio* between the surviving spouse and the children; just as there had been between the spouses. There is, however, a judgment of the Supreme Court of Ceylon in which it was held that this custom had never been introduced into Ceylon: *Wijeyckoon v. Goonewardene*.[2] Accordingly, many of the remarks made by the writers on Roman-Dutch law generally as to what remains to be done by the surviving spouse are made with reference to the prevention of the "Boedelhouderschap." On the whole however, the authorities seem to be in accordance with the view of the learned Judges of the Court of Appeal. Thus, *Burge 3, 425*, says: "Though at the death of either of the spouses the community came to an end, an estate was left to which the survivor, together with the next of kin, was entitled. If there were children of the marriage, and the marriage property had been held in joint-ownership by the spouses, it remained joint-property between the survivor

[1] *2 K. & J. 83.*

[2] *2 C. L. R. 59.*

and the children. If there had existed between the spouses community of property in the sense of 'holding in common,' the children or other next of kin of the predeceased spouse inherited half the common property and remained owners in common with the surviving spouse until division." It is only after having said this that he goes on to point out the distinction between the provinces where there is a continuing community and where there is not.

Their Lordships are, therefore, of opinion that there is, to say the least of it, no material put before them which would enable them to say that the view taken as above by the learned Judges of the Court of Appeal was wrong. There is, however, one matter which must be mentioned. During his lifetime and before the death of his wife, C. Brito mortgaged the estate of Dombawinne: first for the sum of Rs. 60,000; and secondly, for the sum of Rs. 30,000. After the death of his wife, he, in 1904, made a further tertiary mortgage for Rs. 30,000. As regards the first two, there is no question of his right to do so, and it is clear that the right declared in favour of the respondents must bear its proportionate share of the burden. As regard the last, there being no continuing community he could not mortgage the whole property for his own debts, but he could do so to pay debts incurred during the *communio*. The decree must, therefore, be varied by adding a declaration to the effect that the one-eighth share in each case adjudged to the respective plaintiffs is liable to its proportionate burden of the Rs. 60,000 and Rs. 30,000 respectively, and as parties are not agreed, there must be an inquiry as to whether the mortgage for Rs. 30,000 in 1904 was created for the purpose of the payment of debts incurred during the subsistence of the *communio*.

Subject to these variations, their Lordships will humbly advise His Majesty to dismiss the appeals, with costs.

Varied.