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October 14.

SILVA *v.* SIMAN.

C. R., Colombo, 5,625.

Ordinance No. 22 of 1871, s. 3—"Possession for ten years previous to the bringing of the action"—Necessity of plaintiff being in possession at time of suit.

Per BONSER, C.J.—It is essential that a plaintiff who claims the benefit of section 3 of the Ordinance No. 22 of 1871 should be in possession when he brings his action.

If plaintiff has suffered ouster, his remedy under section 4 is to recover possession within one year of his dispossession, without going into the question of title. But if he acquiesces in his dispossession for a year, he must prove his title.

ACTION instituted on 8th March, 1898, for declaration of title, ejectment of defendants, and damages.

Plaintiff alleged that his father, being "seized and possessed" of a certain land, leased the same to one Jaya (the father of the defendants) in 1879; that Jaya held it till plaintiff's father died in 1884, and then as tenant of plaintiff till he (Jaya) died; that thereafter Jaya's widow, and after her death in 1893 her son, the first defendant, paid rent to plaintiff till 1894; that in July 1895, plaintiff sued the first defendant and had him ejected from the land; that in April, 1896, the defendants "unlawfully entered upon said premises and are disputing plaintiff's right thereto;" and that "plaintiff and his predecessors in title have been in the "undisturbed and interrupted possession of the said premises by a "title adverse to and independent of the defendants and all others "for upwards of thirty years, and the plaintiff in this behalf claims "the benefit of section 3 of Ordinance No. 22 of 1871."

The defendants denied possession under plaintiff or his father of the land described in the plaint, and claimed it by prescriptive right.

After hearing the evidence for plaintiff and defendants the Commissioner found that Jaya, the father of the defendants, entered under plaintiff's father and paid rent to him; that plaintiff and first defendant had also paid rent to plaintiff; that all the defendants were ejected by process of law in 1895; and that they had unlawfully entered on the land again in 1896.

He gave judgment for plaintiff as prayed.

The defendants appealed.

Bawa, for appellants.—The words of Ordinance No. 22 of 1871 are explicit as to the kind of possession necessary to entitle plaintiff to a decree in his favour. Section 3 deals first with the prescriptive title of the defendant to an action, and then proceeds

to state that " proof of such undisturbed and uninterrupted posses- " sions as hereinbefore explained ..... shall entitle plaintiff to a " decree in his favour." The words of the section are " proof of " the undisturbed and uninterrup ed possession by a defendant in " any action, or by those under whom he claims, of lands or " immovable property, by a title adverse to or independent of that " of the plaintiff (that is to say, 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 acknowledg- " ment of a right existing in another person would fairly and " naturally be inferred) for ten years previous to the bringing of " such action, shall entitle the defendant to a decree in his favour " with costs. And in like manner, when any plaintiff shall bring " his action ..... for the purpose of being quieted in his posses- " sion of lands ..... or to prevent encroachment or usurpation " thereof, or to establish his claim in any other manner to such " land ..... proof of such undisturbed and uninterrupted posses- " sion, as hereinbefore explained, by such plaintiff ..... " shall enable such plaintiff ..... to a decree in his favour " with costs." Here " possession for ten years *previous* to the bringing of such action " means possession for a period of ten years uninterruptedly from the date of the action. Hence it is essential that the plaintiff must be in possession at the time of the suit. In the present case he is not. He admits in his plaint that he went out of possession in 1896, about two years before action. He cannot therefore maintain the suit. It is true this objection was not taken in the Court below, but it is not necessary to do so. Before plaintiff can claim the benefit of the law of prescription, as laid down in the Ordinance No. 22 of 1871, he must show that he has fulfilled the conditions under which only the prescriptive right will enure to him. If he was dispossessed, the law gave him the power under section 4 to prove dispossession at any time within one year of the dispossession, and in that case he would have been restored to possession without having to prove his title to it. Having thus got into possession, he could have brought an action under section 3 to be quieted in his possession. He did not do so. In the present case, plaintiff's first prayer is that " he be declared entitled to the said premises," and his second prayer that " defendants be ejected from the said premises." Neither of these prayers is available to him under section 3, as confessedly he is not in possession, and he does not show any title except what he calls " undisturbed and uninterrupted possession. He never had such possession, because " possession " as defined by section 3 means possession at the date of action.

