1915.

Present : Ennis J. and Shaw J.

BRITO *v.* MUTHUNAYAGAM.

331—D. C. Negombo, 9,946.

*Ante-nuptial contract—Interpretation—*Communio quæstuum *must be expressly excluded—Roman-Dutch law—Prescription—Co-owners.*

Under the Roman-Dutch law ante-nuptial contracts were strictly interpreted, and unless the document expressly renounced the *communio quæstuum*, property acquired during the subsistence of the marriage was deemed to be held in community.

An ante-nuptial agreement contained the following clause:—"In consideration of the premises the said Tangamma doth hereby renounce all right to community so far as the property, estate, and effects of the said Christopher Brito are concerned, it being understood that the said Christopher Brito shall have, hold, and enjoy his separate property, without any claim thereto on the part of Tangamma."

Held, that the *communio quæstuum* was not excluded by the above clause.

THE facts are fully set out in the judgment.

E. W. Jayewardene (with him *Balasingham*, *Obeyesekere*, *Canekeratne*, and *Loos*), for appellant.

A. St. V. Jayewardene (with him *Allan Drieberg* and *Samarawickreme*), for respondent.

Cur. adv. vult.

December 10, 1915. ENNIS J.—

Christopher Brito and Tangamma Nannitamby married in 1866, having executed an ante-nuptial agreement which contained the following clause:—"In consideration of the premises the said Tangamma doth hereby renounce all right to community so far as the property, estate, and effects of the said Christopher Brito are concerned, it being understood that the said Christopher Brito shall have, hold, and enjoy his separate property, without any claim thereto on the part of Tangamma."

In 1879 Nannitamby, the father of Tangamma, sold to Christopher Brito an estate called Dombawinne.

Tangamma died in 1900, Christopher Brito in 1910, leaving surviving them four children, Philip, Christopher, Teresa, and Aloysia.

Philip died in 1911, and his wife, the plaintiff, sues as executrix of his estate.

Teresa died in 1905, and her husband, one Senathiraja, is the plaintiff in a connected case.

Aloysia, the first defendant in the case, married the second defendant.

Christopher Brito left all his property by will to his daughter Aloysia.

The plaintiff contends that the Dombawinne estate was held by Christoper Brito and his wife Tangamma in community of property, and that on the death of Tangamma her half share devolved upon the children in equal shares. She claims as executrix of Philip a one-eight share.

The learned District Judge held that Tangamma had renounced her right to community of property in Dombawinne by the ante-nuptial agreement, and that the property was the separate property of Christopher, and passed under his will to the first defendant. The learned Judge also decided an issue as to prescription in the defendant's favour, and dismissed the plaintiff's claim. The plaintiff appeals.

There are two points for determination on the appeal:—First, whether Dombawinne was held by Christopher and Tangamma in community of property; and second, if so, whether the respondents have established a prescriptive title.

The determination of the first point turns on the construction of the ante-nuptial agreement. I can see no ambiguity in the terms of this document, and accordingly no oral evidence can be considered in deciding the meaning. The Roman-Dutch law with regard to the interpretation of such documents is perfectly clear. There was a strong presumption in favour of community, and unless the community was expressly renounced the presumption prevailed. So, where in the document the *communio omnium bonorum* was renounced, the *communio quæstuum* was deemed to be included. Briefly, a renunciation of the *communio omnium bonorum* covered all property in which the parties had an interest at the time of the marriage, the *communio quæstuum* all other property acquired during the subsistence of the marriage. Ante-nuptial contracts were strictly interpreted, and unless the document expressly renounced the *communio quæstuum*, property acquired during the subsistence of the marriage was deemed to be held in community—*1 Nathan 256; 3 Burge 397; Walter Pereira, 2nd ed., 212, 237, 243.* It would seem that ante-nuptial contracts are to be construed on the state of things at the date of the marriage, and Tangamma, in renouncing "all rights to community" in Christopher Brito's property, renounced only her right of community in the property in which Christopher Brito had an interest at the date of the marriage. It was urged that such a construction would have no meaning with reference to existing facts, as Christopher Brito had no property at the date of the marriage. The evidence that he had no property

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is far from conclusive, and in my opinion is not relevant, in that it seeks to contradict the terms of the document.

