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DABARE *v.* MARTELIS APPU.

D. C., Colombo, 11,048.

Evidence of ouster—Abandoning of possession because of threatened beating—Validity of judgment of a Supreme Court Judge read in Court after he has left the Island—Prescription—Ordinance No. 22 of 1871—Possession previous to action.

Per CURIAM.—A person who abstained from acts of possession because he feared a beating cannot be said to have been ousted.

BONSER, C.J.—Further consideration has not shaken in any degree the opinion I expressed in *Silva v. Siman*, 4 *N. L. R. 144.*

As the judgment of MONCREIFF, J., in *Banda v. Banda (4 N. L. R. 302)*, over-ruling *Silva v. Siman*, was read in Court by Browne, A.J., after the former had left the Island, the decree entered in that case does not bind the parties, nor can the judgment of those judges pronounced in that case be relied on as authority.

The word prescription is not usable in Ceylon in the sense of *usucapio* in which it was used by Roman-Dutch Law writers, because the effect of the Regulation No. 13 of 1822, was to establish the law of *usucapio* and to entitle a defendant in possession, who has been sued by a plaintiff for the recovery of immovable property, "to a sentence in his favour," if for ten years before the bringing of such action the defendant has been in undisturbed possession by a title adverse to and independent of the plaintiff.

The expression "entitle the defendant to a sentence in his favour" means the usual decree that the "defendant be absolved from the instance," which is the equivalent of the English judgment that "the plaintiff take nothing by his writ and the defendant go without day" (*sine die*).

The Ordinance No. 8 of 1834, which repealed the Regulation of 1822, did not re-introduce the old law of acquiring title by prescription. Its object was *inter alia* to extend to plaintiffs in possession the right which that Regulation had given only to defendants in possession.

The Ordinance No. 22 of 1871, which repealed the Ordinance of 1834, did not alter in any substantial way the previous state of the law.

BROWNE. A.J.—Possession (of a party to a suit or his predecessor in title) by a title adverse to and independent of the other party for the period of ten years gives a statutory title by prescription, in the sense of *usucapion*, equal to that which the old Common Law gave. If *usucapion* was ever abolished, it has been so fully restored that a plaintiff may establish thereby his claim to land.

When a person has held possession by a title adverse to, &c., and loses such possession at any time previous to his institution of an action *rei vindicatio*, such action is maintainable against any one who cannot by grant or deed or like possession for a period later than his, establish in his defence a title superior to that of the plaintiff.

THE plaintiff, alleging that he had jointly with two sisters inherited from his father an undivided one-fifth of a divided western half of Etambagaha-owita and purchased two undivided fifths of the half, sought in this action to vindicate from the defendants, who were joint heirs with him and his vendors, a divided

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three-fifths of the land. He alleged that the said three fifth parts was separated off and possessed by the plaintiff with the consent of the other heirs for the last sixteen years, and that it was bounded on the north, &c., and that he was ousted on 8th January, 1898. The action was brought on 28th February, 1898. Plaintiff prayed that he may be declared entitled to the said divided three-fifths, and that defendants be ejected therefrom.

The Additional District Judge (Mr. F. R. Dias) found that Etambagaha-owita was in 1857 the property of one Dinis Dabera; that he had five children, viz., Siman, Lewis, Jeeris, Sarah, and Punchi Nona; that Sarah was given in marriage to one Carolis, and by deed dated 2nd October, 1857, Dinis Dabera conveyed him the eastern half of the land; that the defendants were the grandchildren of Carolis by his first wife (not Sarah); that in 1881 plaintiff bought two-fifths of the western half which belonged to his uncles Jeeris and Louis, which, together with the one-fifth that belonged to his own father Siman, made up the three-fifths claimed by plaintiff; that the three-fifths of the western half was partitioned by agreement among the co-heirs in 1881; that plaintiff had possessed the divided portion since then and had acquired a prescriptive title to it; and that he was obliged to give up possession in 1898, because he was threatened to be beaten if he held it. He entered judgment for plaintiff.

The defendants appealed. The appeal was argued on the 15th and 19th February, 1901.

