1896.
February 8 and 14.

SIMAN APPU *v.* CHRISTIAN APPU.

D. C., Colombo, 1,980.

Ordinance No. 22 of 1871, s. 3—"Uninterrupted and undisturbed possession."

WITHERS, J.—"Possession" of a land must be continuous, peaceful, and for a certain period.

It is "interrupted" if the continuity of possession is broken either by the disputant legitimately putting the possessor out of the land and keeping him out of it for a certain time, if the possessor is occupying it; or by occupying it himself for a certain time and using it for his own advantage, if the party preventing is not in occupation.

And possession is "disturbed" either by an action intended to remove the possessor from the land, or by acts which prevent the possessor from enjoying the free and full use of the land of which he is in the course of acquiring the dominion, and which convert his continuous user into a disconnected and divided user.

LAWRIE, A.C.J.—If the actual physical possession has never been interrupted, it matters not that the possessor has been troubled by law-suits or by claims in execution or by violence. If he has succeeded in holding possession, such attempts to oust him only make it the more certain that he held adversely to those who disputed with him.

PLAINTIFF alleged that one Don Daniel, being the original owner of the land in dispute, mortgaged it with the plaintiff and one Fernando as security for due payment of a certain sum of money; that the plaintiff and his co-creditor instituted an action against Don Daniel for the recovery of the said sum of money, and on judgment being obtained caused the Fiscal to seize the property under mortgage; that at the sale the plaintiff and his co-creditor purchased the same and obtained a Fiscal's transfer; that subsequently the plaintiff and his co-owner sold the said land to one Jusey Silva and Susey Pulle, who were put in possession by them, and who mortgaged the same property to the plaintiff as security for the payment of the purchase money; that the said

1895.
February 8 and 14.

Jusey Silva and Susey Pulle having failed to pay plaintiff his moiety of the said purchase money, the plaintiff sued them for the recovery of the same, and having obtained judgment issued writ and seized the property, whereupon the present defendant claimed the same before the Fiscal who, in terms of section 241 of the Civil Procedure Code, reported the claim to the District Court, which after inquiry directed the release of the said land ; and the plaintiff prayed (1) that his execution-debtors, Jusey Silva and Susey Pulle, be declared to be the owners of the said property at the date of the seizure thereof under the said writ, and the same liable to be sold in execution ; (2) that the defendant's claim to the said property be declared groundless, and be set aside ; and (3) that the defendant be condemned to pay the plaintiff the sum of Rs. 200 as damages.

The defendant by his answer denied all the above allegations, save that he claimed the land and that his claim was upheld by the District Court. He further pleaded that this land originally belonged to the Crown, and that the Crown, in consideration of the long possession of the same by the defendant, granted to him a certificate under the 7th clause of the Ordinance No. 12 of 1840 declaring that the Crown had no title thereto. He further claimed the benefit of the 3rd section of the Ordinance No. 22 of 1871, alleging that he was in the undisturbed and uninterrupted possession of the said land for ten years and upwards previous to the institution of the present action, by a title adverse to and independent of the said Jusey Silva and Susey Pulle and their predecessors in title.

The District Judge heard evidence on both sides, and decided the case in favour of the plaintiff, holding that the two District Court cases bearing Nos. 41,552 and 69,316, relied on by the plaintiff's counsel, were *res judicata*, and estopped the defendant from denying the right of the plaintiff's execution-debtors, who derived their title from one Don Christian and Don Daniel ; that Don Christian had sued the defendant in case 41,552 and got judgment for this land as far back as 1865, and that Don Daniel had also sued defendant in 1876 for this land, when the defendant admitted Don Daniel's right to 11 acres out of the 17 acres he claimed ; that the 11 acres decreed to Don Daniel in 1877 were the identical 11 acres now in dispute ; that the judgments in both those cases were *res judicata* as between defendant and plaintiff, whose title ultimately rested on Don Christian and Don Daniel ; that defendant had never enjoyed quiet possesssion for ten years ; that eight years before the trial there was a riot on the land, when a house was burnt down and defendant was tried for

1895.
February 8 and 14.
BROWNE, A.J.

shooting some people; and that though the defendant had all along resisted, and successfully resisted, disposcession, yet his possession was anything but undisturbed and uninterrupted.

In these circumstances, the District Judge gave judgment for plaintiff.

The defendant appealed, and the case was heard in appeal on the 8th February, 1895.

