1959 *Present :* **Basnayake, C.J., and Pulle, J.**

RAJAPAKSE and others, Appellants, *and* HENDRICK SINGHO and others, Respondents

S. C. 815—D. C. Gampaha, 3,761/P

Co-owners—Exclusive possession of the common property by some of the co-owners—Effect—Ouster—Prescription.

Fresh evidence—Retrial—Permissibility.

(i) Action for the partition of a land was instituted on August 24, 1953. There was overwhelming evidence that the defendants, since the year 1922, were not only in occupation of the land but also took its produce to the exclusion of the plaintiffs and their predecessors in title, and gave them no share of the produce, paid them no share of the profits, nor any rent, and did no act from which an acknowledgment of a right existing in them would fairly and naturally be inferred.

Held, that the evidence disclosed an ouster of the plaintiffs by the defendants and that the ouster continued for a period of over ten years.

(ii) If evidence which was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence will be given by an appellate Court by granting a retrial.

APPEAL from a judgment of the District Court, Gampaha.

Sir Lalita Rajapakse, Q.C., with *F. W. Obeyesekere* and *D. C. W. Wickremasekera*, for Plaintiffs-Appellants.

Cecil de S. Wijeratne, with *G. L. L. de Silva*, for Defendants-Respondents.

Cur. adv. vult.

June 22, 1959. BASNAYAKE, C.J.—

This is an action for the partition of a land called Keragahalanda in extent 4 acres and 3 roods. It is common ground that Atapattu Liyanarallage Paulis purchased it on deed No. 5,822 of 17th December 1895 (P1). Of this land, Paulis sold to Don Thelenis " an undivided portion of land of the extent of about two acres " on deed No. 17,115 of 6th January 1919 (P2) and " an undivided portion of land of three roods " on deed No. 18,352 of 23rd July 1920 (P3). On 11th August 1921 by deed No. 2,131 (P4) Don Thelenis sold " an undivided eleven-nineteenth (11/19) part or share " to his grandson Ranatun Vidane Rallage Gunasekera who on 28th October 1927 by deed No. 3,766 (P5) sold the undivided interests he purchased to Don John Seneviratne Gunawardhana. On 1st May 1953 the plaintiffs purchased those interests on deed No. 14,871 (P6) from Gunawardhana and on 24th August 1953, less than four months after their purchase, they instituted this action.

The defendants, ten in number, resist the plaintiffs' action on the ground that they have been in possession to the exclusion of the plaintiffs and their predecessors in title. The 1st, 2nd, and 3rd defendants are children of Paulis, the 5th, 7th, 8th, 9th and 10th defendants are his grandchildren. The 4th and 6th defendants made no claim. The 1st, 2nd, 5th and 8th defendants live on the land. On it there are three houses and the foundation of a fourth. There is also a well. The 1st plaintiff in his evidence admits that the 1st defendant owns one of the houses, the 2nd defendant another, and the 8th defendant the third. He also admits that the foundation and well belong to the 5th defendant, and that the 1st defendant planted all the coconut trees on the land, one hundred and forty-two in number.

The 1st plaintiff confessed that he never got " possession ", but he says that his predecessor Gunawardhana who owned the ten acres of land adjoining this land which at one time formed part of it plucked coconuts. This evidence is of little value in view of the 1st plaintiff's own statement that the land is a jungle and that the coconuts that can be plucked from it are not enough for a meal. Not one of the predecessors in title of the plaintiffs was called to give evidence on their behalf.

The surveyor's report discloses that the 1st plaintiff had no knowledge of this land whatsoever. There are plantations valued at Rs. 4,274, consisting of coconut, jak, arecanut, mango, coffee, del, tamarind, beli, cotton, pepper, kaju, lime, orange, kitul, in a land which he calls a jungle.

The 1st defendant a man 60 years of age, a son of Paulis, states that after the death of his father in 1922 he took the produce of the land and gave his brothers and sisters their share to the exclusion of the predecessors in title of the plaintiffs. Don Thelenis's grandson, D. G. Ranatunga, Village Headman of Dematadenikane for twenty-seven years, who is also known as R. G. Gunasekera, to whom in 1921 Don Thelenis transferred the share now claimed by the plaintiffs, states that he never enjoyed the produce of the land nor occupied it and that his successor in title Gunawardhana never exercised any rights of ownership and that the defendants lived on the land and enjoyed its produce to his exclusion.

R. P. Jema the retired headman of Radawadunna, who had been headman for thirty-two years, supports the 1st defendant. He says that it was Paulis's children and grandchildren who enjoyed the produce of this land to the exclusion of all others and that to his knowledge neither Don Thelenis nor Gunawardhana " possessed " it.

I shall now turn to the law on the subject of prescription among co-owners as admittedly the plaintiffs and defendants are co-owners and the latter have been in occupation of the land since 1922 to the exclusion of the predecessors in title of the plaintiffs.

It is settled law (*Corea v. Appuhamy*[1] and *Cadija Umma v. Don Manis*[2]) that the possession of one co-owner is the possession of the other co-owners and that possession *qua* co-owner cannot be ended by any secret intention in the mind of the possessing co-owner. The possession of one co-owner does not become possession by a title adverse to or independent of that of the others till ouster or something equivalent to ouster takes place.