Bawa, for appellant.—Plaintiff has attempted to exclude his co-heirs, the defendants, from possession, by taking advantage of the Ordinance No. 22 of 1871. He has failed to prove title by prescription. Plaintiff being owner of an undivided share, all acts proved by him are consistent with defendants' case. Plaintiff admits he paid taxes throughout his possession as for an undivided whole. That is an admission of common right, and it estops plaintiff from setting up a claim to divided possession. Defendants have proved that Carolis died in possession of the whole land. It is true that he had a proper title to one-half only, but as a matter of fact he exercised rights of ownership over the whole. He died intestate, and his widow Sarah is still alive. In the Testamentary Case No. 3,225 of the District Court of Colombo, the whole of Etambagaha-owita is given as belonging to the estate of the deceased Carolis, and as in common possession of his heirs. The oral evidence, too, supports the defendants' contention that the land was never divided nor possessed dividedly. Plaintiff has failed to establish title by prescription.

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H. J. C. Pereira, for plaintiff, respondent.—Plaintiff's case rests upon title by prescription. He has proved an agreement between the co-heirs as to partition of the three-fifths claimed. After such partition in 1881 plaintiff was in the undisturbed and uninterrupted possession of this share till the ouster in 1898. [BONSER, C.J.—What is the history of the legislation on this subject? It begins with the Regulation No. 13 of 1822.] The Regulation of 1822 repealed the Common Law of Prescription, and enacted, *inter alia*, that "proof of the undisturbed possession "of land or immovable property by a title adverse to that of the "claimant or plaintiff in any action for ten years before the bring- "ing of the action shall entitle the defendant to a sentence in his "favour". No title by prescription could be acquired under that Regulation by the plaintiff. But it was repealed by the Ordinance No. 8 of 1834, and the Common Law was then restored. [BONSER, C.J.—No. The unabridged edition of the Ordinances shows that the Regulation was repealed except so far as regards the repeal by that Regulation of previous laws or customs touching the periods of prescription.] The Ordinance of 1834 enacted that proof of the undisturbed and uninterrupted possession by defendant or plaintiff, by a title adverse to or independent of plaintiff or defendant, would entitle plaintiff or defendant, as the case may be, to a decree in his favour. This is in accordance with the Roman-Dutch Law. Vanderlinden lays down that "the right of property is acquired by prescription of time" (*Bk. 1, ch. 2, § 4*). In the Roman-Dutch Law the third of a century was the requisite period, but the Ordinance of 1834 limited it to ten years previous to the bringing of the action. [BONSER, C.J.—That means, next previous.] No, ten years at any time, provided that no one has prescribed subsequently. That is the Common Law. Marshall's *Judgments*, title "Prescription." *Banda v. Banda, 4 N. L. R. 302.* The words "next previous" occur in *2 and 3 Will. IV., c. 71, § 2*, but Creasy, C.J., pointed out in C. R., Point Pedro, 41 (*Ràmanàthan, 1860, p. 79*), that the consequences of introducing the word "next" into our Ordinance would be very serious, and that the local Legislature advisedly omitted it. [BONSER, C.J.—Then you might prove that for ten years before the flood you had possession]. Yes, if no one set up prescriptive title in the meanwhile. The judgment of Creasy, C.J., in the Point Pedro case has been acted upon without demur. [BONSER, C.J.—But see the judgment of this Court in D.C., Colombo, 87,427, reported in *8 S. C. C. 31.*] That case was carefully analyzed in *Banda v. Banda, 4 N. L. R. 302*, and rejected. [BONSER, C.J.—But this case does not bind me. It came on for argument before Moncreiff and Browne, J.J., and

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when Browne, J., read his own judgment and that of Mr. Moncreiff, the latter had left the Island. It has no more force than a judgment of the Registrar. As between the parties to the case, the decree may be set aside any moment.] The District Judge is satisfied with the evidence led by the plaintiff, and has given judgment in his favour on the merits.

Bawa replied.

Cur. adv. vult.

19th March, 1901, BROWNE, A.J.—

Dinis, the original owner of the owita in question, conveyed the eastern moiety of it to his son-in-law, defendant's grandfather Carolis, in 1857, shortly after his marriage, and died two years later. He had five children, Simon, Lewis, Jeeris, Punchi Nona, and Sarah, the second wife of Carolis.

