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EMANIS *v.* SADAPPU *et al.*

D. C., Galle, 2,758.

Prescription—Adverse possession of land—Effect of abortive action for recovery of such land—Interruption of possession—Roman-Dutch Law as to adverse possession—Ordinance No. 8 of 1834, s. 2, and Ordinance No. 22 of 1871, s. 3—Effect of unanimous decision of Collective Court.

Held, by LAWRIE and WITHERS, J.J., following the decision in *Unambuwe v. Janohamy* (*2 C. L. R. 103*), that an action for the recovery of land, which had ended in a nonsuit or other decree against the plaintiff, was not such an interruption of the defendant's adverse possession of the land as disentitled him to a decree in his favour in terms of section 2 of Ordinance No. 8 of 1834, or section 3 of Ordinance No. 22 of 1871, in a subsequent action against him for the same land by the same plaintiff.

Per BONSER, C.J.—A solemn and unanimous decision of the Supreme Court in its collective capacity on a question of law must be treated as a binding authority in all subsequent cases. Even if the Court as constituted at a later date was unanimously of opinion that the original decision was wrong, it would be out of its power to alter the law as there laid down. That can only be done by the Privy Council altering such decision, or by an enactment of the Legislative Council.

THE facts of the case appear in the judgment.

Dornhorst, for appellant.

Wendt and *Sampayo*, for respondent.

Cur. adv. vult.

2nd Feburary, 1897. BONSER, C.J.—

In this case, which raises a serious question as to the authority of decisions of the Collective Court, I have the misfortune to differ from the rest of the Court. That question may be shortly stated thus: Is a solemn and unanimous decision of the Collective Court on a question of law delivered in 1862—a decision which followed previous decisions of this Court—to be treated as a binding authority or not ?

It is obvious that if this question is to be answered in the negative, it will be impossible in the future to regard any question of law as finally settled. The result will be that the law, which is proverbially uncertain, will be rendered more uncertain still, and the passion for litigation, which is one of the curses of this Island, will be fostered. Cases will be instituted and appeals taken on the chance that the Court will be induced to refuse to follow its former decisions.

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The appellant in this case was the defendant in an action *rei vindicatio*, and he appeals against a decision of Mr. Moysey, Acting District Judge of Galle, who gave judgment for the plaintiff, overruling the appellant's plea under Ordinance No. 22 of 1871 of ten years' undisturbed possession.

It appears that the plaintiff had brought a previous action within the ten years, which ended in a nonsuit.

The Acting District Judge held that the possession was thereby disturbed, and the Ordinance prevented from running. In so holding he followed a long chain of authority, which I will shortly state.

Marshall, C.J., in his valuable treatise published in 1839 under the title of *Judgments of the Supreme Court of Ceylon from 1st October, 1833, to March, 1836*,* commenting on Ordinance No. 8 of 1834, which, so far as is material to the present case, is identical with Ordinance No. 22 of 1871, thus states his view of the law :—

"The question to be asked would seem to be this : Can the "possession under which the party claims be considered to have "been undisturbed and uninterrupted by the assertion of other "claims for the space of ten years ?" And he goes on to say that when Chief Justice he was of opinion that the presenting a petition to the Judicial Commissioner of Kandy (the usual mode of commencing actions in that Court) respecting the land in dispute was sufficient to bar a title by prescription.

This opinion of Marshall, C.J., was adopted by Carr, C.J., and Temple, J., in 1854, in the case of *Medankara Unanse v. Haligomua Unanse* (D. C., Kurunégala, 12,911 ; *Ram. 1843-1855, p. 54*). The Court, in delivering judgment, said : "It has been urged by "the appellant's counsel that the defendant (appellant) had a "prescriptive title from adverse possession for ten years previous "to the bringing of this case, which was a new action, and not "a continuance of the former one. This Court has held, where "the possession under which a party claims a prescriptive title "has ineffectually been contested, that this contest would nevertheless be an interruption or disturbance to defeat the claim of "prescription," and they sum up the law as follows : "It is essential "to a title by prescription that the party claiming should have "for ten years previous to the bringing of the action held the "peaceable and continued possession without any interruption "by the true owner, without any acknowledgment by him in "possession of that person being the owner, and without any "suit having been instituted against him."

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On 11th December, 1855, the same two Judges, in case No. 83 from the Court of Requests of Chavákachchéri,* reversed the decision of the Commissioner and followed their previous decision giving judgment in the following terms: "It has been decided "by the Supreme Court that ten years' possession will not give a "prescriptive title to the land if there has been a suit during "the period to contest the possessor's right, although such suit "may have been discontinued."

