July 7, 1910 *Present:* Mr. Justice Wood Renton and Mr. Justice Grenier.

TIMOTHY DAVID *v.* IBRAHIM.

D. C., Puttalam, 2,100.

*Prescription—Proof of prescriptive title in a third party who was not a party to the case, or predecessor in title of the party setting up prescription —Ordinance No. 22 of 1871, s. 3—Muhammadan wife—*Femme sole*—Husband cannot bring action on behalf of wife without joining her.*

In order that a person may avail himself of section 3 of Ordinance No. 22 of 1871, possession for the prescriptive period must be shown on the part of the person litigating or of those under whom he claims.

Where plaintiff who had paper title to a land sued defendant, a Muhammadan, for declaration of title, ejectment, and damages, and defendant set up a prescriptive title on the part of his wife, and alleged that he was in possession of the land on behalf of his wife, but did not get his wife added as a party to the action,—

Held, (1) That it was not open to defendant under the circumstances to establish his wife's prescriptive title.

(2) That it was for the defendant to have got his wife made a party to the case if he wanted to set up her title by prescription.

(3) That under Muhammadan Law the husband is in no sense the legal representative of the wife for the purpose of such proceedings as these.

THE facts of this case are stated in the judgment of Wood Renton J. as follows:—

In this case the plaintiff-respondent sued the defendant-appellant for damages on account of alleged trespass on land claimed by the respondent as his, for declaration of title, and for the ejectment of the appellant from the land in suit. The appellant in his answer pleaded that the land belonged to his wife, Mira Natchia, and her sister Balkis Umma, under a deed of gift executed in their favour by their father, and that these two persons were no parties to the action. He proceeded, however, in the next paragraph of the answer, to set up a prescriptive title in himself, in virtue of the terms of section 3 of Ordinance No. 22 of 1871. The learned District Judge held that the paper title to the land in question was in the respondent, but he went on to indicate that if the proper parties had been before him, he should have been disposed to uphold the plea of prescription in so far as the appellant's wife is concerned, but pointed out, however, that the wife was no party to the case,

and that on the authority of the decisions in *Terunnanse v. Menika* [1] and *Kirihamy Muhandirama v. Dingiri Appu* [2] the respondent's claim of title could not be defeated by proof of prescriptive title in a third party, who was not a party to the case, or the predecessor in title of such party. On these grounds he gave judgment in favour of the respondent in regard to the questions of title and ejectment, with damages and costs. He was careful to explain, however, that his decision in no way prejudiced the rights of the appellant's wife, whatever these might be.

The defendant appealed.

Sampayo, K.C. (with him *Tisseverasinghe*), for the defendant, appellant.—The defendant is not precluded from showing that the person under whom he claims is lawfully entitled to the property. Defendant is entitled to prove the prescriptive title of a third person incidentally to justify his occupation. Plaintiff should have joined the person disclosed as owner in the answer as a party to this action, and got a decree against him if he could.

The case relied on by the learned District Judge, *Terunnanse v. Menika*,[1] has been commented upon by Hutchinson C.J. in *Pedro Costa v. Fernando;* [3] and it was held in the latter case that in an action under section 247, Civil Procedure Code, the execution-creditor may prove the prescriptive title of the execution-debtor.

Bawa (with him *Zoysa*), for the respondent, not called upon.

July 7, 1910. Wood Renton J.—

His Lordship stated the facts, and continued:—

It would appear that the appellant and his wife are Muhammadans; and it is therefore clear law that the husband is in no sense the legal representative of the wife for the purpose of such proceedings as these. On this point I may refer to the case of *Saibo Dorey v. Ahamado Lebbe Marikar*,[4] where it was held that a Muhammadan husband, on the ground that his wife is practically a *femme sole* as regards her property, has no right to sue for her dowry without either joining the wife or having obtained her special authority. So far as this case is concerned, the appellant's claim to have the express plea of prescription, which is set out in the plaint, and which formed the subject of one of the issues at the trial, upheld to the extent of defeating the respondent's claim, consists in the fact, if it be a fact, that, as he alleges in his evidence, he has been possessing the lands on his wife's behalf. In view of the decisions to which I have just referred, I do not think that such possession

[1] *(1895) 1 N. L. R. 200.*
[2] *(1903) 6 N. L. R. 197.*
[3] *(1908) 11. N. L. R. 210, 4 Bal. 26.*
[4] *Ram 72-76, 309.*

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is sufficient. The case of *Kirihamy Muhandirama v. Dingiri Appu* in particular bears a strong resemblance to the present. It was a case in which certain defendants, who were sued in an action *rei vindicatio*, set up a plea of prescriptive title on behalf of persons who had not been made parties to the proceedings. It was held by Mr. Justice Moncreiff, Sir Charles Layard concurring, that this cannot be done, and the law was laid down in general terms that in order that a person may avail himself of section 3 of Ordinance No. 22 of 1871, possession for the prescriptive period must be shown on the part of the person litigating or of those under whom he claims. It is not, and it cannot be, contended here that the appellant in an way claims under his wife; and under these circumstances I think that the District Judge was right in the conclusion at which he had arrived. I do not see that there is any hardship in that decision, apart from the question of law which this appeal has raised. The appellant was fully aware of his wife's title, and he not only pleaded it, but alleged that his wife and her sister were necessary parties to the action. It was in his interest that they were necessary parties, for he had set up a plea of prescription so as to defeat the respondent's title, and, in my opinion, it was for him to see that they were brought into the suit. On these grounds I would dismiss the appeal with costs.

GRENIER J.—I agree.

Appeal dismissed.