Present : Bertram C.J. and De Sampayo J. 1922.

COORAY *v.* THE CEYLON PARA RUBBER CO., LTD.

209 and 210—D. C. Ratnapura, 3,198.

Contempt of Court—False evidence—Witness should not be punished while he is being examined—Proper time for punishing for contempt of Court is after the close of the case of the party calling witness or of the whole case—Criminal Procedure Code, s. 440—Prescription—Possession of a portion of a large extent of jungle—Interpretation of deed—Donation—Provision that donees were not to claim any further rights—Is it effective disinherison ?

The proper time for dealing with a witness under section 440 of the Criminal Procedure Code for giving false evidence is after the conclusion of his own evidence and after the close of the case of the party who calls him, or of the whole case if the completion of the trial is likely to render more apparent the falsehood of any statement.

Semble, where a person sold to another about 573 acres of jungle land, and the purchaser at once cleared the boundaries of the entire extent and treated the entire area as one *corpus*, but planted only a portion of the land, the possession of the planted portion may be taken to be possession of the whole.

A Kandyan having five sons and one daughter gifted to his five sons a property. The daughter claimed a share by inheritance to the exclusion of the sons, relying on a passage in the deed of gift which was to the effect that "no further rights with respect to my interest in the said *nindegama* shall be claimed by (the donees) after my death."

Query, whether this amounted to an effective disinherison of the donees.

THE facts are set out in the judgment of De Sampayo J.

Bawa, K.C. (with him *Drieberg, K.C.*, and *Schokman*), for defendant company, appellants.

A. St. V. Jayawardene, K.C. (with him *Fonseka*), for respondent.

Bawa, K.C. (with him *Drieberg, K.C.*, and *Schokman*), for witness, appellant in No. 210.

May 15, 1922. BERTRAM C.J.—

I have read the judgments of De Sampayo J., both on this appeal and on the subsidiary appeal, and agree with his conclusions.

In spite of the finding of the learned District Judge I can have no doubt that Tikiri Kumarihamy understood that she and her brothers were disposing of the whole of their interest in the land to

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Mr. Clark, and that she realized that possession of the whole land was retained, and the subsequent clearing and planting operations were undertaken on this footing. Under these circumstances, even though it subsequently transpired that she had an outstanding interest (which, as it seems to me, could not have been more than 1/84th), and even though after the execution of the deed she remained a part-owner in respect of this interest, the possession of those claiming through Mr. Clark must be considered adverse possession, and adverse with respect of the whole area which the parties to the deed had in contemplation.

I would, therefore, concur in the decree proposed by my brother De Sampayo on both appeals.

S. C. No. 209.

DE SAMPAYO J.—

Many questions were discussed at the argument of this appeal, but I think the decision on one issue will dispose of the whole case. It is necessary, however, to state the facts at some length in order to understand the dispute. The plaintiff N. K. Cooray has brought this action to vindicate 13/112 shares of certain lands included in the Dela *nindegama* comprising several hundred acres of land. The *nindegama* belonged to two brothers—Loku Bandara *alias* Loku Nilame and Punchi Bandara *alias* Heen Nilame. The elder brother Loku Nilame was married to Elapata Kumarihamy, and had by her two children Loku Bandara and Tikiri Bandara, and then the younger brother Heen Nilame joined him as associated husband of Elapata Kumarihamy. By this association there were four children born, namely, Medduma Bandara, Punchi Bandara, Kuda Bandara, and Dingiri Bandara. About the year 1870 Loku Nilame died, and thereafter Heen Nilame had two more children, namely, Podi Bandara and Tikiri Kumarihamy. It is certain deeds granted by the last named for her interest in the lands in question that have led to the present dispute. Loku Nilame's half share of the *nindegama* was inherited by the first six children, that is to say, the two children born to him solely and the four children of the associated marriage. As regards the half share of Heen Nilame, he, by two deeds of gift dated December 18, 1896, and November 6, 1900, donated 1/16th share to each of the four associated children, namely, Medduma Bandara, Punchi Bandara, Kuda Bandara, Dingiri Bandara, and 1/16th share to his son Podi Bandara. Further, Heen Nilame, by his deed No. 13,922 dated March 10, 1904, purported to sell 1/16th share to his daughter, the said Tikiri Kumarihamy. By deed dated August 28, 1907, executed in the circumstances which will be presently mentioned, Tikiri Kumarihamy sold 1/14th share to the defendant company's predecessor in title, Mr. P. D. G. Clark, but notwithstanding that