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W. Pereira, for plaintiff, respondent.—The effect and meaning of section 3, corresponding to section 2 of the earlier Ordinance No. 8 of 1834, was considered by CREASY, C.J., in *Naker v. Sinnatty* (*Ram. 1860, p. 75.*) It has been held that " possession for ten years *previous* to the bringing of the action " does not mean possession for ten years *next before* the bringing of the action. The Supreme Court was quite opposed to the introduction of the word " next," as the consequences would be serious. CREASY, C.J., said " the result " would be that men who were turned out of lands and houses " would lose all the benefit of prescriptive title, unless they ran off " to the court-house and instituted a suit on the very day on which " the wrongful act was committed. Nothing is more common in " the plaints for ejectment, which we daily read, where the plaintiff " claims by prescription, than an allegation that the ouster occurred " one or two or more years (short of ten) ago. Every one of these " plaints must be held bad on the face of them, if the Ordinance is " to be construed as the present defendant desires. The Supreme " Court should pause long before it so revolutionized the adminis- " tration of justice in one of its most important branches, even if " there was anything in the language of the Ordinance which " seemed to favour it. But the Ordinance is not so worded, and " the Supreme Court has double cause not to invent law to make " mischief." This authority guided the Bench and Bar for years till *Casie Chitty v. Perera* (*3 S. C. C. 31*) came before CLARENCE and DIAS J.J., in 1886, when they came to a different conclusion, without stating any reason for it. In a latter case, *Abubaker v. Perera* (*9 S. C. C. 48*), CLARENCE stated that he had not the opportunity of considering *Naker v. Sinatty*, decided by CREASY, C.J., as it was not quoted to him.

BONSER, C.J.—

In this case the plaintiff sought to eject the defendants from a certain land. He alleged, in his plaint, that this land was part of the estate of his deceased father, that he was his diseased father's executor, and that two years before the commencement of this action the defendants had ousted him from the land. At the trial, an irrelevant issue was framed, as to whether the plaintiff and his predecessors in title had been ten years in undisturbed possession of the land prior to ouster. Apparently the plaintiff sought to rely on section 3 of Ordinance No. 22 of 1871. The Commissioner found that the plaintiff had been in undisturbed and uninterrupted possession ten years before ouster, and accordingly he gave the plaintiff judgment.

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Now it is quite clear from section 3 that a plaintiff who relies upon that section must be in possession when he brings his action. The words are:—" And in like manner, when any plaintiff " shall bring his action, or any third party shall intervene in any " action for the purpose of being quieted in his possession of lands " or other immovable property, or to prevent encroachment or " usurpation thereof, or to establish his claim in any other manner " to such land or other property, proof of such undisturbed and " uninterrupted possession, as hereinbefore explained, by such " plaintiff or intervenient, or by those under whom he claims, shall " entitle such plaintiff or intervenient to a decree in his favour with " costs."

Now, if it had been intended that a plaintiff out of possession should be able to prove ten years' possession before commencement of action, and should be able to rely upon that possession to recover possession of the land claimed, nothing would have been easier than to have said so.

In that case the section would have been expressed thus: " In like " manner when a plaintiff shall bring an action for recovering any " land," &c. It does not say so. It seems to me quite clear that the plaintiff must be in possession, and if he had been ousted there is a very simple remedy provided by law for recovering possession without going into the question of title. There is one thing essential to such an action, and that is that it must be brought within a year from the ouster. If a person ejected from land acquiesces in his dispossession for a year, then if he wishes to recover the land he must prove his title. In the present case the plaintiff acquiesced in the dispossession for nearly two years, and then he commenced his action, in which he alleged his title as executor of his father. The real issue between the parties raised on the pleadings, as to whether the land ever formed part of the estate of the testator, was never decided.

The case, therefore, must go back for the Commissioner to try that issue. Costs will abide the event.