1942 *Present :* **Wijeyewardene J.**

FERNANDO *v.* FERNANDO

108—C. R. Negombo, 44,783.

Co-owners—Purchaser of entire property from a Co-owner—Prescription—Ouster.

A purchaser of property from a co-owner, who purported to sell the entirety of the property, is bound to prove an ouster or to lead such evidence as would justify the Court in presuming that an ouster has taken place at least ten years before the institution of the action.

APPEAL from a judgment of the Commissioner of Requests, Negombo.

C. E. S. Perera (with him *C. J. Ranatunge*), for defendant, appellant.

L. A. Rajapakse (with him *R. N. Ilangakoon*), for plaintiff, respondent.

Cur. adv. vult.

October 27, 1942. WIJEYEWARDENE J.—

The plaintiff instituted this action to obtain a declaration of title to lots N and O of a field called Davatagaha Cumbura. The defendants admitted the title of the plaintiff to the entirety of lot O and two-eighth shares of lot N. They further pleaded that the second defendant was entitled to five-eighth shares of lot N and the added-defendant to the remaining one-eighth share of lot N.

The following is a brief statement of the devolution of title on deeds to lots N and O as proved by the evidence in this case :—

(*a*) By virtue of a partition decree entered in D. C. Negombo, 1,764, and by right of inheritance from their parents, eight persons, Allis, Noiya, Roido, Mendiris, Carolis, Suwaris, Mango and the added-defendant, became entitled to an undivided one-eighth share each of lot N. Noiya conveyed his one-eighth share to Carolis by deed D 5 of 1918, Mango her one-eighth share to the added-defendant by AD 1 of 1920, and Roido her one-eighth share to the second defendant by D 4 of 1920. Mendiris, Carolis and Suwaris and the added-defendant conveyed four-eighth shares to the second defendant by D 3 of 1921. The heirs of Allis conveyed their one-eighth share to Carolis by P 1 of April 7, 1926. Thus, in 1926, Carolis was entitled to two-eighth shares, the second defendant to five-eighth shares and the added-defendant to one-eighth share of lot N.

(*b*) Allis and Carolis were each entitled to a half share of lot O. The heirs of Allis conveyed their half share of lot O to Carolis by P 1 of 1926, who thus became entitled to the entirety of lot O.

(*c*) By deed P 2 of February 4, 1935, Carolis purported to convey the entirety of lots N and O to Migoris, who by P 3 of March 2, 1940, conveyed them to Cornelis, who in turn conveyed them to the plaintiff by P 4 of June 15, 1940.

It is, therefore, clear that the plaintiff can claim only two-eighth shares of lot N and the entirety of lot O by virtue of deed P 4, as his predecessor in title, Carolis, was entitled to only those interests in 1926, though the deed P 3 executed by him in 1935 purported to convey the entire lots N and O.

In order to substantiate his claim to the entirety of lot N, the plaintiff must prove that he acquired a prescriptive title against his co-owners, the second defendant and the added-defendant. The plaintiff relies, for this purpose, on a usufructuary mortgage bond P 6 of July 12, 1926, executed by Carolis in favour of one Sanchina in respect of the lots N and O and the oral evidence given by himself and the two witnesses, Sanchina and Davith Perera. Sanchina stated that lots N and O were cultivated for her by Migoris up to 1935, when the bond was discharged. Davith Perera corroborated Sanchina and added that from 1935 up to the date of the action neither Carolis nor the second defendant cultivated the field. The plaintiff, too, gave similar evidence. No explanation has however, been given for the failure of the plaintiff to call Migoris to prove

the possession from 1935 to 1940. On the other hand, Carolis, who was called as a witness by the defence, stated that the field was not cultivated by Migoris from 1935 to 1940. He explained that he mortgaged the whole of lot N as the second defendant, his son, was a minor at the time and could not join in the execution of the bond. Carolis gave his age as 50 years and the second defendant could not have been possibly more than 15 years old when the bond was executed in 1926. It may also be noted that, when Carolis sold the entirety of lots N and O by P 2 in 1935 to Migoris, he based his title to the property on the deed P 1 and did not claim to have acquired title to any shares by prescriptive possession.

The question now arises whether the plaintiff can be said to have established his title by prescriptive possession, even if all the evidence led by him in support of that plea is accepted.

In *Corea v. Iseris Appu* [1], the Privy Council stated the law with regard to prescription among co-owners in the followng terms :—

> "His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."

In that case, the defendant who attempted to set up a prescriptive title against his co-owners, had *de facto* possession of the whole estate for over 30 years. The trial Judge found that during that period "he had planted and leased and mortgaged and sold various lands and generally dealt with them as owner". In spite of this and other findings of fact in favour of the defendant the Privy Council refused to uphold his claim to title by prescriptive possession.