Dornhorst and *Morgan*, for appellants.

Drieberg and *Seneviratna*, for respondents.

Cur. adv. vult.

14th February, 1895. BROWNE, A.J.—

Plaintiff did not at all base his claim in his plaint upon the previous decisions of the lower court in the suits 41,552 and 69,316 respectively. Those decisions were of the years 1868 and 1877, and the evidence in the case is that the defendant was not removed from his possessior by legal process as the result of either of them. Even had he been, there was ample time thereafter before this action was instituted in December, 1891, for the defendant to have acquired a fresh title by prescription. I could not therefore affirm the decision for the reason of *res judicata* given by the learned District Judge.

Then there is no clear proof here that any action thereafter was instituted against defendant in regard to this land, the effect of which would have been that the *litis contestatio* or *vocatio in jus* would have effected a constructive or civil interruption as held by this Court in 12,911, D. C., Kurunegala (*S. C. Min., 19th July, 1854*); 9,601, D. C., Jaffna (*Rámanáthan, 1862, p. 189*); 37,705, D. C., Galle (*ibid, 1877, p. 133*). As to this, see the later judgment of this Court (*2 C. L. R. 103*), that with the decision of the suit the interruption ceases and is effaced.

As to the other disturbance, which is the entry of the plaintiff and his plucking fruits in 1855, though on being resisted he left the land, it was held a disturbance of defendant's naked possession for over ten years (19,802, D. C., Mátara, *Legal Miscel. 1864, p. 56*). I find no proof here of interruption or disturbance at any date within ten years of action instituted proved to have been made by plaintiff or his predecessor in title of the defendant. I do not know who is the Peris Sinho by whom he mentions an attempt was made to disturb him "five or eight years ago," and as to what Susey Pulle did when he "tried to oust" defendant and the latter shot a man in "regular riot." No particulars are given. It may be that not a man ever set foot on the land itself, nor that the defendant was a loser of a nut thereby.

1895.
February 8 and 14.
WITHERS, J.

I accept entirely the verdict of the learned District Judge that defendant has always resisted all attempts to oust him, and I hold him entitled to a decree in his favour, so long as it has not been proved and held that his possession was interrupted or disturbed.

WITHERS, J.—

I am also of opinion that judgment should have gone for the defendant.

I am not aware of any decision of our Courts which explains the sense of the words "uninterrupted and undisturbed possession" used in our Prescription Ordinances. Interruption or disturbance might occur in different ways, according as the land or other immovable property was the subject of a title alleged to be acquired under these Ordinances.

Possession of a land must be for a certain length of time, must be continuous, and must be peaceful.

Possession is interrupted if the continuity of possession is broken by the disputant legitimately putting the possessor out of the land and keeping him out of it for a certain time, if the possessor is occupying it; or by occupying it himself for a certain time and using it for his own advantage, if the party prescribing is not in occupation.

Possession is disturbed either by an action intended to remove the possessor from the land or by acts which prevent the possessor from enjoying the free and full use of the land of which he is in the course of acquiring the dominion, and which convert his continuous into a disconnected and divided user.

Such, roughly speaking, are the considerations which I should be disposed to look to in deciding the question whether there has been such a disturbance or interruption of possession of a land as would defeat a claim to a decree of title by prescription.

I can find in this case no evidence that the defendant was ever disturbed or interrupted in the sense above indicated within ten years previous to the bringing of this action.

LAWRIE, A.C.J.—

The learned judge finds on the evidence that "the defendant "has been residing on the land for many years, and that he has "disputed with various claimants, and he has resisted all efforts "to oust him."

In another part of the judgment he says, "defendant has all "along resisted, and successfully resisted, dispossession." If the actual physical possession has never been interrupted, it matters

1896.
February 8 and 14.
LAWRIE, A.C.J.

not that the possessor has been troubled by lawsuits, or by claims in execution, or by violence; if he has succeeded in holding possession, these attempts to oust him only make it the more certain that he held adversely to those who disputed with him.

Until they succeed in getting the decree of a competent court on which they evict him, his possession is good as against his opponents.

Here it is clear that the possession of the defendant has not been interrupted during the ten years before action. Has it been undisturbed? A disturbance is something less than an interruption; it is a disturbance if for a time some one succeeds in getting partial possession, not to the entire exclusion of the former possessor, but jointly with him.

In my opinion, there has been no disturbance, and I would set aside the judgment and dismiss the action with costs.