Present: Lascelles C.J.

1912.

HARMANIS *v.* AMARASEKERA.

279—C. R. Balapitiya, 8,765.

Tattamaru *possession—Co-owner cannot exclude another co-owner who does not abide by the arrangement to possess in* tattamaru.

Plaintiff, who purchased an undivided share of a land, sued the defendant for his share of the produce. The Commissioner of Requests dismissed the action on the ground that plaintiff's vendor had taken the produce for the year in which he sold his share, and that defendant was entitled to take his turn before the possession by *tattamaru* came to an end.

Held, reversing the judgment of the lower Court, that plaintiff as co-owner was entitled to get a share of the produce.

LASCELLES C.J.—Possession in *tattamaru* is an arrangement by which the co-owners agree for considerations of convenience to possess the entirety of the *corpus* in turns instead of each taking his proportionate share of each crop. The arrangement, not being by notarial deed, in no way affects the rights of the co-owners' each of whom is free at any time to resume his strict legal rights.

The termination of the *tattamaru* possession may leave rights which require adjustment.

If, for example, one co-owner puts an end to the *tattamaru* possession, or alienates his share at a time when he has had more turns of possession than his co-owners, he is liable to account to his co-owners for what he has taken over and above his fair share of the rents and profits. But a co-owner who is in the position of the defendant in this case cannot claim, on the strength of the *tattamaru* arrangement, to exclude his co-owner altogether from the property.

THE facts appear sufficiently from the judgment.

Bawa, K.C., for plaintiff, appellant.

De Sampayo, K.C., for defendant, respondent.

Cur. adv. vult.

October 15, 1912. LASCELLES C.J.—

This appeal raises a curious point with regard to the possession by co-owners of the common property by *tattamaru*. The plaintiff's vendor and the defendant were entitled to the land in question in equal undivided shares, and had possessed by *tattamaru* for some twelve years, when the plaintiff, in October, 1911, bought one of these shares.

1912.

LASCELLES C.J.

Harmanis v. Amarasekera

When the plaintiff called upon the defendant for his share in the produce, the latter refused to give it, on the ground that the plaintiff's vendor had possessed the land for the last year, and that it was therefore his, the defendant's, turn to possess it.

The plaintiff now sues for damages, the amount of which is agreed at Rs. 75. The learned Commissioner of Requests has dismissed the action on the ground, as I understand his judgment, that as the plaintiff's predecessor in title took the first turn, the defendant should be allowed to take his turn before the possession by *tattamaru* could come to an end.

In order to ascertain the rights of the parties, it is necessary to consider the real nature of possession by *tattamaru*. In this connection I have been referred to a passage in the judgment of Phear C.J. *in Ram Menika v. Ram Menika and Appuhami*,[1] in which the learned Judge describes the rights of co-owners who by mutual arrangement have separately occupied a fractional share of the property. This passage is, in my opinion, an equally apt description of the rights of the co-owners when the land is possessed by them in *tattamaru*. " But obviously," the learned Judge pointed out, " this (*i.e.*, occupation in severalty) is only one of many methods by which joint proprietors exercise their right, and however long a period such a user in *quasi*-severalty may endure, it cannot effect any alteration of right, because it is from beginning to end only referable to, and in exercise of the common right, an essential ingredient in which is that any joint owner, or owner in common, is entitled at any time to dissent from the existing arrangement. Doubtless, he must not exercise this right of dissent in such a way as unnecessarily to cause loss to his co-proprietor.

Possession in *tattamaru* is an arrangement by which the co-owners agree for considerations of convenience to possess the entirety of the *corpus* in turns instead of each taking his proportionate share of each crop. The arrangement, not being by notarial deed, in no way affects the rights of the co-owners, each of whom is free at any time to resume his strict legal rights.

Of course, the termination of the *tattamaru* possession may leave rights which require adjustment. If, for example, one co-owner puts an end to the *tattamaru* possession, or alienates his share at a time when he has had more turns of possession than his co-owners, he is liable to account to his co-owners for what he has taken over and above his fair share of the rents and profits. But a co-owner who is in the position of the defendant in this case cannot claim, on the strength of the *tattamaru* arrangement, to exclude his co-owner altogether from the property. To hold that he could do this would be to raise the *tattamaru* arrangement to the level of a notarial deed modifying the legal rights of the co-owners.

[1] *2 S. C. C. 153.*

The present case is, in my opinion, in no way analogous to the cases where an apparent breach of the English Statute of Frauds or of the Ceylon Ordinance No. 7 of 1840 has been allowed, on the ground that the Courts will not allow the Statute to be used as an instrument of fraud. Here there is no question of fraud. If the defendant has any claim against the plaintiff's vendor, there is nothing to prevent his recovering it.

The decision is, in my opinion, erroneous, and I set it aside, entering judgment for the plaintiff for Rs. 75 with costs here and in the Court below.

Set aside.