1902.
February 11.

FERNANDO *v.* TEGIS APPU.

D. C., Kalutara, 2,092.

Cultivation of Crown land by several persons—Contribution by them all of half-improved value under Ordinance No. 12 of 1840—Crown grant in favour of one cultivator only—Sale by that cultivator to plaintiff of a divided portion—Action in ejectment against other cultivators in possession—Their right to retain possession in spite of the Crown grant—Duty of Court to try the real question at issue between the parties.

Where a Crown land was cultivated by several persons and each contributed his share of half the improved value, in terms of the Ordinance No. 12 of 1840, to S M, one of the co-cultivators, and deputed him to apply to the Crown on their behalf for a grant, and such grant was made in favour of that cultivator only, but they continued to be in possession together; and where S M purported to sell a divided portion to F, and F sued in ejectment S M's co-shares, alleging ouster; and where the District Court found that there was no ouster and dismissed plaintiff's case,—

Held, that it was the duty of the Court to try the real issue between the parties, namely, whether the defendants have possessed their shares for a period of ten years previous to action, and that the decision of the majority of the Supreme Court in *Lenohamy v. Samuel* (2 *C. L. R. 101*) should not be understood as depriving co-owners, who claim in *rei vindicatio* and fail to prove the alleged ouster, of all further right of action to the land.

Per BONSER, C.J.—If, in such a case, the Court finds the plaintiffs have alleged an ouster which they cannot prove, or what it thinks is fictitious, it may punish them in costs, but cannot deprive them of further opportunities of maintaining their claim to the land.

THE plaintiffs in this case were the landlord and his lessee. They complained of ouster by the defendants and prayed for a declaration of title in favour of the first plaintiff and for ejectment of the defendants.

The first plaintiff claimed under one Sultan Marikar, to whom the Crown had granted the land on the 21st March, 1871, on payment by him of half the improved value, under Ordinance No. 12 of 1840.

The defendants laid claim to one-half of the entire land under a conveyance from one Samsi Lebbe of about five acres, and from Sultan Marikar himself of about two acres. They further alleged that, when the Crown put up for sale the land in suit in 1869, Sultan Marikar and his co-sharers (the predecessors in title of the defendants), intending to buy the land, agreed that Sultan Marikar should bid for it and buy it for himself and his co-sharers, and that the grant passed by the Crown in favour of Sultan Marikar was really for himself and his co-sharers. They denied the right of Sultan Marikar to convey title to a defined portion of the said land to the plaintiff.

The issues tried by the District Judge were: (1) did Sultan Marikar have a Crown grant in 1871, and was it in his favour alone, or for himself and others; (2) did he convey to the first plaintiff a defined south-western portion; (3) did defendants disturb and oust the plaintiffs; and (4) if so, what was the damage suffered by them?

The District Judge (Mr. Allan Beven), after hearing evidence, delivered judgment as follows:—

"I do not think it unusual for a Crown grant to be made out in the name of one person while there are several other shareholders to the land. The question for me to decide is whether subsequent to the issue of the Crown grant to Sultan Marikar the defendants were regarded as co-owners of this land. I am satisfied that the father of the first three defendants asweddumized the field with the original owner Samsi Lebbe, for I cannot but regard Samsi Lebbe as the original owner, in spite of the Crown grant in favour of Sultan Marikar. For a long period from 1824 to 1871 by act of possession and cultivation they were regarded as owners.

"By deed No. 4,728, January, 1861, Samsi Lebbe sold to the first and second defendants and the deceased brother of the third defendant three acres of this land. By deed No. 1,553 of 26th January, 1861, Sultan Marikar conveyed two acres to the first defendant. The father of the defendants, in consideration of having asweddumized this land, was allowed a portion equal to two acres. This was inherited by the defendants, who thus became entitled to seven acres or half the land.