Plaintiff, the son of Simon, being 55 years old at the trial in 1899, must have been born *circiter* 1844. Allowing twenty years for a generation in Ceylon, his father Simon must have been born *circiter* 1824, and therefore he and his brothers must have been about 30 years old when their father Simon sold the eastern half to their brother-in-law Carolis. We do not know when Simon died, but his brothers Lewis and Jeeris must have been over 50 years old when they in 1881 conveyed their right to their nephew, the plaintiff. Sarah, Carolis's widow, describes her husband to have lived far away from the owita, and to have cultivated it but once, whereas her brothers lived close to the owita.

The first large issue of fact is, whether Carolis at his death in 1867 had acquired title by adverse, &c., possession for over ten years to the western moiety which had not been sold to him and so to the whole. Is it probable that his brothers-in-law, plaintiff's vendors of two-fifths, and plaintiff and his father before him owning one-fifth, would have suffered any such possession for the period 1859 (Dinis's death) to 1881? What happened thereafter ?

Carolis was a widower when he married plaintiff's aunt Sarah, *circiter* 1857. First defendant, a grandson of Carolis's first marriage, was born in 1867, the year Carolis died. Computing back forty years, Carolis's first marriage must have been about 1827, and thus for the ten years (1857-1867) of his ownership of the eastern moiety he must have had the children of his first marriage, who were first defendant's father, Clara, mother of second defendant, Adrian, and another able to help him to attain such rights by adverse possession. Sarah, his widow, admits she personally knows nothing of possession. Clara and Adrian assert their father asweddumized and possessed solely till his death, that

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his administrators then conveyed a moiety of the whole land to the children of the first marriage, and the widow and children of the second marriage respectively, but that thereafter only a son of the second bed cultivated, and that but a portion. On the other hand, they admit plaintiff successfully claimed the rights he acquired in 1881, when a trial went against Adrian, and it is proved plaintiff always paid the paddy tax till its abolition in 1890.

In fact, there is no evidence against plaintiff's title to three-fifths of the western half and adverse possession of a certain defined portion thereof for his share, save the execution of the deed by Carolis's administrators in 1869, purporting to convey to the children of his second bed one-fifth of each moiety of the land, as one of sixteen allotments thereby conveyed. From 1867 to 1898 there have been thirty-one years within which plaintiff's uncles could have so adversely possessed their two-fifths and his father's one-fifth for fourteen years to 1881, and he held thereafter the three-fifths for seventeen years. Defendant's evidence wholly fails to negative that adduced by plaintiff in respect of the period 1869-1898. It asserts Don Carolis's exercise of right till his death, one cultivation thereafter, and the rest is silence. I therefore find the plaintiff's evidence of absolute possession of the extent he claims was rightly credited by the learned Additional District Judge.

Will this then give him title ? Was he ever evicted from the land on 8th January, 1898 ? and if evicted, had he right to institute this action on 28th February 1898, over seven weeks subsequently, to be declared entitled to a divided three-fifths of the land ?

The Roman-Dutch Common Law defined one way of acquiring right of property to be " by prescription of time, viz., undisturbed possession of one-third part of a century." The other three methods were occupancy, delivery or conveyance, and accession. (*Vanderlinden, Bk. 1, ch. 7, § 2; Van Leeuwen, 1 lib. 21, chaps. 2 and 8*). That Common Law was proclaimed to continue in Ceylon by the Proclamation of 23rd September, 1799, and *qua* Dutch inhabitants and their testamentary and matrimonial causes by section 53 of the Charter of 1801.

Regulation No. 13 of 1822, section 2, enacted that from the 1st September, 1822, " all laws heretofore enacted, or customs existing " with respect to the acquiring of rights, or the barring of civil " actions by prescription, within and for the maritime districts of " this Island, shall cease to be of any force or effect, and the same " are hereby wholly repealed."