In *Tillekeratne v. Bastian* [2] this court upheld a claim to prescriptive possession by the defendants against a co-owner. In that case, the period of possession was more than forty years. Referring to the nature of the possession in that case, de Sampayo J said : "The land had no plantation worth considering ; it was plumbago land and the defendants dug plumbago therein both by themselves and through lessees all throughout. While a co-owner may without any inference of acquiescence in an adverse claim allow such natural produce as the fruits of trees to be taken by the other co-owners, the aspect of things will not be the same in the case where valuable minerals are taken for a long series of years without any division in kind or money. The effect of this becomes still more pronounced where the co-owner, being also a co-heir, has alienated his share to a stranger and the stranger too is kept out (for over 20 years)". In that case a Divisional Bench of this Court expressed the view—"It is a question of fact, whenever long continued exclusive possession by one co-owner is proved to have existed, whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that separate and exclusive possession had become adverse at some date more than ten years before action was brought."

A similar question arose in *Brito v. Muthunayagam* [3]. In that case, which dealt with the rights of the children against their father, the Privy

[1] *(1911) 15 N. L. R. 65.* [2] *(1918) 21 N. L. R. 12.* [3] *(1918) 20 N. L. R. 38.*

Council held that as the children were co-owners with the father the possession of the entire property by the father was not adverse, although there were strained relations between the father and the children. In the course of his judgment, Lord Dunedin said, referring to *Corea v. Iseris Appu* (*supra*).

"In that case, it was held by this Board that the possession of one co-parcener could not be held as adverse to the other co-parcener. Lord Macnaughton, who delivered the judgment, cited the dictum of Wood V.C., in *Thomas v. Thomas*[1]: Possession is never considered adverse if it can be referred to lawful title."

In *Brito v. Muthunayagam* (*supra*) it was found that the father had executed a mortgage in respect of the entire property many years before the institution of the action but that was not considered as furnishing evidence of an ouster. While approving the principle laid down in *Tillekeratne v. Bastian* (*supra*) this court refused in *Hamidu Lebbe v. Ganitha*[2] to presume an ouster though in that case the defendant was found to have had possession for nearly 40 years. In *Careem v. Ahamadu*[3] one Noorami Umma and her brothers and sisters were entitled to a land by inheritance. In 1889 Noorami Umma obtained a conveyance for the whole property from one of her brothers, who was entitled to only a share of the land. Noorami Umma remained in the occupation of the house on the land from 1889, mortgaged the whole land in 1892, and executed a deed in respect of the entirety of the land in 1897. The defendant claimed the entirety of the property by right of purchase in 1920, in satisfaction of a mortgage executed by the children of Noorami Umma. The plaintiff, who was one of the brothers of Noorami Umma, disputed the title of the defendant shortly afterwards. This court held that the evidence of possession did not lead to the presumption of an ouster in the absence of evidence to show that the co-owners of Noorami Umma had knowledge of the various transactions of Noorami Umma.

In the present case, the judgment of the Commissioner of Requests is not very helpful on the question of prescription. He has upheld the plea of prescription on the ground that Carolis and the second defendant "do not derive title from the same source". It is difficult to understand what the learned Judge meant by that statement as admittedly they derive title from Allis and others who were co-owners. The learned Counsel for the respondent was unable to throw any light on this observation of the Commissioner of Requests.

The plaintiff does not purport to prove exclusive possession for more than 15 years before the institution of the action, and the evidence shows that during some part of that period the second defendant was a minor. To uphold the plea of prescription it is necessary to presume that Carolis began to possess adversely against his minor son from 1926, when he executed the mortgage bond. There is not even a suggestion of any ill-feeling between Carolis and the second defendant and added-defendant, the sister of Carolis. The deed P 2 executed by Carolis shows that when he transferred the land to Migoris he claimed title only on deed P1 and

[1] (*1855*) *2 K. J. 79.*
[2] (*1925*) *27 N. L. R. 33.*
[3] (*1923*) *5 C. L. Rec. 170.*

did not assert title on any other ground. There is, moreover, no evidence whatever to show that either the second defendant or the added-defendant was aware of the execution of the mortgage bond P 6. The plaintiff has failed to prove an ouster or to lead such evidence as to justify the Court in presuming that an ouster must have taken place at least ten years before the institution of the action.

I set aside the judgment of the Commissioner of Requests and direct decree to be entered, declaring the plaintiff entitled to lot O and two-eighth shares of lot N. The plaintiff will be entitled to a writ of ejectment in respect of lot O, if the defendants are in possession of lot O. The plaintiff will pay the second defendant and the added-defendant the costs here and in the lower Court.

Judgment varied.