In 1862, in the case of *Canepady v. Vally*, D. C., Jaffna, 960,† the judgment of the Collective Court—Creasy, C.J., Sterling and Temple, J.J.—was delivered in the following terms: "The "Supreme Court held in a case from Kurunégala (12,911, decided "19th July, 1854) that a former suit, although nonsuit, is a bar to "the Prescriptive Ordinance, and therefore considers the case "No. 1,699 by the plaintiff against defendant a bar to defendant's "prescription." True it is that Creasy, C.J., added an expression of his doubt as to the correctness of the original decision.

The facts, however, that so eminent and learned a Judge as Creasy, C.J., although he doubted, did not venture to differ, but concurred in the judgment of the Court, shows that he thought that the rule was too firmly established to be shaken, and therefore is a much stronger authority for the existence of the rule than if he had merely concurred with the rest of the Court.

Mr. Justice Thomson, in his *Institutes of the Laws of Ceylon*, published in 1866, treats the law as settled by these decisions (2 *Inst. 187*).

In 1877 this Court again affirmed its former decision in a case on appeal from the District Court of Galle, No. 37,705.‡ That case was instituted in 1875 to recover a garden.

The plaintiff had brought an action for the same land in 1860, which ended in a nonsuit in 1869. The District Judge held that the defendant had acquired a title by prescription, having been in possession since 1860, but Clarence and Dias, J.J., reversed that decision in these terms:—"This Court has repeatedly held that "the institution of a suit is an interruption (No. 12,911, D. C., "Kurunégala, 19th July, 1854)."

The law thus laid down seems never to have been again in question until the unfortunate decision of this Court in 1892, in the case of *Unambuwe v. Janohamy* (*2 C. L. R. 105*). I say unfortunate, because it was obviously based on a mistake, as has been pointed out by my brother Withers, who was a party to it,

* Nell's *C. R. Cases, p. 253.* † *Ram. 1862, p. 189.* ‡ *Ram. 1877, p. 133.*

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and who has expressed his surprise that no one called attention to the error at the time the judgment was delivered. It is still more surprising that any editor of *Law Reports* should have reported the case. The greatest Judges are liable to err, and Lord Campbell, who, when at the bar, reported in the Court of King's Bench, which at that time was presided over by Lord Ellenborough, one of the most eminent of the Judges who have occupied the position of Lord Chief Justice of England, used to say that he had a drawer full of Lord Ellenborough's bad law. It is no disrespect to the two Judges who decided the appeal in *Unambuwe v. Janohamy* to say that a judicious reporter would have kept this decision of theirs in his drawer. It does not appear, however, to have done much harm, for in the present case the Acting District Judge, recognizing, as any one who read the report with care would recognize, that it was a slip, declined to follow it. And, indeed, my brother Withers in a more recent case (*Siman Appu v. Christian Appu, 1 N. L. R. 288*) is reported to have stated without any qualification that possession is disturbed by an action intended to remove the possessor from the land—a proposition which is in accordance with the law as laid down by the previous decisions of this Court.

I have not discussed the question as to what our decision would be if the matter were *res integra*, for such a discussion would, in the view I take of the effect of those decisions of this Court to which I have referred, be a fruitless and barren one. If it were necessary to express an opinion on this point, I should be content to adopt the view of my brother Withers, whose knowledge of Roman-Dutch Law is so much greater than mine. But in my opinion this question is not open; even if the Court as at present constituted was unanimously of opinion that the original decision was wrong, it would, I conceive, be out of our power to alter the law as laid down by our predecessors. That can only be done by the Privy Council reversing those decisions, or by an enactment of the Legislative Conncil.

LAWRIE, J.—

I follow the latest decision of this Court on the question, "What "constituties an interruption of prescription," that pronounced on 13th September, 1892, in the Kandy District Court case, 4,646 (reported in *2 C. L. R. 103*).

To overrule that decision and to return to the decisions which it overruled would be confusing to the public and to the profession, and I could not revert to the former decisions because, as I said when I decided D. C., Kandy, 4,646, I think that

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they were wrong, and that opinion I gave effect to in February, 1896, in a judgment reported in *1 N.L.R. 288*. The older decisions rested on the Dutch Law of Prescription, but it was decided in 1870, in D. C., Colombo, 1,245, and in 1871 in D. C., Galle, 30,015, that the Dutch Law of Prescription was abolished by the Ordinances of 1822, 1834, and 1871, and that the sole authority in the chapter of law was the Ordinance. The decisions as to interruption founded on the Roman-Dutch Law then ceased to have any weight. We must construe the Ordinances apart from the Dutch Law.