Did it abolish all the Common Law methods of acquiring right by accession, conveyance, and occupancy, as well as that by prescription ? or, disregarding the punctuation, were the words

" by prescription " to be read as appended to " the acquiring of rights " as well as to " the barring of civil actions, and so that only the mode of acquisition by prescription was repealed ? or, was the repeal one not of the Common Law but only of the grafts on it by special enactments or local custom of which special recognition had been previously made, viz., by the Proclamations of 1st March, 1801, and 9th May, 1803 ? Did it sweep away all the Common Law as to acquisition of title when it so repealed the part, and in lieu thereof only enacted that thereafter "proof of the " undisturbed possession of land or immovable property by a title " adverse to that of the claimant or plaintiff in any action for ten " years before the bringing of the action shall entitle the defendant " to a sentence in his favour with costs," and made no provision for the rights of a plaintiff in any such action ?

No doubt as regards the limitation of actions, the Common Law was completely abrogated at first by the Proclamation of 1801 (vide *Legal Miscellany* [*1821*] *25; Ram.* [*1821*], *19*), and then by Ordinance No. 8 of 1834, 21,698, C.R., Kurunegala, *Vand*, *183* (which was the decision that necessitated the enactment of Ordinance No. 22 of 1871), re-affirmed at page 262, and *1 N. L. R. 202*. But these decisions said nothing of the acquisition of title at Common Law. Moreover, that such acquisition was therein allowed only to a defendant in an action may be possible from the way Van Leeuwen discusses the matter. If it were so, and if a plaintiff never by the old Common Law, or never after Regulation No. 13 of 1822, took any benefit by prescription in the sense of *usucapio*, did the Ordinance No. 8 of 1834, twelve years later, restore to him any of the old Common Law rights ? or give him any new right he never had ere then ?

After enacting over again the rights already held by a defendant in respect of his possession, it ordained for the first time in our Statute books, " and in like manner, when any plaintiff shall bring " his action for the purpose of his being quieted in his possession " of lands or other immovable property to prevent encroachment " or usurpation thereof, or to recover damages for such encroach- " ment or usurpation, or to establish his claim in any other manner " to such land or other property, proof of such undisturbed and " uninterrupted possession shall entitle such plaintiff to a decree " in his favour with costs. "

A question has been raised as to the meaning of the term " such land or other property, " and I think it is suggested that " such " must mean " of which he is in possession. " The grounds for such contention would appear to be these: (1) The section commences with the re-enactment of the right of a defendant in respect of a

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possession which presumably he would be still enjoying. Then, when it proceeds to legislate for the case of a plaintiff, it does so not in a separate section but in the same, and with an additional linking of the one remedy to the other by the words " and in like manner. " (2) When it proceeds to enumerate instances in which plaintiff may utilize for legal claims the benefit of past possession, it mentions first, " for the purpose of being quieted in " his possession of lands or other immovable property (which " in effect regards him to be in possession and wanting only to be " quieted therein) to prevent encroachment or usurpation thereof " or recover damages therefor " (still suggestive of his holding possession, though with some actual or threatened disturbance of enjoyment), and then adds, possibly *ejusdem generis*, " or to establish his claim in any other manner to such land. "

Sir Charles Marshall throws no light upon the question of the extent of right which in this Ordinance drafted by him it was intended to give thus to a plaintiff. He says, only that one of the alterations in Regulation No. 13 of 1822 thereby effected was " in giving plaintiffs the benefit of such (that very word of this debate) ten years' possession which, by the strict terms of the Regulation in 1822, would have been limited to defendants. "

For my own part I doubt we should limit either part of the section to the benefiting only of a party who is in actual possession. As to the latter part, I do not think the doctrine of *ejusdem generis* would restrict the right " to establish his claim in any other manner " to cases similar to the quieting in or keeping undiminished an actual possession. As to the first portion of it, even a defendant might not be in possession of the lands sued for. After he had possessed twelve years, plaintiff, with a documentary title in his pocket, might evict him *vi et armis*, and ere the latter could bring his possessory action sue at once to be quieted in his possession. Defendant might of course reconvene for a possessory decree, but could he not also, as the issue of title had been raised by the holder of documents, advance his superior claim to limit plaintiff's action, and correlatively to be given a decree in his favour ?

I would therefore still consider that possession of the necessary character and for the required time gives a statutory title by prescription in its sense of *usucapio* equal to that which the old Common Law gave. If the latter was ever taken way, it has been so fully restored that a plaintiff may establish thereby his claim in any other manner to land.