deed Tikiri Kumarihamy by another deed dated May 7, 1918, purported to sell 13/112 share to the plaintiff on the footing that she was entitled to 1/8th share by inheritance from Heen Nilame who had died intestate in November, 1904, and to 1/16th share by purchase upon the above deed No. 13,922, and that after deducting the 1/14th share, which she had sold to Mr. Clark, she was still entitled to 13/112 share. This is the foundation of the plaintiff's claim in this action. But it will be observed that the 1/8th share which had remained undisposed of by Heen Nilame would, under ordinary circumstances, have been inherited not by Tikiri Kumarihamy alone, but by all the six children, and Tikiri Kumarihamy's inherited share would have been only 1/84th share. But in asserting title to the whole 1/8 share by inheritance, she appears to have relied on a provision in Heen Nilame's deeds of gift in favour of his five sons, to the effect that " no further rights with respect to my interest in the said *nindegama* shall be claimed by (the donees) after my death." It is to me very doubtful whether this amounts to an effective disinherison of the donees, but, in view of the point on which the case turns, it is unnecessary to consider this question.

The title of the defendant company to the entirety of the lands, so far as the claim is made under the members of the Dela family, is as follows: Heen Nilame by deed of agreement dated November 20, 1896, that is to say, before the dates of the deeds in favour of his six children, agreed with Mr. P. D. G. Clark to sell to him his interest in the chena lands of the said *nindegama* at the rate of Rs. 15 per acre, after a survey shall have been made, within twelve months of the date of the agreement, and received in advance Rs. 3,000 to secure which he granted a special mortgage to Mr. Clark. After Heen Nilame's death, his six children carried out his agreement with Mr. Clark as follows: A survey was made by Surveyor Balasooriya on January 28, 1906, and the entire land as pointed out to him was found to contain 710 acres 2 roods and 14 perches, but excluding certain extents belonging to the pangukarayas or tenants and to the Crown, the *bandara* lands available for sale were ascertained to be 573 acres 2 roods and 37 perches. By deed dated July 20, 1907, Medduma Bandara, Punchi Bandara, Kuda Bandara, Dingiri Bandara, and Podi Bandara sold 13/14 shares of the above extent of land to Mr. Clark. A proportionate share of the Rs. 3,000 paid in advance to Heen Nilame being taken into account, the consideration paid on this deed was Rs. 7,989·35. Similarly, by deed dated August 28, 1907, Tikiri Kumarihamy sold the remaining 1/14th share to Mr. Clark for the consideration of Rs. 614·69½. In connection with the negotiations between Mr. Clark and his vendors, which took place at the family house at Dela, it would seem that the latter agreed among themselves to ignore the deeds given by Heen Nilame. The District Judge

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doubts whether Tikiri Kumarihamy would personally have taken part in these negotiations, but Mr. Clark's evidence is definite on that point, though he admits that Medduma Bandara was the chief spokesman. He says that there were conferences at Dela Walauwa, and that the subsequent deeds in his favour were in accordance with what was then agreed upon by all the parties. I have no reason to think that this evidence is false or mistaken. Mr. Clark purchased with the view of selling the lands again to the defendant company, and I cannot conceive that Mr. Clark who has been described as a shrewd man of business would not have taken care to secure the consent of all the parties concerned and to see that the entire land was conveyed to him. Moreover, he was anxious to know in what proportion the parties were to bear the advance of Rs. 3,000, and it was natural for him to discuss the question of shares with all the members of the family whom he knew very well personally. He entered into an agreement with the defendant company on December 3, 1907, and put the company in actual possession of the land, and subsequently formally conveyed it by deed on January 17, 1910. It is true that Tikiri Kumarihamy gave a separate deed to Mr. Clark executed not at Dela, but at Balangoda. After her marriage which was in *diga*, her home appears to have been at Balangoda, and the probabilities are that she returned home soon after the conferences at Dela without waiting for the execution of any deed there. As a matter of fact, Mr. Clark says that she was expected to join in the deed with her brothers, but as she was not there at the time a separate deed was subsequently obtained from her. The fraction 1/14th would appear to be explainable in this way. There were altogether eight children of the two brothers Loku Nilame and Heen Nilame and one had died, and as Tikiri Kumarihamy and her brother Podi Bandara were children of Heen Nilame alone, each of them was considered to be entitled only to 1/7 of 1/2 or 1/14th share, and the remainder to belong to the other members of the family. The form of Tikiri Kumarihamy's deed and all the circumstances indicate that she intended to convey to Mr. Clark her whole interest in the land, whatever it was, and that the fact of her having any further share after her sale to Mr. Clark was a much later discovery probably due to Cooray, the plaintiff. It is possible that, as she says, she questioned Medduma Bandara why she was made to sell only 1/14th share, and was assured that he would " settle and give her the remaining shares." That assurance, if in fact given, can only mean that Medduma Bandara undertook some personal responsibility, but Tikiri Kumarihamy's own evidence makes it sufficiently clear that she knew that between her and her brothers the whole land was being sold to Mr. Clark. In this connection it is noticeable that, though the defendant company entered upon the whole land at once, and by the year 1909 the

entire acreage was converted into a rubber estate, she made no sign, and only sold her alleged remaining shares to the plaintiff in May, 1918.