On the first point I would hold in favour of the appellant. There remains to be considered the question of prescription. In the case of *Corea v. Appuhamy* [1] the Privy Council held that the possession of one co-owner enured to the benefit of the other co-owners, and that position could only be altered by an ouster, or something in the nature of an ouster. On the death of Tangamma, Christopher became a co-owner of Dombawinne with his children, and any ouster to establish prescription must be looked for between the death of Tangamma in 1900 and July 7, 1904 (*i.e.*, ten years before the institution of the suit). In this connection there is the letter D 8 of December 9, 1900, written by the plaintiff to the second defendant, in which she states that Senathiraja recommended a "fight" for Dombawinne. We are asked to presume from the word "fight" that Christopher Brito intended to hold the land adversely. Again, there is the letter D 35 of January 5, 1901, from Senathiraja to the second defendant, offering to sell his wife's interest in Dombawinne. Neither of these letters is in any way sufficient to prove an ouster by Christopher. They merely indicated that Christopher was holding Dombawinne and possession by one co-owner is not proof of an ouster by him. There is one other document, the mortgage D 17 of April 17, 1904, by Christopher to second defendant. With regard to this, counsel for the appellant pointed out that a surviving spouse was by Roman-Dutch law entitled to so deal with the property for the purpose of paying debts. The evidence of the second defendant shows that the money raised on the mortgage was mostly for interest on previous mortgages. This mortgage of the land by Christopher is therefore no evidence of an ouster. I am unable to find in the evidence any direct act of Christopher Brito which could be considered an ouster, and applying the principle of *Corea v. Appuhamy*,[1] I would hold that Christopher Brito's possession enured for the benefit of his co-owners. For these reasons I would allow the appeal, with costs.

SHAW J.—

The appellant, as executrix of Philip J. R. Brito, deceased, sued the respondents, claiming a declaration of title to a one-eighth share of Dombawinne estate, and for damages for having been kept out of possession, under the following circumstances:—Christopher Brito, the father of Philip Brito, married Tangamma Nannitamby in the year 1866, prior to the coming into operation of the Matrimonial Rights and Inheritance Ordinance, 1876, and, consequently, when community of goods was an incident to marriage. Prior to the marriage an ante-nuptial agreement was made, by deed dated June 25, 1866, to which deed Tangamma's father, E. M. Nannitamby,

[1] *(1911) 15 N. L. R. 65.*

was also a party. By this deed E. M. Nannitamby settled on the intending spouses a life interest in a property called the Plopalie estate, with a reversion to their children, and by the same deed Tangamma did hereby renounce all right to community, so far as the property, estate, and effect of the said Christopher Brito are concerned, it being understood that the said Christopher Brito shall have, hold, and enjoy his separate property, without any claim thereto on the part of the said Tangamma."

During the existence of the marriage Christopher Brito acquired by purchase from one Tambyah the Dombawinne estate, the subject-matter of the present suit.

Tangamma died in March, 1900, leaving her surviving her husband and four children of the marriage, including Philip Brito, of whom the appellant is widow and executrix.

After the death of Tangamma, Christopher Brito remained in possession of the Dombawinne estate, and died in December, 1910, having by his last will nominated the first defendant, respondent, his sole heir, and the second defendant, respondent, his executor.

During the lifetime of Christopher Brito and Tangamma the estate was heavily mortgaged by Christopher Brito for the purpose of payment of debts, and it was again mortgaged by him to the second defendant, respondent, in 1904, subsequent to the death of Tangamma.

On August 18, 1914, the appellant instituted this action, the contention being that the Dombawinne estate was, by reason of the marriage in 1866, the common property of Christopher Brito and Tangamma, and that Philip, as one of the four heirs of Tangamma, was entitled to one-eighth of the property.

The defences raised were, first, that by the ante-nuptial contract of June 25, 1866, Tangamma had renounced community in her husband's property, both present and to be acquired during the marriage; and second, that Christopher Brito and the respondents had a prescriptive title to the property.