But in this case it is unnecessary to decide such questions. I consider that plaintiff, who merely abstained from possessing

because he feared a beating, cannot be said to have been ever evicted. His action is rather one to be quieted in possession, and I would decree that he should be quieted.

As to the other question of whether ten years " previous " is to be construed as " next previous, " I note that Mr. Justice Thomson, writing in 1866, makes no answer to the fifth question he puts in vol. 2, p. 181: " How is prescribed period of ten years to run "; nor does he mention the decision of 1860. The authorities cited to us appear to support the contention that the enactment of the Ordinance No. 22 of 1871, after the decision reported in the *Legal Miscellany (1860)*, *p. 65*, and *Râmanâthan (1860)*, *p. 79*, must be considered to have been made adoptive of the judicial interpretation of the terms in its predecessor No. 8 of 1834, when those terms were then simply adopted and re-enacted, and that " previous " must be construed to mean not " next previous, " but " at any time previous, " to the institution of the action, unless possibly it were ever to be held that the construction put in the decision upon " previous " was erroneous, for that, when substituted for the word " before " used in the Regulation it repealed, its use denoted some period of time with a definite moment or event to mark its conclusion. Till then, however, I consider we are bound by that decision, and that we must hold the law to be that, when a person has once held adverse, &c., possession of a land for fully ten years, and in any way loses possession of it, he has acquired a title by such possession which he can vindicate at any time therefore against any one who cannot by grant, deed, or like possession in a period later than his, establish in his defence a title superior to that of the plaintiff.

BONSER, C.J.—

Agreeing as I do in the decree proposed by my brother, it is, strictly speaking, not necessary for me to make any observations. But at the same time I wish to guard myself against its being supposed that I concur in what I may without disrespect call the *obiter dicta* of my brother in the judgment just read. I will briefly offer some remarks, equally *obiter* expressing my views on the subject.

Further consideration has not shaken in any degree the opinion I expressed in *Silva v. Siman (4 N. L. R. 144)*, and knowing that my late brother Withers, who was such an ornament to this Bench, was of the same opinion, I therefore with the more confidence reiterate that opinion.

It seems to me that much misapprehension has been occasioned by the fact that the effect of the Regulation No. 13 of 1822 has not

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been fully recognized by many of those who have had to consider this subject, and further, that the practice of speaking of prescriptive title has also tended to obscure the subject. I must confess to being guilty of having used that expression myself more than once in judgments which I have delivered in this Court, but when I came to look into the matter, I satisfied myself that that was an incorrect expression, and I see that so far back as 1866 Mr. Justice Thomson took exception to it. In a note of his on a judgment of the Supreme Court, where the expression " prescriptive title " was used, he corrects it and adds, " or rather the right not to be sued, " and he points out that in Ceylon the word " prescription " is not used in the sense of *usucapio*, in which it was used by Roman-Dutch Law writers. He states that in Ceylon it is confined solely to limitation of actions. There is no doubt that as regards the Roman-Dutch Law, which was preserved by the terms of the Capitulation, one of the means of acquiring title was by possession for a certain number of years of the property of another. A good deal turned upon the question of the nature of that possession, whether it was *bonâ fide*, or how it was first commenced, and other like considerations. But in 1822 the Regulation to which I have referred was passed. After reciting that " whereas doubts have been entertained with respect to the " periods which shall be considered as prescribing against or " barring actions for the recovery of property movable or " immovable, according to the laws now in force; and whereas " it must tend to the security of property and the quieting of " titles to ascertain the same, " it goes on to enact that "all laws " heretofore enacted or customs existing with respect to the " acquiring of rights or the barring of civil actions by prescrip- " tion within and for the maritime districts of this Island, shall " cease to be of any force or effect, and the same are hereby " wholly repealed;" and proceeds to substitute, as regards immovable property, a remedy: " It is further enacted that.....proof of " the undisturbed possession of land or immovable property by " a title adverse to that of the claimant or plaintiff in any action, " for ten years before the bringing of the action, shall entitle the " defendant to a sentence in his favour with costs." That is the only provision with regard to immovable property which is contained in that Regulation. The rest of it deals with movable property and various actions to recover debts, damages, and the like. I do not think that it can be contended that, after that Regulation was passed, any trace of the old law of *usucapio* remained. The only right given was to a defendant in possession, who, if he could show that his possession was such as that