What is undisturbed and uninterrupted possession? It is defined in the Ordinance itself: it is 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. In the present case the defendant has possessed the lands for more than ten years. He has paid no rent, no produce, nor has he performed any service or duty, nor has he, either in Court or anywhere else, done any act from which an acknowledgment of a right in the plaintiff could fairly and naturally be inferred.

Here the actual possession of the defendant has not been interrupted, it has been continuous. He has been twice sued in the District Court by the plaintiff for the recovery of the lands. In both actions the plaintiff was nonsuited. His possession has therefore been proved to have been on a title adverse to or independent of the plaintiff.

When an action to recover lands is brought against a man in possession, the currency of that possession in law, though not in fact, is arrested so long as the action is pending.

If the plaintiff be unsuccessful, if the action ends by a decree against him or in a nonsuit, then the defendant is in the same position as if the action had never been brought—his actual possession has not been interrupted, the claim on which legal interruption was founded has not been sustained.

For these reasons I agree with my brother Withers, that the decree in favour of the plaintiff must be set aside and the action dismissed with costs.

WITHERS, J.—

This is an ordinary action *rem vindicare*. The defendants are in possession of a field called Motamulla, answering to lots A 1, 2, 3, 4, which are delineated in the plan filed with the plaint.

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The plaintiff claims to be the owner of this field, and he asks to be declared the owner of it and to have the field taken over from the defendants and given to him.

This field has been the subject of a similar action between the parties or their predecessors in title.

In January, 1883, the present plaintiff joined with his alleged co-heirs in an action to vindicate this field from the present first defendant and two others, who, according to the libel, had taken unlawful possession of the same in the latter part of the year 1882. The plaintiffs succeeded in the Court below, but the judgment in their favour was set aside in appeal, and this Court decreed that the plaintiffs should be nonsuited on the ground that the evidence of their possession of the disputed field was altogether inadequate in competition with a Crown grant.

In July, 1886, the same plaintiff and one Dowege Eronis Appu joined in a similar action to the last against the same defendants to recover what I shall assume is the same land as that in the former action and as this in the now pending appeal.

By a judgment of the District Court of Galle in November, 1887, the plaintiffs were once more nonsuited. No appeal was taken from that judgment.

In April, 1894, the first plaintiff in the former action having bought up the shares claimed by his alleged co-owner of the property, instituted the present action against the first and third defendants in the former action to recover the field above mentioned.

It was claimed, *inter alia*, for the defendants that for ten years previous to the bringing of the action they had been in possession of the field under circumstances entitling them to a decree in their favour according to the provisions of the Ordinance No. 22 of 1871. And but for the two actions referred to they would have had a decree in their favour, for it is admitted, I understand, that they have been in adverse possession of the field for ten years and upwards previous to the bringing of this action.

The District Judge has however held that those actions constitute such an interruption to the defendants' possession as to disqualify them for a decree in their favour. He has further held that the plaintiff's title is superior to that of the defendants', and on that issue he has also decided in favour of the plaintiffs.

Thus, two questions arise for our decision: one a question of fact, the other a question of law. Has the plaintiff found a superior title? is a question of fact.

Granting his superior right of property at the times when the previous actions were instituted, have those actions constituted

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such a disturbance and interruption to the defendants' possession during the ten years previous to the pending action as to defeat their claim to a decree in their favour under the Ordinance No. 22 of 1871? This is the question of law. The present case came up in appeal in the first instance before the Chief Justice and myself, and when it appeared that the judgment in the case of *Unambuwe v. Janohamy*, reported in the second volume of the *C. L. R. p. 103*, was in conflict with previous decisions on the question of the extent of interruption of possession by an unsuccessful suit, it was ordered that the case should stand over for the Full Court.

The case has since been argued before the Chief Justice, my brother Lawrie, and myself.

The principal judgment in the case of *Unambuwe v. Janohamy* was my judgment, and was concurred in by Chief Justice Burnside. That was an action of *rem vindicare*, and in the course of my judgment I used this language:—"The learned Judge (my brother "Lawrie) would himself have given judgment for the defendant "on this plea (*i.e.*, of prescriptive possession) but for the opinion "which to his mind was forced on him by judgment of this Court "to the effect, as he seems to interpret them, that an action of "ejectment against a person in possession interrupts that possession and snaps the continuity of it. But I do not understand "any decision to go that length. Possession is interrupted, *i.e.*, "held in suspense by an action, and so long as that action subsists "time is not gained by the occupant against his adversary pending "the same. But if the action is abandoned or lost and the defendant remains in possession, the temporary gap of time opened "during the proceedings closes again, and the period of interruption by the suit enures to him for whom time and adverse "possession are creating a prescriptive title."