By the law prevailing here at the time of the marriage, in the absence of any ante-nuptial agreement to the contrary, *communio omnium bonorum* between the spouses ensued upon the marriage by operation of law. This extended not merely to community in the property of the spouses existing at the time of the marriage, but to the *communio quæstuum*, which, with the exception of certain inherited property, included acquisitions of the spouses during the marriage.

By ante-nuptial contract either of these species of community might be excluded (*Pereira 243; Burge 396*), but the presumption of law was in favour of community (*Burge 397*, and authorities there cited), therefore whatever was not expressly provided for by ante-nuptial contract was subject to the community, and consequently if the community of property be excluded, community of all profit

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and loss accruing during the marriage remains (*Maas. 12, 11, 1; Nathan 256*). As stated by *Van Leeuwen* (*Cens. For. 1, 1, 12, 10*), " when community of goods has been excluded, community of gain and loss arising during the marriages is, notwithstanding, considered to have taken place by operation of law ..... If community of goods be excluded, community of gains accruing or losses resulting is only held to be excluded if that be expressly stated "; and if the husband bought immovable property with his own money, it was considered on account of his marital power that he acquired it for community, even if he acquired it in his own name (see *Burge 408*).

Applying this law to the present case, I do not think that Tangamma, by the ante-nuptial agreement of June, 1866, can be held to have renounced her interest in after-acquired property of her husband. The *communio quæstuum* is certainly not specifically excluded; therefore, the " property, estate, and effects " of Christopher Brito mentioned in the deed, and his " separate property," can only refer to the property he had at the date of the marriage, all future-acquired property falling into the community of gains and losses. This being so, the half share of the Dombawinne estate belonging to Tangamma devolved, on her death in 1900, on her four children, one-eighth of the property therefore vesting in Philip Brito, the husband of the plaintiff, appellant.

The question then arises, whether Christopher Brito and his executor and devisee have acquired a prescriptive title to the whole estate as against his children, the legal owners of the half share?

Christopher Brito undoubtedly remained in possession of the property from the time of his wife's death, but he was a co-owner with his children, and his possession is that of his co-owners, unless something equivalent to an ouster by him of his co-owners can be shown—*Corea v. Appuhamy*.[1]

A mass of evidence and family correspondence has been adduced in the case, most of it entirely irrelevant, and in strictness inadmissible. It shows that most of the children were in impecunious circumstances, and were frequently, and often successfully, applying to their father for money; but nowhere is there any direct demand by any of the children on their father for their share of the property, nor is there any assertion on his part, either verbal or in witing, that he claimed any legal right to the entire property. The only letters that seem to me to have any but the remotest bearing on the matter in dispute are the letter of December, 1900, from the present plaintiff to her father-in-law, Christopher Brito, written in the lifetime of her husband Philip, in which she says that they have been advised " to fight for our share of Dombawinne," to which no reply appears to have been made; and a letter of January 5, 1901, from Mr. Senathiraja, the husband of one of the other children, to his brother-in-law the present second defendant, respondent, offering

[1] *(1911) 15 N. L. R. 65.*

to sell his interest in the property, and urging the children's claims thereto under the Roman-Dutch law. From these letters we are asked to infer that the father was claiming to hold the property under an adverse claim of right. There is one other fact, which seems to be the strongest piece of evidence in support of the claim to a prescriptive title, namely, the mortgage of this property by Christopher Brito in his own name in April, 1904, to the second defendant, respondent, for Rs. 30,000, which mortgage must have been made with the knowledge of his children. It appears, however, that the estate had been heavily mortgaged during the time of the marriage and was not of its present annual value, and that the great part of the consideration for the mortgage was the money due to the second defendant, respondent, for unpaid interest on one of the previous mortgages.

I am of opinion that the legal title of the one-eighth claimed is in the plaintiff, and that the respondents have not sufficiently established an ouster by Christopher Brito of his co-owners. I would therefore allow the appeal, with costs.

With regard to the damages, the parties agreed on the method of assessment in the course of the trial. In case of any difficulty arising, application must be made to the Judge.

Set aside.