mentioned in the Regulation, was to be entitled to have a sentence in his favour with costs, by which I understand to be meant the usual decree for a defendant, viz., that " the defendant be absolved from the instance," which is the equivalent of the English judgment that " the plaintiff take nothing by his writ and the defendant go " without day." That Regulation continued in force till 1834, when the Ordinance No. 8 of that year was passed " to assimilate, amend, and consolidate the laws.....regarding the prescription of actions." That Ordinance is said to have been drafted by the distinguished Chief Justice of this Court who drafted the Charter of 1833, Sir Charles Marshall, and it repealed the Regulation of 1822. If it had simply repealed that Regulation without more, it might have been contended, as it was contended in argument before us, that it set up again all the former Roman-Dutch Law of *usucapio*. Much inaccuracy results from using abbreviated editions of Ordinances, and it was assumed that that Ordinance of 1834 simply repealed the Regulation of 1822 without more. On referring to the Ordinance itself we find that the Regulation was not repealed *in toto*, but that so much of it as repealed previous laws was expressly kept alive. It is clear, therefore, that the Ordinance of 1834 did not have the effect of re-introducing the previous law as to acquiring of title by prescription. Sir Charles Marshall, in his well-known book, states that one of the objects of section 2 of the Ordinance of 1834, the section which deals with actions as regards the possession of land, was to explain the term " adverse title " which had been used in the Regulation, and which had been misunderstood by the subordinate Judges, and so extend to plaintiffs the right which the Regulation had given only to defendants. Now, one would have expected that the relief given by that section would be intended for plaintiffs who were in the same position as defendants under the former Regulation, that is to say, to persons in possession, and that relief was to be given to such persons whether they were plaintiffs or whether they were defendants; and I think that an examination of the words of the Ordinance bears out that expectation. The section, after enacting that proof of possession by a defendant in any action of land, independent of that of the claimant or plaintiff in such action, for ten years previous to the bringing of such action, shall entitle the defendant to a decree in his favour with costs, goes on to deal with the case of a plaintiff, " and in like manner " (which seems to show that the person with whom the section is going to deal must be in the same position as the person with whom it has already dealt) " when any plaintiff shall bring his " action for the purpose of being quieted in the possession of

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"lands, to prevent encroachment or usurpation thereof,"—meaning clearly land of which he was in possession—"or to recover damages "for such encroachment or usurpation;" and then we come to words which have been thought to establish the doctrine that a person who has been out of possession for an unlimited time may bring his action under this section, "or to establish his claim in any other manner to such land." That word "such," it seems to me, can only refer to the land previously referred to, that is to say, land in his possession, and that it was intended to cover a case in which a person being in possession might legally establish that possession and repel by anticipation the attacks of any person who sought to dispossess him.

I should mention that the Ordinance of 1834 was repealed by the Ordinance No. 22 of 1871; but that repeal did not alter in any substantial way the previous position of affairs. It re-enacted clause 2 of the Ordinance of 1834 in practically identical words. Then, there is this fact to be remembered, that there is nothing in our Ordinance similar to the clause contained in the English Statute of Limitations which extinguishes the right of the true owner. But a reference to the debates in Council on the occasion of the passing of the Ordinance No. 22 of 1871 shows that that fact was present to the mind of the Legislature at the time, for although it was suggested that a clause should be inserted extinguishing the right of the true owner and conveying it to the possessor, the Legislature, out of respect no doubt to Sir Charles Marshall's draftsmanship, declined to adopt the suggestion.

Then, in the argument we were referred to a decision which was given in 1860 by the late Chief Justice Creasy. That was a question of right of way. An objection seems to have been taken that, the right of way not having been exercised for some time, the plaintiff was not in a position to sue because he was not in possession or *quasi* possession of the right. The Chief Justice laid stress upon the words "previous to the bringing of the action," and held in effect that what was intended was any period of time prior to the bringing of the action, and that the words "bringing of the action" did not indicate one of the *termini* of that period, and he says that "the result would be that not only "men who were disturbed in the use of easements, but men who "were turned out of lands and houses would lose all the benefits "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."