The decisions referred to are Rámanáthan's *Reports for 1854, p. 54; for 1862, p. 189; for 1877, p. 133;* Marshall's *Judgments, 39, p. 525;* Nell's *C. R. Cases (1855), 253.*

They were fully discussed in the argument before us, and it is plain beyond question that they do go the length of deciding that the institution of an action does interrupt the growth of prescriptive possession, so that it must, as it were, strike a fresh root and grow for a full period of ten years in that or any other interruption having the like effect.

How I came to state in *Unambuwe v. Janohamy* that previous decisions do not go that length, or how Burnside, C.J., came to express his assent to that statement, I am quite unable to say. It is almost as surprising that when the judgments were delivered in Court no one called our attention to the statement, nor can I

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understand how I came to make that statement if the full significance of the previous decisions was made manifest to us at the hearing.

However, I did say so, and I can only confess that my statement was erroneous. Nor do I care to surmise what our judgment would have been if our attention had been called to the error of the statement. What we have now to dertermine is whether we should declare the new law to be wrong and the old law to be right, or whether we shall adhere to the new law.

Even if we came to the conclusion that the new law is right, it might well be thought proper, for the sake of uniformity, to revert to the law as declared by our predecessors.

I yield to no one in my recognition of the necessity of a course of uniform decisions. Justice cannot be administered if the opinions of Judges are constantly changing. For all that I humbly conceive that the law as laid down in the case of *Unambuwe v. Janohamy* is not only right, but that it ought to be followed for the future.

If my colleagues are against me on this point I shall cheerfully yield to their view and concur with them in retracing our steps. Why I think the new law to be the better law I now proceed to explain. By the Regulation No. 13 of 1822 it was declared that all laws theretofore enacted, and all existing customs with respect to the acquiring of rights or the barring of civil actions by prescription within and for the maritime districts of the Island, should ceased to be of any force or effect, and that the same should thereby be wholly repealed.

That and an explanatory Regulation No. 5 of 1825 were repealed by Ordinance No. 8 of 1834, which was afterwards repealed by Ordinance No. 22 of 1871.

It has been held by this Court that the Roman-Dutch Law of prescription between private persons was swept away by the Regulation of 1822, and the Ordinance No. 8 of 1834 was framed to take its place.

One result of the excision of the Roman-Dutch Law is to abolish the right of acquiring a title to immovable property by possession for length of time and to substitute for it the Statute Law of No. 8 of 1834 and No. 22 of 1871.

By these laws a plaintiff in possession of land at the time of bringing suit, and wishing to have his land preserved to him in quiet enjoyment, is entitled to have a decree in his favour if he proves an undisturbed and uninterrupted possession of the land by an adverse title for ten years previous to the bringing of the action.

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What is meant by " previous to the bringing of the action " has never been accurately determined. Plaintiffs have been allowed elastic margin of time between ouster and action.

Again, a defendant who is in possession of a land which a plaintiff seeks to take from him may on proof of similar possession for a similar period have a decree in his favour for the land in dispute.

The Ordinance No. 8 of 1834 was introduced the year after the enactment of the Real Property Act of 1833 in England, and seems to have caught up and framed the definition of adverse possession as finally determined by English decisions.

I mention this not to suggest that our Ordinance should be interpreted by the Law of England. I demand that it shall be construed by its own language.

I do protest against its being construed by reference to the very law which it has specially repealed. The Roman-Dutch Law doctrine that a civil action interrupts the possession so as to necessitate a fresh possession when the proceedings are terminated for the acquisition of a title by prescription was swept away in 1822, and to apply that doctrine to the Ordinance of 1834 is to undo that legislation.

The new Ordinance clearly to my mind contemplates by disturbance and interruption a physical disturbance and a physical interruption of possession.

To wait for nine years and 364 days and then to file a plaint and serve a summons on the adverse possessor for the purpose of compelling him to maintain possession for another period of ten years would render the new legislation nugatory.

The case of *Unambuwe v. Janohamy* disturbs no existing titles: it rather makes for quieting and assuring them. In my humble opinion then this case should be followed. It follows therefore that the defendants in the present action should have a decree in their favour.