"The defendants have put in evidence the copies of plaint and answer in partition suit No. 1903, which in my opinion can justly be received in evidence in spite of the contention of counsel

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for plaintiff. The judgment in that case clearly shows that plaintiff and Sultan Marikar brought a collusive action for partition in order to deprive these defendants of their shares in this land. Having failed in their object after the decision in that case, the first plaintiff leases this land to second plaintiff, in order that he may put forward a cause of action to strengthen his title to the land. I do not believe that plaintiff ever possessed this land at any time. I consider the ouster fictitious, and that this case is brought merely that first plaintiff should get a good title to the land. Sultan Marikar and first plaintiff attempted to get a good title by means of a partition decree, but were frustrated by the vigilance of Mr. Roosmalecocq, the then District Judge. First plaintiff has failed in this his second attempt. The action is dismissed with costs."

Plaintiffs appealed.

Sampayo, *R. H. Morgan*, and *Dornhorst*, for plaintiffs, appellants.

Walter Percira and *H. A. Jayawardene*, for defendants, respondents.

11th February, 1902. BONSER, C.J.—

The real issue in this case was never tried. Plaintiff got a conveyance in 1896 from one Sultan Marikar and complains that the defendants ousted him on a certain date and took possession of the land. It appears that Sultan Marikar in 1871 obtained a grant from the Crown on payment of half the improved value, under Ordinance No. 12 of 1840.

The defendants' case is, that Sultan Marikar and they were at the time in joint occupation and joint possession of the land in certain definite shares; and that Sultan Marikar, when the land was put up for sale by the Crown, was deputed by them to apply to the Crown on their behalf for a grant on payment of half the improved value; that they contributed their share towards the expenses; that the Crown grant was accordingly taken in the name of Sultan Marikar, and everything went on just as before, down to the commencement of this action. The case of the defendants is that, although the title under the Crown grant had been in Sultan Marikar, yet the possession of the land was in accordance with the arrangement made by them in 1871 with Sultan Marikar; and that they therefore by possession for some five and twenty years acquired a right to retain the possession in spite of the *primâ facie* title conferred on Sultan Marikar to the whole land by the Crown grant.

That issue was never tried, but issues were stated which were not very material.

One issue was whether the defendants had ousted the plaintiff. The District Judge decided that issue against the plaintiff, finding that plaintiff never had possession and had never been ousted, and that this was purely a fictitious cause of action. Mr. Walter Pereira argued for the respondents, that on this finding the action ought to have been, and was properly, dismissed, relying upon the judgment of the majority of this Court in *Lenohamy v. Samuel* (*2 C. L. R. 101*), where the Court dismissed an action brought by the plaintiff who claimed to be entitled to an undivided half of the land and alleged that the defendants were entitled to the other half, and had ousted him and excluded him from all enjoyment of the land. The Court there held that the proper form of action in such a case was a partition, and that they would not allow the plaintiff to maintain an action of ejectment on a fictitious allegation that they had been ousted by the defendants. If that case is to decide that, when parties who claim to be owners of land bring an action alleging an ouster which they are unable to prove, they are to be punished by having their action dismissed, and being deprived of all further opportunities of maintaining their claim to the land, I think it will be inconsistent with the law and procedure of this Court which has been established for the last nine or ten years. The practice as laid down by this Court is this: that it is the duty of a judge to ascertain what is the real question at issue between the parties. If he finds that plaintiffs have alleged an ouster which they cannot prove, or which he thinks is fictitious, then he can punish them in costs, but he ought not, it seems to me, punish them by depriving them of all right of action.

The question at issue between the parties in such a case is, in substance, whether the plaintiff is entitled to the land or not, and it seems to me that the judge ought (and it is in accordance with the practice of recent years) to try that question. (Mr. Dornhorst has just called our attention to the fact that the present practice is in accordance with the older practice as reported in *Madankara Terunnanse v. Dias*, *7 S. C. C. 145*.)

We think that in this case the action should go back to try this issue as to whether the defendants have possessed any of the shares which they claim for a period of ten years previous to action, so as to enable them to retain possession in spite of the Crown grant.

The costs of this appeal will abide the ultimate result.

WENDT, J.—Agreed.