Now, I venture to think that that argument was not sound. In the first place, it assumed that there was such a thing as

prescriptive title, which I have shown was not the case. The law provided the possessor with a remedy for such a case, and that was by a possessory action to get himself restored to possession. He further stated that the counsel for the defendants in appeal asked the Supreme Court to introduce the word " next " before the word " previous," but he omits to notice that the draftsman of the Ordinance of 1834 substituted the more precise word " previous " for the vaguer word " before " which occurred in the Regulation. I cannot help thinking that this change was intentional, and was made with the view of excluding the construction adopted by the learned Chief Justice. It seems to me that the policy of the law is entirely in favour of the construction which I have adopted, for if a man may wait three years, he may wait thirty years before bringing his action, and then the onus would be on the person who was in possession to show that the claimant had in some way transferred or lost his title; for, once such a thing as prescriptive title is admitted, there are only three ways of dealing with it, viz., by a notarial conveyance, or a judgment of a competent Court, or by prescription vesting the title on some other person. So far as I can see, these are the only three ways in which a prescriptive title could be displaced. It certainly is not in the interests of suitors or in the general interests of the administration of justice that persons should be encouraged or allowed to postpone the assertion of their rights. It seems to me that the policy of the law dictates that a person who having no title may have a right to remain in possession against the true owner by reason of length of possession, if he is rejected by the true owner, should apply to the Court at once to be restored to possession, and should not be allowed to wait an indefinite time before asserting his rights. I may add that there are difficulties in the way of adapting a prescriptive title to our system of registration. Until the decree is made in favour of the person claiming such a title there is nothing to register, and the case might easily be imagined where the original owner, having recovered possession and being able to show a perfect title, might sell the land to a purchaser who was quite ignorant of the rights of a person out of possession, who might come forward subsequently and assert his rights under the Ordinance.

These are the reasons which appear to me to justify me in adhering to the opinion which I expressed in a previous case. I may also mention that this doctrine, which apparently took its origin in the judgment of 1860, does not appear to have made much impression on the profession, and was very soon forgotten. In 1886 Mr. Berwick, who was then and had been for some ten or

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eleven years District Judge of Colombo, one of the busiest Courts in the Island, and who was not disinclined to uphold the Roman-Dutch Law wherever he could, appears to have been entirely ignorant of any such doctrine as *usucapio* existing in this Island, and that ignorance appears to have been shared by the profession. for, in that year, Mr. Berwick tried a case where the plaintiff who had been out of possession for some years sued to recover possession upon the strength of a title alleged to have been acquired under the Ordinance of 1871 by long possession. Although the case was argued for the plaintiff by no less an eminent lawyer than the late Attorney-General, Sir Samuel Grenier, no suggestion appears to have been made that the case was not one of first impression; no one referred to this decision of Chief Justice Creasy, and no one suggested that there was any authority on which the action could be supported. Mr. Berwick, in a long and careful judgment, ridiculed the contention as being an impossible one, and suggested that, if such an action lay, a man might allege his period of possession to have occurred in the reign of King John.

When that case came on in appeal to this Court, it was argued again by counsel before Mr. Justice Clarence and Mr. Justice Dias, the latter of whom had practised for some years at the Bar before he became a Judge. During the whole of the argument the decision of Chief Justice Creasy was never referred to either by the Bench or the Bar; no one seemed to be aware of its existence, and the decision of Mr. Berwick was affirmed. It appears to me therefore that the doctrine cannot claim any such continuity of existence as would entitle it to respect, if it were in the first instance unsound. But, as I said before, these observations of mine, like those of my brother, are merely *obiter* and must be taken for what they are worth. They are not intended to preclude any further argument in a similar case when it arises. I shall be quite ready to reconsider my views.

I wish to add with regard to the case of *Banda v. Banda* (*4 N. L. R. 302*), which was cited to us in the course of the arguments, that though of course the views of my brothers Moncreiff and Browne are entitled to the greatest respect wherever and whenever expressed, that case cannot be relied on as an authority, for the judgment of my brother Moncreiff was read *per incuriam* after he had left the Island, and was therefore *functus officio*, and the decree founded thereon was irregularly entered up.