

KAPURUHAMY v. HENDRICK *et al.*

C. R., Kurunegala, 2,954.

1895.

June 26.

Possession of undivided shares of land by taking produce of trees on divided portion of land—Verbal arrangement—Admissibility of evidence of enjoyment of specific trees to support title to undivided share—Onus probandi.

It is competent to owners of undivided shares of land to make arrangements among themselves as to the enjoyment of the produce of their land.

The owner of an undivided share of a land may, in support of his claim to such share, call evidence to show that he had taken the produce of a certain number of trees in the garden.

Where the defendant in a case pleads title by prescription to the land in dispute, the plaintiff is not obliged to wait until the defendant had called evidence, and then to rebut such evidence. It is open to the plaintiff to call evidence in the first instance to anticipate the defendant's case.

IN proof of his claim to $\frac{5}{16}$ of a cocoanut garden, plaintiff proved that forty years before action it was held by one Mudalihamy and Ettarali apparently as joint-owners; that Mudalihamy was entitled to $\frac{5}{16}$ only of the land; that Mudalihamy took the produce of 25 trees in a particular part of the garden; that his interest devolved on him, the plaintiff; and that he had, since his purchase up to a short time before the institution of this suit, taken the fruit of the 25 trees.

After giving evidence himself to this effect, plaintiff proposed to called other witnesses to corroborate the statement that he and his predecessors in title had been taking the produce of the 25 trees. The Commissioner declined to admit such evidence, and dismissed the action.

On appeal,

Van Langenberg, for appellant.

Bawa, for respondent.

26th June, 1895. BONSER, C.J.—

It is quite competent for the owners of undivided shares to make arrangements among themselves as to the enjoyment of the produce of the land, and evidence showing that the plaintiff had enjoyed the fruit of these trees would go to support his title to $\frac{5}{16}$.

Further, the evidence was admissible on another ground. The defendants had pleaded adverse possession of the whole of the garden for the prescriptive period as they were entitled to do, and it was competent for the plaintiff to adduce evidence to meet

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June 26. they have called evidence, and then to call rebutting evidence.
BONSER, C.J. It is competent for him to call evidence in the first instance
to anticipate the defendant's case.

The case must go back to be re-tried, and the costs of the
previous proceedings and of this appeal will abide the event of
the new trial.