There was a question as to whether some of the lots comprised in the area sold to Mr. Clark were not tenants' holdings, and not *bandara* lands to which, therefore, the plaintiff could not claim title under Tikiri Kumarihamy. The defendant company also set up title upon a Crown grant issued in connection with certain Waste Lands proceedings. This was *primâ facie* a good source of title with regard to chenas in the Kandyan Provinces, but the plaintiff sought to meet it by relying on a *sannas* in favour of the Dela family. The Crown appears to impeach the *sannas* as a forgery, but the matter could not be fully investigated, as only a copy of the *sannas* was produced. But if the defendant company's plea of prescription is upheld, none of these other questions need be gone into.

On the issue of prescription I am distinctly of opinion that the decision should be in favour of the defendant company. The District Judge has upheld the prescriptive title of the defendant company to the lower portion which was planted with rubber in 1907 and which forms the larger portion of the area in dispute, but has not similarly upheld the claim with regard to the upper portion consisting of about 130 acres, which was not opened till 1909, and he has accordingly declared the plaintiff entitled to 13/112 of that portion. The boundaries of the entire extent were cleared by Mr. Clark on purchasing the land, and it is certain that Mr. Bridge, manager of the estate under the defendant company, whose evidence has been generally accepted by the District Judge, from the beginning treated the entire area as one *corpus*, under such circumstances that possession of part must be taken to be possession of the whole. Moreover, rights of ownership were exercised even before 1909 over the upper portion by acts of possession such as cutting and taking timber and sticks, and I think that the defendant company's claim by prescription in respect of the entire area, including the upper portion, is well founded. It was contended, however, that Tikiri Kumarihamy was a co-owner, and that the defendant company's possession was on her behalf also. But if, as I hold, Tikiri Kumarihamy, when she sold 1/14th share to Mr. Clark, thought that she was disposing of her whole interest in the land, or at all events if she knew, as it must be concluded she did, that on the strength of the sales by her and her brothers Mr. Clark and the defendant company considered the entire land to have been acquired and entered into and continued in possession on that footing, and if notwithstanding that knowledge she allowed them so to possess the land exclusively, the circumstances amounted to something in the nature of an ouster of Tikiri Kumarihamy, and the possession became at once adverse to her. For this reason

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also the plaintiff's cross notice of appeal from the judgment of the District Judge so far as it rejects his claim to the power portion of the land is bound to fail.

In my opinion the defendant company's appeal must be allowed, and the plaintiff's action dismissed in its entirety, with costs in both Courts, and the plaintiff's cross notice of appeal must likewise be dismissed.

S. C. No. 210.

DE SAMPAYO J.—

This is an appeal taken by the witness Kuda Bandara from an order sentencing him to pay a fine of Rs. 50 as for contempt of Court under section 440 of the Criminal Procedure Code. The appellant was called as a witness by the defendant company, and in the course of his cross-examination he said with reference to Heen Nilame's deed of gift : " We showed the deed of gift to Mr. Clark himself. I cannot say why he should deny it. No, the deed was with my brother Medduma Bandara, and he might have shown. I do not know whether it was shown or not." The District Judge here noted at once that the witness gave false evidence in saying " we showed that deed to Mr. Clark himself," and then saying " I don't know whether it was shown or not." The answer one way or the other was not material to the case, and it is obvious that the witness did not intend to mislead or deceive the Court, nor does the District Judge state that the witness had any such intention. On being called upon to show cause why he should not be punished for contempt of Court, the witness stated somewhat pathetically " I have forgotten." I am not surprised that the man forgot or had no clear recollection of one small detail of a transaction which took place thirteen years before, and which according to the District Judge himself was carried through by his brother Medduma Bandara. I think either the appellant's explanation should have been accepted, or the matter should have been overlooked as not worth noticing. The proceeding has, however, a serious aspect about which I wish to add a word. The appellant was dealt with for contempt of Court, while he was still under examination and before the conclusion of the case of the defendant company which had called him. In my opinion, a proceeding such as this is apt to intimidate the witness with regard to the rest of his evidence, and other witnesses who are still to be called, and generally to prejudice the course of justice. Section 440 of the Criminal Procedure Code no doubt provides that it shall be lawful for the Court to sentence a witness " summarily." But that expression refers not to the time at which a witness should be dealt with, but to the nature of the proceedings. I think it should be laid down, as a general rule, that the proper time for dealing

with a witness under section 440 is after the conclusion of his own evidence, and after the close of the case of the party who calls him or of the whole case if the completion of the trial is likely to render more apparent the falsehood of any statement.

The order appealed from should, in my opinion, be set aside.

Appeal allowed.