In our judgment in S. C. 12—D. C. Tangalle No. P. 60 delivered on December 19, 1958, which has not yet been reported, we have discussed the question of prescription among co-owners at length and we do not therefore propose to refer to all the cases discussed in that judgment.

The law being as stated above the only question that arises for decision in this case is whether the evidence discloses an ouster of the plaintiffs by the defendants and whether that ouster continued for a period of over ten years. The expression " ouster " which is used in *Corea's* case (*supra*) and later in *Cadija Umma's* case is a concept of English Law and we must turn to that system of law in order to ascertain its meaning. The matter is discussed in the cases of *Doe v. Prosser*[3] and *Peaceable v. Read*[4]. In the former case Justice Aston said—

> " There have been frequent disputes as to how far the possession of one tenant in common shall be said to be the possession of the other, and what acts of the one shall amount to an actual ouster of his companion. As to the first, I think it is only where the one holds possession as such, and receives the rents and profits on account of both. With respect to the second, if no actual ouster is proved, yet it may be inferred from circumstances, which circumstances are matter of evidence to be left to a jury. "

In the latter case Lord Kenyon C.J. said—

> " I have no hesitation in saying where the line of adverse possession begins and where it ends. *Prima facie* the possession of one tenant in common is that of another, every case and dictum in the books is to that effect. But you may shew that one of them has been in possession and received the rents and profits to his own sole use, without account to the other, and that the other has acquiesced in this for such a length of time as may induce a jury under all the circumstances to presume an actual ouster of his companion. And there the line of presumption ends. "

[1] *(1911) 15 N. L. R. 65.*
[2] *(1938) 40 N. L. R. 392.*
[3] *1 Cowp. 217 and 98 E. R. 1052.*
[4] *1 East 569, 102 E. R. 220.*

The expression " actual ouster " needs explanation and as it is an expression used by both Lord Mansfield and Lord Kenyon in the cases referred to above I cannot do better than explain it in the very words of Lord Mansfield—

> " Some ambiguity seems to have arisen from the term ' actual ouster ' as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. But that is not so. "

In the instant case the evidence that the defendants since the death of Paulis in 1922 were not only in occupation of the land but also took its produce to the exclusion of the plaintiffs and their predecessors in title, and gave them no share of the produce, paid them no share of the profits, nor any rent, and did no act from which an acknowledgment of a right existing in them would fairly and naturally be inferred, is overwhelming.

In this state of evidence I do not see how we can disturb the finding of the learned District Judge though undoubtedly there are statements in his judgment which invite criticism, and learned counsel for the appellants rightly directed our attention to those statements especially the statement of the learned District Judge that questions of ouster and prescription did not arise for consideration. With that view we are unable to agree. Those questions do arise but on the facts of this case there is no difficulty in resolving them in favour of the defendants.

Learned counsel also complained that on the mistaken impression, for which, he submitted, there was no justification in the evidence, that Don Thelenis was alive at the date of trial, the learned Judge had drawn an adverse inference against the appellants and we were invited to send the case back for a retrial on the ground that Don Thelenis was not alive at the date of the trial. Learned counsel submitted an affidavit with the certificate of registration of death of a Police Headman named Don Thelenis in support of his application. But in view of the uncontradicted evidence of Jema that Don Thelenis did not possess the land it is immaterial whether Thelenis was alive or not at the time of the trial. The complaint of learned counsel does not appear to be entirely justified on the evidence. R. P. Jema the retired headman who is a witness for the defendant stated—

" Q : Do you know a person called Thelenis ?
" A : Yes.
" Q : He is also a man of that area ?
" A : He is living in the adjoining village.
" Q : The original owner sold over half a share when he was residing on this land to Thelenis ?
" A : Yes.
" Q : And Gunasekera got the land from Thelenis ?
" A : Yes. "

It would appear from the record that the above answers were elicited in cross-examination. If Thelenis was in fact dead the failure of the plaintiffs to challenge witness Jema's statements is inexcusable especially

if the grandfather of Gunasekera and Don Thelenis, the Police Headman referred to in the affidavit, were one and the same person. If a statement in regard to a fact which could have been ascertained with the exercise of due diligence is allowed to pass unchallenged at a time when they had an opportunity of contradicting it the plaintiffs alone must take the blame. It would be wrong to criticise the trial Judge on that score. The principles governing the grant of a retrial to enable a party to produce fresh evidence are well established. It has been repeatedly stated that the invariable rule in all courts and one founded upon the clearest principles of reason and justice, is that, if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by granting a retrial. (*Nash v. Rochford Rural Council* [1]; *E. H. Lewis & Sons Ltd. v. Morelli* [2].)

There being no presumption that all the predecessors in title of the plaintiffs are dead it is for them to explain why they are not called to give evidence. The plaintiffs have failed to do so and it is legitimate for the court to presume that the evidence of those persons if produced would be unfavourable to them, especially as one of them, a headman, did give evidence in favour of the defendants.

Before we part with this judgment we desire to draw the attention of both practitioners and Judges to the words of Bertram C.J. in *Alwis v. Perera* [3] wherein the importance of requiring a witness to explain exactly what he meant by such expressions as " I possessed ", " We possessed " is emphasised.

The appeal is dismissed with costs.

PULLE, J.—I agree.

Appeal dismissed.